STATE OF MICHIGAN
IN THE SUPREME COURT

JOAN M. GLASS,

Plaintiff/Appellant

v

RICHARD A. GOECKEL
and KATHLEEN D. GOECKEL,

Defendants/Appellees

Supreme Court Dkt No.126409
Court of Appeals No. 242641
Alcona Circuit Ct. No. 01-10713-CK

/

PAMELA S. BURT (P47857)
Attorney for Plaintiff/Appellant
WEINER & BURT, P.C.
635 N. US 23, P.O. Box 186
Harrisville, MI 48740
(989) 724-7400

SCOTT C. STRATTARD (P33167)
Attorneys for Defendants/Appellees
BRAUN, KENDRICK, FINKBEINER
4301 Fashion Square Blvd.
Saginaw, MI 48603
(989) 498-2100

/

BRIEF OF AMICI CURIAE

SAVE OUR SHORELINE
AND
GREAT LAKES COALITION, INC.

Submitted by:

SMITH, MARTIN, POWERS & KNIER, P.C.
Attorneys for Save Our Shoreline and
Great Lakes Coalition, Inc.
By: DAVID L. POWERS (P39110)
900 Washington Avenue
P.O. Box 219
Bay City, MI 48707-0219
(989) 892-3924

TABLE OF CONTENTS

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

INDEX OF AUTHORITIES

FEDERAL CASES

STATE CASES

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

STATE STATUTES AND BILLS

OTHER AUTHORITIES

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

STATEMENT OF BASIS OF JURISDICTION

Amici Curiae adopt Appellees' Statement of Basis of Jurisdiction.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

STATEMENT OF QUESTIONS PRESENTED

I. UNDER MICHIGAN LAW, DO OWNERS OF PROPERTY ABUTTING THE GREAT LAKES OWN TO THE WATER'S EDGE AT WHATEVER STAGE FREE OF THE PUBLIC TRUST?

Trial Court's Answer	: No
Court of Appeals' Answer	: No
Plaintiff/Appellant's Answer	: No
Defendant/Appellee's Answer	: Yes
Amici's Answer	: Yes

II. DOES THE GREAT LAKES SUBMERGED LANDS ACT MODIFY THE RULE OF OWNERSHIP TO THE WATER'S EDGE?

Trial Court's Answer:	: Yes
Court of Appeals' Answer	: Did not answer
Plaintiff/Appellant's Answer:	: Yes
Defendant/Appellee's Answer:	: No
Amici's Answer	: No

III. WILL REAFFIRMING *HILT* HAVE THE ADVERSE EFFECTS WHICH PLAINTIFF AND AMICI ASSERT?

Trial Court's Answer:	: Did not answer
Court of Appeals' Answer	: Did not answer
Plaintiff/Appellant's Answer:	: Yes
Defendant/Appellee's Answer:	: No
Amici's Answer	: No

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

STATEMENT OF FACTS

Amici Curiae adopt Appellees' Counter Statement of Facts.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

INTEREST OF AMICI CURIAE

Formed in August of 2001, Save Our Shoreline ("SOS") is a Michigan nonprofit membership corporation committed to the preservation of riparian rights, which in Michigan includes the right of ownership of Great Lakes riparian lands to the water's edge, wherever that may be at any given time. Since its formation in 2001, the grass-roots group has rapidly grown to over 2,000 households. SOS members have a direct and substantial interest in this Court's decision regarding the extent and nature of their ownership of Great Lakes riparian lands. In addition to its amicus effort in this litigation, the group recently pursued and obtained passage in this state of 2003 PA 14, which relates to a riparian's right to maintain their waterfront property, including the control of vegetation on Michigan's beaches. The group has also participated by way of amicus brief in *Borden Ranch Partnership* v *US Army Corps of Engineers*, 536 US 903; 122 S Ct 2355 (mem); 153 L Ed 2d 178 (2002), regarding the reach of federal statutes over Great Lakes beaches as well as other matters. The organization is responding to what it perceives as an organized effort, which includes units of state and federal government, and others, to increase public control of the lakeshores, to the prejudice of private owners and the principle of private property. The theories proffered by Plaintiff and her amici in this case have been specifically used and developed as part of that effort.

Incorporated as a Michigan non-profit corporation in 1986, the Great Lakes Coalition, Inc. represents thousands of Great Lakes private property owners. Also known as the International Great Lakes Coalition, it works directly with the International Joint Commission, Boards of Control, and federal and state entities on issues of concern to lakefront owners. It also provides to such entities technical and scientific research, and participates in various studies regarding the Great Lakes. It was incorporated in 1986 as a Michigan non-profit corporation.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

This brief is the product of substantial legal research commissioned by the amici herein and ongoing continuously back to 2001, and benefits from the input of dozens of attorneys from throughout the Great Lakes region who have provided substantial input and research materials.

ARGUMENT

I. UNDER MICHIGAN LAW, OWNERS OF PROPERTY ABUTTING THE GREAT LAKES OWN TO THE WATER'S EDGE, AT WHATEVER STAGE, FREE OF THE PUBLIC TRUST.

A. Introduction.

The issue before the Court has been considered by "an authoritative source that has been relied upon by property law practitioners in Michigan for nearly 50 years." OAG No 7147 (January 9, 2004). That source—the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan—has adopted the following standard:

> The waterfront boundary line of property abutting the Great Lakes is . . . the naturally occurring water's edge.[1]

Land Title Standards, 5th Ed, Standard 24.6.

The Committee correctly cites *Hilt* v *Weber*, 252 Mich 198; 233 NW 159; 71 ALR 1238 (1930) as its primary authority. Amicus submits that the Attorney General was correct; that the land title standard is indeed authoritative on this issue; and that *Hilt* v *Weber* does indeed resolve the issue before this Court.

---

[1] In a caveat, the Land Title Standard considers, but rejects, the proposition that the "ordinary high water mark" represents the boundary. The Land Title Standards Committee includes "only those principles of land title law which are clearly supported by the law of the state . . . as to which there are relevant statutes or cases which are reasonably definitive in their effect or holding. Points of law that are subject to some dispute, or as to which there are conflicting opinions, are not included . . . *Id.*, preface. Contrast this land title standard with the assertion of Amicus Tip of the Mitt that "the water's edge claims advanced by Defendants-Appellees and Amicus Curiae SOS and Chamber . . . represents [sic] a radical change in Michigan's property rules pertaining to the Great Lakes Shoreline." Brief of Tip of the Mitt, pp 19-20.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

B. The Seminal Case of *Hilt* v *Weber* Governs this Case.

The issue before this Court is governed by this Court's landmark decision of *Hilt* v *Weber*, *supra*, in which this Court clearly and unambiguously held that shoreline property owners on the Great Lakes own to the water's edge, at whatever stage. The decision also specifically dispelled the notion that the public trust extended landward beyond the water's edge. Since its issuance in 1930,[2] the decision has stood unscarred, being neither overturned nor criticized by any Michigan case. To the contrary, its principle of ownership to the water's edge at whatever stage was reaffirmed in numerous cases, most recently by this Court in *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994), a case which specifically held that the riparian owner, and not the public, owned the beach between the water's edge and the so-called "ordinary high water mark."[3] Under the authority of these cases, the argument that the public has any fee

---

[2] The law in *Hilt* was well established long before Plaintiff purchased her property, and began traversing the beaches at issue.

[3] The concept of "ordinary high water mark" is often referred to, but seldom defined, in case law, and is further clouded by many varied judicial, statutory, and administrative definitions and references. For example, early decisions relate the mark in terms of tidal changes in water level (which occur twice daily), exclusive of other types of change. See, eg, *People* v *Warner*, 116 Mich 228; 74 NW 705 (1898). Others refer to other periodic changes uninfluenced by tide. *See Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923). On the Great Lakes, the water cycle from high to low water and back can be thirty to forty years or more. (See Appendix 1). This difference becomes significant when trying to extrapolate a rule for tidal waters, and apply it to non-tidal waters, as Plaintiff does in her brief. For example, while tidal waters are "incapable of cultivation or improvement," Great Lakes shorelands, portions of which may be dry for upwards of 40 years, have regularly been built upon. *Shively* v *Bowlby*, 152 US 1, 57 (1894); *see, eg, Kavanaugh* v *Baird*, 241 Mich 240; 217 NW 2 (1928), *rev'd* 253 Mich 631; 235 NW2d 871 (1931) (cottage built on relicted land). Even in the Great Lakes, the meaning differs. While court decisions refer to a mark on the shore, or the absence of vegetation, at least two administrative agencies have adopted fixed elevations. For example, MCL 324.32501 et seq. sets a level of 579.8 feet above sea level; the MDEQ asserts the level is 580.5 feet; the U.S. Army Corps of Engineers asserts the mark is at 581.5 feet; some court decisions, discussed later in this brief, suggest that due to lack of tides, low and high water marks may be the same. Complicating the concept of ordinary high water mark are manmade influences such as dredging, water diversion, and gravel mining, which have lowered lake levels. Steinberg, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore," pp 74-75; *see also* "Region's Disappearing Resource," Detroit Free Press (January 25, 2005) (Appendix 2). Thus, the term means different things to different people.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

ownership interest in property between the water's edge and the so-called "ordinary high water mark" must fail.

The decision of *Hilt* v *Weber*, *supra*, is widely cited by state and national authorities for its determination of the boundary for the intersection between the Great Lakes and riparian land. In *Hilt*, a land contract purchaser of shoreline property, in defending against foreclosure, asserted that the seller misrepresented the property line as a boundary near the water. He argued that the meander line,[4] being 277 feet from the water, was the boundary under the authority of *Kavanaugh* v *Rabior*, 222 Mich 68; 192 NW 623 (1923) and *Kavanaugh* v *Baird*, 241 Mich 240; 217 NW2d 2 (1928); *rev'd* 253 Mich 631; 235 NW 871 (1931) (hereinafter the "*Kavanaugh* cases"). The *Hilt* Court expressly overruled the *Kavanaugh* cases, and held that because the boundary line extended to the water's edge, no damage occurred from misrepresenting the boundary line as being 100 feet from the water.

A study of the *Hilt* decision and its history reveals its intellectual and historical significance. According to Professor Theodore Steinberg, a presidential scholar at the University of Michigan, "[b]efore the *Kavanaugh* case, property owners along Michigan's shores believed that they owned to the water's edge," which "seemed to be a sensible boundary." Steinberg, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore," The American Journal of Legal History, Vol. XXXVII, p 72 (1993) (*See* Appendix 3). The *Kavanaugh* cases changed that historical and legal understanding, and "converted to public property Michigan's hundreds and hundreds of miles" of shore. *Id.* at 77.

[4] A meander line, according to *Hilt*, is simply an approximation of a shoreline boundary for the purpose of computing the amount of acreage sold by the government, and was never intended to be a boundary in fact. *Hilt* at 204-206.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

According to Steinberg—whose article offers a rich and detailed account of the *Hilt* decision and the facts and circumstances that led to the decision—the judicial appropriation effected by the *Kavanaugh* cases caused a flurry of new activity. Shoreline renters began to withhold rent. Surveyors began marking the new property lines. Shoreline owners organized. Real estate brokers complained, and a bill before the Legislature to clarify the water's edge as the boundary was passed, but vetoed by the governor. In some areas of the state, hundreds of feet of property between the water's edge and upland property was declared public land. *Id.* at 77-78, 82. In light of this legal turmoil, this Court promptly accepted the *Hilt* case for review and set forth its reason for doing so:

> Because of the conflict of authority, and also because the executive and legislative branches of the state government have felt the need of more precise statement of the legal situation as a basis of legislation, we finally determined upon a frank re-examination of the *Kavanaugh* cases . . .

Hilt at 202. The Court noted that in addition to the briefs of the parties, it had the benefit of those of "the attorney general and others representing public and private interests as *amicus curiae*." *Id.* Hence, the *Hilt* decision is not some ordinary decision on the topic; it was a momentous decision intended to clarify a serious legal problem to a young, developing state. A studied reading of the exhaustive decision evidences the fact that the Court intended the decision to be the final word on the issue, not only by the decision's legal standing, but by the strength of its reasoning. In its analysis, the *Hilt* Court carefully and methodically addressed all of the arguments that might be brought to bear on the issue, including an historical analysis of relevant federal and state decisions and consideration of the public trust doctrine. With virtually every page of the *Hilt* decision carefully crafted, and in light of the historical background, there can be no doubt that this Court knew of the import of its decision; that it applied the appropriate amount

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

of resources in finding and determining the law; and that it intended to bring final resolution to the issue of shoreline ownership in Michigan.

(1) Factual Background of the Hilt Decision.

The allegations of fraud in *Hilt* arose from a visit to the property on December 1, 1925 (*See* Record, *Hilt* v *Weber*, p 88-91, attached hereto as Appendix 4). At that time, the seller's agent represented that a stake "driven in the shore 100 feet from the water" represented the boundary. *Hilt* at 201. The water at this point in time was extraordinarily low. A review of data from the U.S. Army Corps of Engineers demonstrates that from 1918 through 2002, Lake Michigan water levels have fluctuated by over six feet, with record highs and lows appearing on a 25 to 40 year cycle, and with near record low water levels on December 1, 1925 (*See* Appendix 1). Indeed, it appears from the chart that only about four to six months from the chart's 84-year coverage saw equal or lower water levels. In other words, since 1918 the water has been higher than at the time of the *Hilt* dispute about 99.5% of the time.

In *Hilt*, the "disputed strip" of land at issue involved the land (or shore) between the stake and the meander line 277 feet from the water. Thus, the "disputed strip" involved land starting 100 feet from the water, and extending 177 feet upland. The Court revealed that at least a portion of this 177-foot strip of land was "made dry land partly by accession and partly by reliction." *Id.* at 201. As explained in Section I(D) below, the term "reliction," as it was used by the Court, specifically includes the cyclical fall of water levels in the Great Lakes.[5] Thus, the issue in *Hilt* specifically involved the nature of the ownership of land which was made dry by the cyclical recession of water on the Great Lakes. As a result, the *Hilt* conclusions about ownership

[5] Plaintiff's assertion at p 2 of her Brief that the land at issue was "permanently relicted and accreted upland above the high water mark" is unsupported and belies the *Hilt* record. *See Hilt* record, pp 90-91: ("beach extends back from the water's edge...over 100 feet...[which] was formerly lake.") (*See* Appendix 2).

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

of relicted land were not *dictum*, as asserted by Tip of the Mitt,[6] but were essential to the case. Further, because no rule of law would distinguish between ownership of the relicted land at issue in *Hilt*, and the relicted land represented by the first 100 feet from the water's edge in that case, the rule announced by *Hilt* necessarily applies to such land.[7]

(2) Federal and State Decisions; Ownership to Water's Edge.

On commencing its analysis, the *Hilt* Court first noted that even in the earlier, contrary case of *Kavanaugh* v *Baird*, *supra*, the Court had acknowledged that "the decision was against the weight of authority, supported by the fact that the contrary authority is substantially unanimous, in state and federal courts, in this country and England." *Hilt* at 203.[8] As for federal law, the Court cited *St Paul & P R Co* v *Schurmeier*, 74 US (7 Wall) 271, 286; 19 L Ed 74 (1868) ("the water-course, and not the meander-line, as actually run on the land, is the true boundary") and *Hardin* v *Jordan*, 140 US 371, 380; 11 S Ct 808, 811; 35 L Ed 428 (1890) ("the waters themselves constitute the real boundary"). After citing additional cases from other Great Lakes states, the Court concluded that under federal law, "the purchaser from the government of public land on the Great Lakes took title to the water's edge (emphasis added)." *Hilt* at 206.

While not cited by the *Hilt* Court, its conclusion was consistent with a decision of the U.S. Supreme Court only five years earlier in *Massachusetts* v *New York*, 271 US 65; 46 S Ct

---

[6] Brief of Tip of the Mitt, pp 7-8.

[7] Indeed, the *Hilt* Court seemed to find that by referring to the stake 100 feet from the shore, Plaintiff did indeed misrepresent the boundary, but since Defendant actually owned to the water's edge, he suffered no harm: "Under this ruling, Defendants suffered no damage from misrepresentation of the boundary line." *Id.* at 227.

[8] The *Kavanaugh* v *Baird* decision provided at p 252:

> These holdings may be out of line with the holdings in other jurisdictions. They may be out of line with the writings of textwriters and the decisions of other courts. We may concede them to be against the overwhelming weight of authority, but we should not overrule them . . . (emphasis added).

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

357; 70 L Ed 838 (1926), which distinguished between tidal and non-tidal waters in determining the boundary along the shore of Lake Ontario. The Supreme Court held that "there are no public rights in the shores of non-tidal waters," rejecting the rule for tidal waters that carried "to highwater mark." *Id.* at 92, 93. *See* also *Vermont* v *New Hampshire*, 289 US 593; 53 S Ct 709; 77 L Ed 1392 (1933) ("there are no public rights in the shores of nontidal waters . . . [but] a different rule has been applied in the case of grants bounded by tidal waters, which carry only to high water mark. *Shively* v *Bowlby*, 152 US 1, 57; 14 S Ct 548; 38 L Ed 331 (1894").[9]

(3) Michigan Property Rights Are Defined by Michigan Law.

The *Hilt* Court next held that once waterfront property was acquired by a private person, state law, and not federal law, controlled[10] the extent of that person's rights:

> The state law became paramount on the title after it vested in a private person.

Id., citing *Hardin* v *Jordan*, *supra*. This proposition was espoused by the Court in *Kavanaugh* v *Baird*, *supra*, at 254, and by the Brief of the Attorney General acting as Amicus Curiae in the *Hilt* case.:

> It is a settled rule of law that each state determines for itself the question of the rights of the riparian owner.

---

[9] Amicus Tip of the Mitt criticizes *Hilt* by arguing that the state took title to the ordinary high water mark, citing *Shively* v *Bowlby*, *supra*. This criticism is misplaced. *Shively* involved tidal waters. Further, the brief makes no mention of *Massachusetts* v *New York*, *supra*, or *Vermont* v *New Hampshire*, *supra*, the latter of which specifically distinguishes *Shively* in holding that there were no public rights in the shores of non-tidal waters. *See* Tip of the Mitt Brief at p 8. The brief does not cite a case involving the Great Lakes. Amicus Tip of the Mitt also suggests that the federal Submerged Lands Act, 43 USC §1301 *et seq.*, established state title to the ordinary high water mark. *See* Tip of the Mitt Brief, p 12. Amicus misconstrues the act, which "creates no new rights for the states," and "is not a grant of title to land, but only a quitclaim of federal proprietary rights in the beds of navigable waterways." *Bonnelli Cattle Co* v *Arizona*, 414 US 313; 94 S Ct 517; 38 L Ed 2d 526 (1973); *see also* 43 USC §1311.

[10] Plaintiff apparently concedes this point. *See* Plaintiff's Brief, p 14.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

(*See* Appendix 5, p 1). This remains the law today. *See Oregon* v *Corvallis Sand & Gravel Co*, 429 US 363, 372; 97 S Ct 582; 50 L Ed 2d 550 (1977) ("that land had long been in private ownership and, hence, under the great weight of precedent from this Court, subject to the general body of state property law").[11]

(4) Under Michigan Law Prior to Hilt, Shoreline Owners Owned to the Water's Edge.

After examining and exposing the underpinnings of previous cases on the subject, the *Hilt* Court concluded that prior to the *Kavanaugh* decisions, "this Court, in common with public opinion and in harmony with the weight of authority, assumed, without question, that the upland proprietor owns to the water's edge . . . (emphasis added)." *Id.* at 212. A detailed review of those cases supports that assertion.

That the water's edge was the boundary between public and riparian ownership was first suggested early in this state's jurisprudence in *La Plaisance Bay Harbor Co* v *Council of City of Monroe*, Walk Ch 155 (1843):

> So, with regard to our Great Lakes, or such parts of them as lie within the limits of the state; the proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake (emphasis added).

[11] Plaintiff and Amicus Tip of the Mitt assert that under the authority of *Illinois Central RR Co* v *Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892) and *Shively* v *Bowlby*, *supra*, the U.S. Supreme Court "extended the public trust doctrine to the shores of the Great Lakes," and that the state is powerless to define the landward extent of the public trust doctrine short of the ordinary high water mark. Plaintiff's Brief, pp 10, 13; Tip of the Mitt Brief, p 22. Neither proposition has merit. It is true that the *Illinois Central* Court, without identifying whether it was applying Illinois law, federal common law, or some other principle, did apply the public trust doctrine to the Great Lakes. Yet there is no mention of the extent of its application to any water mark other than a reference to land under water. *Id.* at 452 ("state holds the title to the lands under the navigable waters" and "control over the waters above them, whenever the lands are subjected to use (emphasis added)." The case involved only lands submerged by water in fact. The Court's subsequent decisions in *Massachusetts* v *New York*, *supra*, and *Vermont* v *New Hampshire*, *supra*, clarify that the public's rights on the Great Lakes end at the water's edge. Even if the public trust along Great Lakes shores extended beyond the water's edge at the time of the federal grant, the Court has held that "it has long been established that the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they *see* fit." *Phillips Petroleum Co* v *Mississippi*, 484 US 469, 476; 108 S Ct 791; 98 L Ed 877 (1988).

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Id., cited in *People* v *Silberwood*, 110 Mich 103, 106; 67 NW 1087 (1896). Thus, only five years after admission to the Union, this Court recognized in plain language that while title to land covered by water is in the state, the "adjacent shore" is not. The term "shore" is typically defined as "[t]he space bounded by the high and low water marks." Black's Law Dictionary (West 1979). Thus, this Court in *La Plaisance* identified the border between state and private land: the low water mark, or higher on the shore to the point where the land is no longer "covered by water."

Forty years followed the *La Plaisance* decision with relative silence on the issue of riparian ownership. But the next 46 years, commencing in 1884, saw a flurry of decisions from this Court that culminated in the *Hilt* decision in 1930. The *Hilt* decision has been followed without question in *Donahue* v *Russell*, 264 Mich 217; 249 NW 830 (1933) ("the riparian owner owns the land beyond the meander line to the edge of the waters"); *Staub* v *Tripp*, 253 Mich 633; 235 NW 844 (1931) ("title extended beyond the meander line to the water's edge"); *Klais* v *Danowski*, 373 Mich 262; 129 NW 414 (1964) (riparian's title extends to the water's edge during periods of low water). More recently, the *Hilt* holding was renewed in 1994 by *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994) (riparian owns beach below ordinary high water mark).

Without reference to *La Plaisance*, *supra*, this Court in *Lincoln* v *Davis*, 53 Mich 375; 19 NW 103 (1884) could not find complete agreement on the extent of riparian ownership, despite agreement in the result. The case involved the lessee of an island and his removal of the plaintiff's fishing nets from the water in front of the island. The majority opinion affirmed a judgment of damages for trespass in favor of plaintiff. That was based on the existence of a statute governing navigable water which precluded "private erections" in such water. The Court

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

held that while the state may act, a private person could not act to remove another person's stakes unless they were nuisances. Since these nets were not nuisances, the riparian owner wrongfully removed the nets, and plaintiff was entitled to recover for defendant's wrongful act of removing plaintiff's property. *Id.* at 391.

While the majority held that plaintiff's riparian rights did not extend to the right to remove the fishing net and stakes in the case, it was not prepared to further limit riparian rights:

> I am not prepared to hold, however, that lands under water are not appurtenant to the upland so far as they can be used at all (emphasis added).

Id. at 392. Thus, the majority was unwilling to accept concurring Justice Champlin's claim that the riparian's title did not extend lakeward of the low water mark. But on one point the Court was unanimous: on the Great Lakes, there is no distinction between low and high water mark:

> I think there is no doubt of the right of the owner of lands on the borders of the lakes to make such use of the covered lands adjacent as will not injuriously affect navigation; and that there is no proprietary division known on these waters as high or low water mark. I agree that it depends on the law of the state how far rights may be exercised consistently with public easement of navigation in the submerged lands (emphasis added).

Id. at 389-390. By this language, Justice Campbell was expressing his agreement on this issue with that of concurring Justice Champlin. Champlin analogized the Great Lakes to the seas, which:

> would seem to call for the application of the same principles as to boundaries which were applied to lands bordering on those seas, with this difference: as there is no periodical ebb and flow of tide in these waters the limit should be at low instead of at high water mark.[12]

Id. at 385. Contrary to the majority opinion, the concurring justice had "no hesitation in saying" that the boundaries of the government's grant to the island in question is "limited by low water mark." *Id.* at 384-385. Thus, a reader of this decision in 1884 would fairly conclude that

[12] This view was accepted by the U.S. Supreme Court. *See Vermont* v *New Hampshire, supra.*

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

according to the unanimous opinion of the state's highest court, the public's title would in no case extend upland beyond the low water mark.

Four years later, Justice Champlin wrote the majority opinion in *Sterling* v *Jackson*, 69 Mich 488; 37 NW 845 (1888), a decision involving the public right to navigate and hunt in water over privately owned soil traced to a swamp land patent. The Court held that under such a patent, the patent holder owned the patented soil beneath the waters of the Great Lakes. As a result, although the Defendant, as a member of the public, was entitled to use of the water because of the paramount right of navigation,[13] that right was not without limits:

> So long as that license continued, he could navigate the water with his vessel, and do all things incident to such 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 the bay, but they were an abuse of such license (emphasis added).

Id. at 497. This Court affirmed a judgment of trespass. The two dissenting justices would not have granted such a limitation on the public's rights. Yet both seemed to assume the riparian's ownership of the shore. Concluding that "there is no part of the open water from which the riparian owner can exclude the public," Justice Campbell emphasized that "the riparian owner's rights in the bed away from the shore are purely theoretical and valueless (emphasis added)." *Id.* at 509. And in his dissent, Justice Morse referred to the "riparian owner of the shore," preceded by an assertion of his right, as a member of the public, to "lie dreamily in [his] . . . anchored boat . . . [and] to note the ripple of its waters as they beat upon the shores of the riparian owner

---

[13] It is important to distinguish this right of navigation with those rights under the public trust. Had Defendant been hunting on waters over state lands held in public trust, he would not have been so limited. But because he was on waters over lands held by Plaintiff in fee, he was limited only to rights of navigation.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

(emphasis added)." *Id.* at 535, 537. Thus, once again, a reader of this decision would conclude that no public rights extended beyond where the water met the shore.

The low water mark was again referenced in *People* v *Silberwood, supra.* In that case, the defendant was convicted of cutting vegetation growing on submerged land in front of his shoreline property, in violation of a state statute. He claimed that as a riparian, he owned to the center of Lake Erie and had the right to cut the vegetation. The Court disagreed. New to the Court, Justice Moore's opinion twice referred to *La Plaisance Bay Harbor Co* v *Council of City of Monroe, supra,* quoting the passage referenced above:

> [T]he proprietor[14] of the adjacent shore has no property whatever in the land covered by the water of the lake.

Id. at 106. The unanimous Court also held that "[t]his doctrine is in harmony with the decisions of all the states bordering on these great seas." *Id.*, 110 Mich at 108-109. The decisions which Justice Moore's opinion referenced were from New York, Pennsylvania, and Ohio, all holding that "the fee of the riparian owner ceases at the low water mark (emphasis added)." *Id.* at 107. The decision then quotes with approval the opinion in *Illinois Central R Co* v *Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892): "the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several states belong to the respective states," and that "the same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes . . . (emphasis added)." *Silberwood* at 107. Thus, this Court in *Silberwood* unanimously confirmed the public trust doctrine for lands covered by water, and

---

[14] Black's Law Dictionary (West 1979) defines the term "proprietor" as "one who has the legal right or exclusive title to anything. In many instances, it is synonymous with owner." That dictionary also defines "shore" as "[the] space bounded by the high and low water marks."

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

further unanimously confirmed that the riparian's fee title ended at the low water mark, where the state's title began.[15]

This Court received little rest on the issue of riparian ownership. Less than two years after *Silberwood*, the Court, without any change in its composition, decided *People* v *Warner*, 116 Mich 228; 74 NW 705 (1898). *Warner* involved the ownership of a marshy island in Saginaw Bay, which was once submerged, but over time became exposed. Warner, being the owner of an adjacent dry island, claimed he owned the marshy island as an accretion to his island. The state claimed the marshy island was an accretion to islands over which it asserted fee ownership, and not simply ownership as part of the bed of the lake. The trial court directed a verdict in favor of the state. This Court reversed, and ruled that a factual dispute existed as to whether the marshy island "gradually extended" from a point on Warner's island, or whether land arose from the water and was later then connected to Warner's island "at times of low water (emphasis added)." *Id.* at 240, 241. The Court, through Justice Hooker, stated its view of the law:

> So, if, by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the state, would be the owner . . . (emphasis added).

Id. at 239. The *Warner* Court knew it was dealing with a case of low cyclical water, and applied the rule of reliction to such facts. It noted that the land at issue "has appeared above the water "since surveys were conducted." *Id.* at 235. And it found necessary an inquiry whether land was revealed "at times of low water." *Id.* Yet its reference to a difference between high and low water marks related only to such marks as set by tides:

[15] The *Hilt* decision, while referring to the *Silberwood* decision, does not fully acknowledge the clarity of the Court's decision on the issue of shoreline boundary at the low water mark.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

> The depth of water upon submerged land is not important in determining the ownership. If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked. The adjoining proprietor's fee stops there, and there that of the state begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation.

Id. at 239. By this language, the Court once again clarified that the state's land is that which is covered by water, though that water may be of shallow depth. Without deciding whether tides have an effect on the Great Lakes, the Court suggested that the absence of tide "makes high and low water mark identical." *Id.* at 239. The resulting water mark—the water's edge—is the boundary, with the state owning all land covered by water, but not relicted land. By placing the low water mark, high water mark, and water's edge at the same line (in the absence of tidal influence), the Court stayed in intellectual harmony with *Silberwood*'s reference to the low water mark as the boundary. Having acknowledged fluctuations in Great Lakes water levels ("times of low water") while suggesting the lack of tide would make low and high water mark identical, the *Warner* decision calls for but one water boundary as acknowledged by *Hilt*: the water's edge. *Hilt*, *supra*, at 222. The *Warner* decision is of special significance because of the *Hilt* Court's suggestion that overruling the *Kavanaugh* cases, as it did, would re-establish *People* v *Warner*, *supra*, overruled by them. *Hilt* at 223.

Only three years later, and again without any change in composition, this Court considered *State* v *Lake St Clair Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901). The majority opinion did not address the issue of boundary, but Justice Hooker, who concurred[16]

[16] Both Tip of the Mitt, at page 23, and Plaintiff, at pages 15-17, misrepresented the concurrence as the Court's decision, despite Amici bringing this fact to Plaintiff's attention in responding to Plaintiff's Application. *See* SOS and Great Lakes Coalition, Inc.'s Brief, p 19. Plaintiff brazenly asserts that the *St Clair* decision "affirmed that public rights in Great Lakes water extend to the high water mark (emphasis added)." Justice Montgomery's majority opinion holds nothing of the sort, and the conclusions of concurring Justice Hooker are quite the opposite as to lands adjacent to patented lands.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

in the *Silberwood* decision, and who wrote the *Warner* opinion, wrote an extensive concurrence. If there was any doubt about Justice Hooker's interpretation of the law in his *Warner* opinion and his concurrence in earlier cases, he clarified it in this concurrence:

> Under the cases of *People* v *Silberwood*, 110 Mich 103 (67 NW 1087, 32 LRA 694), and *People* v *Warner*, *supra*, it must be taken as settled law that all land submerged, when the water in the lakes stands at low-water mark, is a part of the lake, and the title in the state, and all land between the low-water mark and the meander line belongs to the abutting proprietor, holding under an ordinary patent from the federal government or state (emphasis added).

Id. at 590. Thus, while Justice Hooker clearly believed that the privileges of the public "extend to high water mark in all tide waters," he acknowledged that on the Great Lakes, the tides have "a trifling effect if they can be said to exist." *State* v *St Clair Fishing & Shooting Club* at 586; *Warner* at 239. As a result, he found them to be governed by a different rule: one that sets the boundary between the state and an abutting riparian firmly at the low water mark, at least where the water is no higher.

After a long period of substantially consistent decisions from this Court announcing riparian ownership of the shores—while recognizing public trust rights in the soil covered by water—the rule was blurred by a newly composed court in *Ainsworth* v *Munoskong Hunting & Fishing Club*, 159 Mich 61; 123 NW 802 (1909).[17] That case—later expressly overruled in *Hilt* v *Weber* (see discussion below)—involved a riparian's interference with hunters in the waters of Munoskong Bay, and his claim of ownership of submerged land. There was no claim that the submerged land was ever dry; defendant simply asserted he owned to the middle of the water.

Key to understanding Justice Hooker's reference to the high water mark—and omitted by Plaintiff—is the Court's explaining that the "submerged land" in question was an island with no abutting proprietor, "separated from the Michigan shore at all points by open water." *Id.* at 585.

[17] Only Justices Moore and Grant remained from the Court that decided *Silberwood*, *Warner*, and *St Clair Fishing & Shooting Club*, *supra*.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Citing the *La Plaisance*, *Lincoln*, *Silberwood*, *Warner*, and *St Clair Fishing & Shooting Club* decisions, two of which found him in the majority,[18] Justice Grant announced:

> It is the established law of this state that riparian owners along the Great Lakes own only to the meander line, and that title outside this meander line, subject to the rights of navigation, is held in trust by the state for the use of its citizens (emphasis added).

Id. at 64. The Court also asserted: "In these cases, and others cited therein, the subject has been fully discussed, and further discussion here would be unprofitable." *Id.* Of course, while the cited decisions acknowledged the public's rights in submerged lands, each of them cite the shore or the low water mark as the boundary, and not the "meander line." The *Hilt* decision well explained the error in the *Ainsworth* Court's choice of words, and specifically overruled the "meander line" statement as an unfortunate mistake by the Court, resulting in part from the fact that the "meander line" and the waterline were the same under the facts of that case; the terms were used interchangeably in the case; and "the bill conceded that defendant owned to the water's edge":

> The dictum in *Ainsworth* v *Hunting & Fishing Club*, *supra*, 'that riparian owners along the Great Lakes own only to the meander line' is overruled.

Hilt, 252 Mich at 207, 208-213, 227.

The overruled *Ainsworth* case was followed by *State* v *Venice of America Land Co*, 160 Mich 680; 125 NW 770 (1910). That case involved title to a portion of an island that was periodically submerged, including being so at the time of statehood. The defendant claimed he owned the land as a result of a chain of title leading back to a grant from the British government, "antedating the title of the United States." *Id.* at 682. The Court's decision does not reflect a consideration of whether defendant owned the land as a riparian owner of adjacent upland,

[18] This would include the *Silberwood*, *supra*, and *Warner*, *supra*, decisions.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

though it stated that the fact that the land is "unsurveyed lands, and within the meander lines, is significant." *Id.* at 701. The Court affirmed the trial court, which held that defendant's predecessor "never had title" to the land at issue. *Id.* at 689.

The unanimous decision joined by Justice Hooker, the writer of the *Warner* opinion, referred with approval to his concurring opinion in *State* v *St Clair Fishing & Shooting Club*, *supra*, describing it as:

> An exhaustive discussion of the nature of the state's title to the land beneath the waters of the Great Lakes . . .

Id. at 702. Thus, the *Venice of America Land Co* majority likely was approving Justice Hooker's view of riparian ownership to the low water mark, at least where dry.[19]

Thus, with the exception of the mistaken, overruled *Ainsworth* case, Michigan law, as announced in this Court's opinions, was consistent from the 1843 *La Plaisance* decision through the 1910 *Venice of America Land Co* decision that the state's fee ended at the low water mark, or perhaps the water's edge, if higher. The *Hilt* decision properly found that the riparian owned to the water's edge.

(5) The Public Trust Doctrine Ends at the Water's Edge.

The *Hilt* Court acknowledged that the so-called[20] public trust doctrine (termed the "trust doctrine" by the Court) had been recognized by Michigan courts as early as 1843 in *La Plaisance*

---

[19] Plaintiff's assertion at page 17 of her Brief that *Venice* committed the Court to a principle that "the state holds title of all lands below high water mark" is unsupportable. As the *Hilt* Court noted, the *Venice* case was not a boundary case, and "[n]o question was raised of reliction, riparian rights, or change of condition as affecting title." *Hilt* at 216. Indeed, the term "high water mark" does not even appear in the decision.

[20] Amicus Tip of the Mitt criticizes this characterization. *See* Tip of the Mitt Brief, p 20. In his article, Professor Steinberg so identified the doctrine. Steinberg at 71. This Court in *Kavanaugh* v *Baird*, 241 Mich at 243, referred to the "so-called 'Trust Doctrine.'" The phrase "public trust doctrine" did not make its way to any reported decision of the Michigan courts until 1969. Moreover, "there is really no single 'Public Trust Doctrine.' Rather, there are over fifty different applications of the doctrine...." Putting the Public Trust Doctrine To Work, 2d edition (Coastal States Organization 1997). Our

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Bay Harbor Co v *City of Monroe*, *supra*, which decision noted that "the proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake (emphasis added)." *Hilt* at 208. The Court also noted the reference to the doctrine in several other cases. *Id.* Finally, the *Hilt* Court acknowledged heated and vigorous arguments, presumably those made by the state Department of Conservation and others by way of amicus briefs, that the trust doctrine should not end at the water's edge, but should extend upward across the dry shore. *Hilt* at 224. The *Hilt* Court clearly and unequivocally rejected this extension of the public trust doctrine for "public control of the lake shores":

> With much vigor and some temperature, the loss to the state of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest.

Hilt at 224. The Court went on to point out that even under the *Kavanaugh* cases, the alleged title to the meander line was merely that of trustee under the trust doctrine: "only for the preservation of the public rights of navigation, fishing, and hunting." *Id.* at 224. So when the *Hilt* Court opined that the state's title ended at the water's edge, it was speaking in terms of that title which is held in public trust. If there is any question from the words used by the majority opinion, it was clarified by this statement from the dissent:

> My brother's opinion is far reaching, for it constitutes the Michigan shoreline of 1624 miles private property, and thus destroys for all time the trust vested in the State of Michigan for the use and benefit of its citizens.

---

characterization is intended to highlight that, whatever the name, the doctrine has been consistently considered by the courts virtually since the creation of the state's judiciary.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Id. at 231. Of course, the majority's decision indicated that no trust in Michigan shorelands was destroyed by its decision, because it never existed there in the first place, but instead ended at the water's edge. In any event, it is clear from *Hilt* that no public trust extended beyond the water's edge and onto the dry lakeshore. This is consistent with *Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923), which the *Hilt* Court cited with approval.[21]

C. The Term "Water's Edge," As Used by the Court, Is Not Vague, But Has a Plain Meaning.

Amicus Tip of the Mitt argues that the term "water's edge" is an imprecise term. *See* Brief of Tip of the Mitt, p 8. Yet under the facts and given the analysis in *Hilt*, the Court could not have spoken more clearly. Further, this Court should consider the context of the *Hilt* decision. During briefing in that case, the Legislature passed on May 7, 1929, after a 24-1 vote in the Senate, a bill intended to overrule the *Kavanaugh* cases. The bill was "to establish the water's edge as from time to time existing as the boundaries instead of the meander line" on Michigan's Great Lakes shores. *See* 1929 SB 316 (Appendix 6). Despite its overwhelming legislative support, the bill was not signed by the Governor, whose Department of Conservation had been busily surveying the new lands granted by the *Kavanaugh* cases,[22] and which probably had a role in the Attorney General's opposition to overruling the *Kavanaugh* cases. The *Hilt* Court was no doubt aware of this legislative attempt to fix the problem when it re-established the water's edge as the boundary and did so using the term "water's edge."

[21] The *Doemel* Court held: "so that during periods of high water the riparian ownership represents a qualified title, subject to an easement [for public trust rights] while during periods of low water it ripens into an absolute ownership as against all the world, with the exception of the public rights of navigation . . ." *Id.* at 398.

[22] Steinberg at 78, *supra*.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

D. Attempts to Distinguish Hilt and Its Use of the Term "Reliction" are Unpersuasive.

Adjudicating a dispute involving land uncovered by near record low water levels, the *Hilt* v *Weber* majority squarely characterized the case as one involving the "rule of reliction," holding that the riparian owner was the fee owner of relicted land. *Id.* at 220. Seventy-four years after that decision, citing no subsequent case, disregarding the plain and unambiguous language used by the *Hilt* Court, and ignoring further elaboration by this Court in subsequent cases, Plaintiff and Amicus Tip of the Mitt now assert that by using the term "reliction," the Court intended some type of "permanent" recession of the water, without offering to explain the type of "permanence" to which the Court might have been referring. *See* Plaintiff's Brief, p 21; Tip of the Mitt Brief, pp 8-9. The assertion belies both the facts and the law as explained by *Hilt*.

While not mentioning the near record low water levels at work in the case, the *Hilt* Court did seem to note that the reliction in question had occurred only since Michigan's admission to the Union, a mere 93 years earlier:

> While some of the disputed strip undoubtedly has always been upland since before admission of the State into the Union, and the rest has been made dry land partly by accession and partly by reliction, the whole will be referred to as relicted land . . . Nor are we concerned with the specific cause of the reliction or accession so it be gradual, imperceptible, and natural or general to the lake (emphasis added).

Id. at 201. Plaintiff offers no facts, no explanation, and no citation to the record or otherwise, that would cause the *Hilt* Court to conclude that the natural or general "reliction" that occurred in *Hilt* was somehow permanent, never to return, and that in a brief period of 93 years since the state was admitted to the Union and acquired the lakebottom from the federal government, it knew it to be so.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

The idea that the term "reliction," as that term was employed by the Court,[23] necessarily means some type of permanent lowering of water also belies the *Hilt* Court's tossing the term into the same pot as other types of constant, as opposed to permanent, change:

> The most ordinary effect of a large body of water is to change the shoreline by deposits or erosion gradually and imperceptibly....

Id. at 219. Similar to such deposits and erosion, perhaps the "most ordinary effect of the Great Lakes" is to change water levels gradually and imperceptibly. *Id. Hilt* was not concerned with the cause of "reliction" that was "gradual, imperceptible, and natural or general to the lake." *Id.* at 201.

The *Hilt* Court also introduces a new term not before mentioned in the earlier cases: "accession." *Hilt* at 201. The term refers to "all that is added to the property (esp. land) naturally or by labor." Black's Law Dictionary (West 2004). Such additions need not be "permanent."

Further evidence of the Court's usage of the term "reliction" is found in the interplay between the opinion and the concurrence of Justice Potter. With the subject dominating his concurrence, Potter seemed to write separately to express his disagreement with the majority on the meaning of reliction:

> The doctrine of reliction has no application to lands temporarily laid bare by a recession in the water due to variation in the amount of evaporation and precipitation, nor the lands laid bare by a recession of the water due to diversion or drainage (emphasis added).

Id. at 228. Justice Potter cited no authority for his conclusions, as his concurrence contained not a single citation. In contrast, as quoted above, the majority was not "concerned with the specific

[23] Plaintiff points to authorities addressing rivers which appear to define or employ the term "reliction" as a permanent lowering of water levels, arguing that since the *Hilt* Court used that term, it could have only intended the term to have the same meaning. *See* Plaintiff's Brief, p 22. Plaintiff has wholly failed to address the arguments herein. Moreover, the Great Lakes are not rivers, and have substantially different hydrological characteristics.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

cause of the reliction," so long as it was "natural or general to the lake (emphasis added)." *Id.* at 201. "Evaporation and precipitation" are natural; diversion or drainage would be general. Had the majority agreed with Justice Potter's conclusions, they could have easily incorporated some or all of his ten sentence concurrence into their decision.

The *Hilt* Court's intended meaning of "reliction" is revealed by its citation to *Brundage* v *Knox*, 279 Ill 450; 117 NE 123 (1917). *See Hilt* at 220. Characterized by the *Hilt* case as one involving the "rule of reliction," *Brundage* involved the recession of water on Lake Michigan, and the riparian owner's actions in building structures to protect the shoreline, which the state asserted was unlawful. Evidence in that case showed that the water had receded between 1890 and 1915, but that it had at various times come up to destroy a fence earlier built to the water's edge. Like Plaintiff in the case at bar, the state's attorney general argued that the riparian's title extended only to the "ordinary high water mark of Lake Michigan." *Id.* at 470. The Illinois Supreme Court disagreed, and after considerable analysis concluded:

> The decree of the circuit court rightly fixed appellee's easterly boundary as the edge of Lake Michigan when free from disturbing causes.

Id. at 473. So in announcing its rule of reliction, the *Hilt* Court chose to cite a case which specifically rejected the ordinary high water mark as the riparian boundary, and set it at the edge of the water.

Further clarifying the point, the Court referred to the application of the "rule of reliction" in *Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923). That case involved the very issue presented at bar, as urged by Plaintiff:

> [T]he defendant and the state contend that the plaintiff's title stops at the ordinary high water mark, and that the title of the land constituting the shore between such ordinary high and low water marks is held in trust for the benefit of the public . . . [including] the purposes of public travel and public purposes generally.

Id. at 394. The Court conceded:

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

> It is true, as contended by counsel who have appeared as amici curiae, that it is unfortunate in one sense that this court, in treating of the boundaries of the riparian owner, has used a variety of expressions, such as "water's edge," "natural shore," "waterline," "ordinary low-water mark," and "ordinary high water mark."

Id. at 397. Still, the Court noted that a "careful reading of all these cases will disclose but very little conflict, from the standpoint of principle, with respect to the issue involved, and when the principles are applied to the facts in each particular case." *Id.*

The Court then observed the "natural order of things":

> During certain periods of the year when precipitation is large, and when the waters of the lakes are swelled by the increasing in-flowing volumes coming from springs, rivers, creeks, and the flowage of surface water and the precipitation in the form of rain, the lake exercises its dominion over the land to the high-water mark. This dominion, however, is not permanent. Upon the seashore, where the waters are affected by the tide, it is intermittent. As to inland lakes and rivers, such assertion of dominion on the part of nature is periodical (emphasis added).

Id. at 398. In the shadow of ostensibly conflicting Wisconsin decisions, the *Doemel* Court bravely concluded:

> So that it would appear but logical to hold that, when nature in pursuance to natural laws holds in its power portions of the land which at periods of the year are free from flowage, then during such periods the strip referred to is subject to all the rights of the public for navigation purposes. On the other hand, when the waters recede, these rights are succeeded by the exclusive rights of the riparian owner. So that during periods of high water the riparian ownership represents a qualified title, subject to an easement, while during periods of low water it ripens into an absolute ownership as against all the world, with the exception of the public rights of navigation and with those rights no interference will be tolerated where the acts affect or have a tendency to affect the public rights for navigation purposes (emphasis added).

Id.[24]

---

[24] Notably, and akin to the *Hilt* decision, the *Doemel* Court felt compelled to this conclusion based on the early development of the law in Wisconsin:

> If the rights of riparian owners had not attached or been declared by the courts, a different situation would be presented. Early in the history of this State this court, in harmony with other courts, has firmly declared that the title of a riparian owner on a navigable inland meandered lake extends to low-water mark. In the early period of our history the lands surrounding these lakes were the property of the state. From time to time the state made grants to private individuals of lands abutting upon the inland waters, and it might be said that by far the greater portion of these grants were executed subsequent to the solemn declaration of the rights of riparian owners by this court. These rights were always considered valuable, and, as a result of

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Citing it no less than three times, the *Hilt* decision fully adopts the reasoning of the *Doemel* Court which, like *Hilt* and *Brundage*, has never been criticized or called into question by any reported decision.[25] Like it characterized the *Brundage* decision, the *Hilt* Court referred to *Doemel* as one involving the "rule of reliction."

Curiously, Plaintiff directs this Court to *Nedtweg* v *Wallace*, 237 Mich 14; 211 NW 647 (1926) for the proposition that this Court limits its interpretation of the word "reliction" to a permanent recession of water. *See* Plaintiff's Brief, pp 21-22. Quite the contrary, in *Nedtweg*, this Court acknowledged the word was capable of two meanings: "the restricted sense of land uncovered by a recession of water," and "the broader sense of former lake bed unfitted by recession of water and accretion for purposes of navigation, hunting, and fishing, and therefore rendered suitable for human occupation." *Id.* The Court then distinguished between the "permanent recession of waters" and "reliction":

> Beds of the Great Lakes, involving no riparian or littoral rights, unfitted for navigation, hunting, or fishing by permanent recession of waters, reliction, accretion, or alluvion, and useful for residence purposes with or without dredging, may be leased by the state in its proprietary capacity under legislative authorization (emphasis added).[26]

Finally, the parties in *Hilt* used the term "reliction" as including the periodic lowering of water levels. For example, after conceding that "other states have adopted the rule that the

---

> such declarations, the doctrines pertaining to riparian rights have become fixed rules of property. Whatever may be our individual inclinations or desires or our views as to property or the public welfare, we cannot disturb the interests which have so become vested. *Id.*

[25] Amicus Tip of the Mitt points out at pp 10-11 of its Brief that *Doemel* was not a Great Lakes case. That is true, but the amicus ignores the point made by Amici SOS and IGLC: that the *Hilt* Court's use of *Doemel* demonstrates the clear meaning of the Court's decision in laying title at the water's edge.

[26] Recall that in authorizing the state to lease relicted lands, the *Nedtweg* Court was working under the precedent of *Kavanaugh* v *Rabior*, *supra*, which had erroneously held that all land below the meander line belonged to the state.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

riparian owner's title extends to the water's edge at normal level," the Michigan Attorney General noted:

> This rule followed by some of the other states results in a shifting ownership back and forth between the upland owner and the state. But it results in the upland owner being the riparian owner at all times, regardless of either reliction or high water levels. It may result, however, in the riparian owner losing entirely the control of his property by the rising of the water so as to cover the land.

Brief of Attorney General Acting as Amicus Curiae, p 22 (Appendix 5). As a result, the proposition that the *Hilt* Court's use of the term did not include variations in water level from time to time, as observed by the *Doemel* Court, is untenable.

E. *Hilt* v *Weber* Remains the Law in Michigan, and Subsequent Cases Have Further Clarified Its Holding of Riparian Ownership to the Water's Edge.

A number of decisions issued since *Hilt* have confirmed its holding of ownership to the water's edge, and the decision continues to represent the law in Michigan. *See*, eg, *Kavanaugh* v *Baird (On Rehearing)*, 253 Mich 631; 235 NW 871 (1931); *Staub* v *Tripp*, *supra*; *Donahue* v *Russell*, *supra*; *Klais* v *Danowski*, *supra*; *Boekeloo* v *Kuschinski*, 117 Mich App 619; 324 NW2d 104 (1982); and *Peterman* v *DNR*, *supra*. Moreover, these decisions interpret *Hilt* consistent with the position of amicus herein and contrary to the position espoused by Plaintiff and her supporting amicus parties.

For example, promptly after *Hilt*, the Court again reviewed *Kavanaugh* v *Baird*, *supra*, reversing its former decision. *Kavanaugh* v *Baird*, 253 Mich 631. Recall that in *Kavanaugh*, the land at issue, described as relicted land, was due to "recent low waters," the Court recognizing that "the waters of the Great Lakes rise and fall over a cycle of years." *Kavanaugh*, 241 Mich at 251, 252. The decision—which "fixes the title to the land in question in the state in trust for its people"—was reversed, and against the State of Michigan, the riparian owner was "entitled to a decree quieting the title in him to the relicted land involved." *Id.* Any criticism that *Hilt* did not involve land revealed by cyclical low water; that the justices did not fully appreciate the cyclical

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

nature of the Great Lakes; that the holding of ownership to the water's edge was *dictum*; or that the state was not a party and is therefore not bound thereby, is rebuffed by the direct reversal of *Kavanaugh* v *Baird*.

More than three decades later, this Court addressed the issue of Great Lakes boundaries once again in *Klais* v *Danowski*, 373 Mich 262. After citing *Hilt*, and after recognizing records dating back to 1860 showing "a high degree of fluctuation in the water levels," this Court in *Klais* specifically employed the term "reliction" to describe the temporary recession of water after "periods of high water level":

> Where, during a period of high water level and inundation of lands of the private claim, conveyance is made of all or some portion thereof by description stating that it runs to the lake, it must be held to mean, unless a contrary intent is clearly expressed, that it extends at least to the border of the lake as of the date of the patent, and, by reason of riparian rights and the consequent right to accretions, beyond if and when accretions or reliction cause the border of the lake to recede further lakeward (emphasis added).

Id. at 423.

Most notably, the *Hilt* decision was upheld and followed by this Court 64 years later in *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994). In that case, beachowners sued the Michigan Department of Natural Resources ("DNR") for compensation due to the destruction of their beach caused by the DNR's negligently installed boat launch and jetties. Citing *Hilt* v *Weber*, this Court held that the state must compensate the riparian owner for its negligent destruction and the resulting "loss of the beach below the ordinary high water mark." *Peterman* at 200-202. In its decision, the *Peterman* Court specifically referenced with approval the *Hilt* Court's conclusion that "the riparian owner has the exclusive use of the bank and shore," holding that the property below the ordinary high water mark was "plaintiff's beach." *Peterman*, 446 Mich at 192, 201, citing *Hilt*, *supra*, at 226. And like the *Hilt* decision, the *Peterman* Court, 64 years later, repeated the *Hilt* Court's recognition of the benefits of "public control of the lake

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

shores," but quoted again its conclusion that the state has no power "which will justify it in taking private property without compensation." *Peterman*, 446 Mich at 193.[27] While one justice dissented in part, arguing that the beach below the ordinary high water mark "is held by the state in trust for the people," the Court found that it was "plaintiff's beach," and affirmed an award "for the loss of plaintiff's property." *Id.* at 201-202. Thus, the argument that the state's fee under the public trust doctrine extends beyond the actual water's edge has been specifically rejected by this Court in 1930 by *Hilt*; in 1931 by *Kavanaugh*; and by *Peterman* in 1994. These cases remain the law in Michigan without criticism by any reported decision.

F. The Court of Appeals, While Reaching the Right Result, Critically Erred in its Analysis.

In an otherwise well-written and persuasive decision, the Court of Appeals in this case critically erred in asserting that the state owned title in fee up to the so-called "ordinary high water mark":

> Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine.

(Opinion, p 9). *See also* page 7 of the opinion:

> Although the state holds title to land previously submerged, the state's title is subject to the riparian owner's exclusive use, except as it pertains to navigational issues.

---

[27] The *Peterman* Court did state that "riparian owners hold a limited title to their property that is subject to the power of the state to improve navigation," but that discussion was *dictum* under the Court's holding; it was provided despite no briefing on the issue of riparian rights; and in any event offers no consolation to plaintiff in this case. *Peterman* at 193-198; *see also* the briefs therein. *See also Hilt* at 225, 226 ("Riparian rights are property, for the taking or destruction of which by the State compensation must be made, unless the use has a real and substantial relation to paramount trust purpose . . . The only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation.") As explained in *Sterling* v *Jackson*, *supra*, the public right of navigation on the Great Lakes excludes any use of the soil, and is to be distinguished from the State's rights under the public trust doctrine. *Id.*, 69 Mich at 497. Mrs. Glass does not navigate on defendant's beach, and has no right to any use of the soil thereon. Amicus Tip of the Mitt erroneously conflates the "navigational servitude," which is limited to rights of navigation, and the "public trust," a very different legal concept. Tip of the Mitt Brief, pp 17-18.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

These statements, as they relate to title, are not, and never have been, the law in Michigan.[28] Moreover, the conclusion is set forth without substantial analysis, and without credible citation of authority. In the first assertion, the Court of Appeals refers us only to *Hilt*, *supra*, at 226. The cited page, which also is cited in an erroneous 1978 Attorney General opinion discussed *infra*, contains no such conclusion by the *Hilt* Court, as more thoroughly set forth in Argument II, *infra*. The *Hilt* decision offers no support for the assertion of the Court of Appeals referenced above.

For the second assertion of the Court of Appeals quoted above, the Court cites the *Peterman* case at page 195. Again, this page from *Peterman* contains nothing to support the assertion made. Quite to the contrary, the *Peterman* Court characterized the property below the ordinary high water mark as that of the riparian:

> In other words, riparian owners hold a limited title to their property that is subject to the power of the state to improve navigation.

Id. at 195. The issue in *Peterman* was the loss of sand from the "loss of the beach below the ordinary high water mark." *Id.* That beach was "plaintiff's beach." *Id.* at 208. The assertion that *Peterman* supports a holding of state title to dry land above the water is clearly and unambiguously wrong, and the Court of Appeals' mistaken assertions of state title above the water's edge should be corrected by this Court.

G. <u>As a Rule of Property Law, Hilt Should Not Be Overturned.</u>

Even if modern courts could find fault with the *Hilt* decision, the decision should nevertheless stand. This Court has held that "stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce reliance." *Bott* v *Commission of Natural*

[28] They do, however, mirror the flawed reasoning of a 1978 opinion of the Attorney General. *See* OAG 1977-1978, No 5327 (July 6, 1978) and discussion in Argument II, *infra*.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Resources, 415 Mich 45, 77; 327 NW2d 838, 849 (1982), citing *Lewis* v *Sheldon*, 103 Mich 102; 61 NW 269 (1894); *Hilt* v *Weber, supra.* Urged in 1982 to extend public rights of use to a creek by modifying the definition of navigability, the Michigan Supreme Court in *Bott, supra*, refused:

> The rules of property law which it is proposed to change have been fully established for over 60 years, and the underlying concepts for over 125 years. Riparian and littoral land has been purchased in reliance on these rules of law, and expenditures have been made to improve such land in the expectation, based on decisions of this Court, that the public has no right to use waters not accessible by ship or wide or deep enough for log flotation, and that, even if there is navigable access to a small inland dead end lake, the public may not enter over the objection of the owner of the surrounding land, and that the only recreational use recognized by this Court as an incident of the navigational servitude is fishing. The Legislature can, if it is thought to be sound public policy to enlarge public access to and the use of inland waters, pass laws providing for the enlargement of the rights of the public in those parts of the state where the Legislature finds that there is a shortage of public access to inland rivers and lakes and for the compensation of landowners affected by the enlarged servitude (emphasis added).

The Court further stated:

> The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. The judiciary must accept responsibility for its actions. Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital . . . It cannot be denied that some landowners have invested their savings or wealth in reliance on a long-established definition of navigability. It also cannot be denied that the heretofore private character of the waters adjacent to their property significantly adds to its market value. Vacationers are not manufacturers who can pass on their losses to a large class of consumers. Techniques to safeguard past reliance on prior law such as prospective overruling are unavailable where property rights are extinguished. Prevention of this hardship could be avoided through compensation, but this Court has no thought of providing compensation to riparian or littoral owners for the enlarged servitude and the resulting reduction in amenities and economic loss.

Id. at 77.[29] Since the *La Plaisance* decision in 1843, confirmed by *Silberwood, supra, Warner, supra, Hilt, supra*, and *Peterman, supra*, riparian owners have relied on the rule of property law established, developing the lakeshores as the *Hilt* Court intended, and under the foregoing authority, the rule should stand.

---

[29] Plaintiff incorrectly asserts that in *Bott*, the log flotation test "was abandoned in favor of the recreational boat test to reflect the changing needs of the public." Plaintiff's Brief, p 18. This, of course, is the opposite of what occurred in *Bott*.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

II. THE GREAT LAKES SUBMERGED LANDS ACT DOES NOT MODIFY THE RULE OF OWNERSHIP TO THE WATER'S EDGE.

A. Introduction.

Plaintiff and her supporting amici[30] assert that the Great Lakes Submerged Lands Act ("GLSLA"), now compiled at MCL 324.32501 *et seq.*, set the boundary between state owned bottomland and the riparian at a statutorily designated "ordinary high water mark" of 579.8 feet above sea level for Lake Huron. This position is also vigorously espoused by the State of Michigan's Department of Environmental Quality and the Department of Natural Resources ("DNR"), both of which have curiously elected not to support their position before this Court.[31] Rejected by less biased observers such as the Land Title Standards Committee of the State Bar (*see* Argument I(A), *supra*), the position of these proponents cannot withstand scrutiny.

B. Under its Plain and Unambiguous Meaning, the GLSLA Does Not Establish a Fixed Boundary Between the State and Riparians.

To determine the meaning of the GLSLA, this Court first looks to its language, and if it is plain and unambiguous, no further inquiry is warranted. *Stanton* v *City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002). The statute at issue provides as follows:

> Sec. 32502. The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will

---

[30] *See* Plaintiff's Brief, p 38; Amicus Tip of the Mitt Brief, p 20; Amicus National Wildlife Federation Brief, p 5.

[31] Although these departments, aware of this litigation, have chosen not to participate, it is notable that Tip of the Mitt Watershed Council receives hundreds of thousands of dollars from one or both of these departments each year. Moreover, its counsel, Cooley Professsor Shafer, previously served as Chief of the Shorelands Division of the DNR.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

> not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet (emphasis added).

According to the statute's terms, it applies (1) only to lands "in the Great Lakes...belonging to the state or held in trust by it...." In *Oliphant* v *Frazho*, 5 Mich App 319; 146 NW2d 685 (1966), *rev'd on other grounds Oliphant* v *State*, 381 Mich 630; 167 NW2d 280 (1969), the Court of Appeals so limited the statute's application, finding that the Act did not apply to patented lands not owned by the state. Having limited the term "lands" to those owned or held in trust by the state, the statute further limits the term "the aforesaid described" lands to those lands (2) "lying below and lakeward of the natural ordinary high water mark." A third limitation of the application of the Act excepts (3) certain "property rights" from the Act, including those "acquired by accretions occurring through natural means or reliction." Finally, the Act defines the ordinary high water mark in terms of elevation, and limits that definition to "purposes of this part." Thus, the Act contains four important limitations of application as it relates to this case.

Because the Act applies only to lands "belonging to the state or held in trust by it," it cannot apply to Defendants' beach above the naturally occurring water's edge, which we know from *Hilt* and its progeny is owned by the riparian.[32] Moreover, the Act does not affect "property rights secured by...reliction." As set forth in Argument I(D) above, relicted land includes land uncovered during periods of low water, as it was in

[32] Even if the navigational servitude referred to in *Peterman*, *supra*, somehow extends beyond the water's edge in times of low water, the servitude does not represent a fee, whether burdened by a trust or not.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Kavanaugh v *Baird, supra*, and other decisions of this Court. Rather, the Act "specifically preserves those riparian rights set forth in *Hilt* and its progeny." Court of Appeals opinion, p 10. In adopting the GLSLA, "the Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted." *Nation* v *WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). This includes the Legislature's use of words which have been defined by the courts. *Kirkley* v *General Baking Co*, 217 Mich 307; 186 NW 482 (1922). The Legislature therefore did not alter the meaning of "reliction" as that term was used by *Hilt*. Under the plain language of the GLSLA, the Act does not apply to Defendants' beach above the water's edge.

Neither Plaintiff nor her supporting amici attempt to rebut the argument set forth above—that the statute's applicability rests on a determination of ownership separate and apart from the statute. Plaintiff concentrates her analysis not on ownership, but on public rights, while Amicus Tip of the Mitt skips an analysis of the statutory language, and launches into its view of legislative history. Amicus National Wildlife Federation merely cites the portions of the statute referring to the ordinary high water mark, omitting the portions which require ownership by the state (thus misleading the reader), illogically concluding that the Legislature set the boundary therein.[33] None of these arguments is tenable. Since the statute unambiguously requires a finding of state ownership prior to application of the Act, further analysis along the lines suggested by Plaintiff and her amici is neither required nor allowed.

C. Adopting Plaintiff's Interpretation of the GLSLA Would Render the Statute Unconstitutional.

The *Hilt* Court's holding of ownership to the water's edge established a rule of property, the modification of which requires compensation to the owners thereof. *Hilt*, 232 Mich at 224;

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Bott, 415 Mich at 77; *Peterman*, 446 Mich at 193. The Great Lakes Submerged Lands Act makes no provision for compensating riparian owners, and an interpretation that the statute sets the boundary not at the water's edge, but at the ordinary high water mark, would therefore render the statute unconstitutional and void. *Thayer* v *Michigan Department of Agriculture*, 323 Mich 403; 35 NW2d 360 (1949).

Courts favor a statutory interpretation which would be consistent with the Constitution. *People* v *Gilliam*, 108 Mich App 695; 310 NW2d 834 (1981). Neither Plaintiff nor her supporting amici explain how the Legislature could change the boundary from the water's edge to the ordinary high water mark without violating the Constitution. To its credit, the Legislature did not so intend.

D. Even if the GLSLA Was Ambiguous, the Legislative History Refutes Plaintiff's Position.

In considering Plaintiff's claim that the GLSLA granted her rights to walk on Defendants' beach, the Court of Appeals properly looked to "the unambiguous language of this statute." Court of Appeals opinion, p 10, citing *Charter Township of Northville* v *Northville Public Schools*, 469 Mich 285, 290; 666 NW2d 213 (2003). Both Plaintiff and Amicus Tip of the Mitt fail to point out any ambiguity in the statute itself, and simply launch into considerations of legislative history. Plaintiff's Brief, pp 37-38; Tip of the Mitt Brief, pp 12-18. While Plaintiff and amici are free to do so, this Court does not. *In re Certified Question from the US Court of Appeals For Sixth Circuit*, 468 Mich 109; 659 NW2d 597 (2003). Moreover, even if the GLSLA was ambiguous, the statute's legislative history does not support the ordinary high water mark boundary theory, as explained below.

---

[33] *See* Plaintiff's Brief, pp 35-39; Brief of Tip of the Mitt, pp 12-20; Brief of National Wildlife Federation, pp 4-5.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

(1) For Over 50 Years, the GLSLA and Its Predecessors Authorized the Leasing of Trust Lands to Riparians.

Contrary to the statements of some commentators, the Great Lakes Submerged Lands Act of 1955 was not new. In 1913, just three years after this Court in *State* v *Venice of America Land Co*, *supra*, held that hundreds of acres of land forming part of Harsens Island was state land, subject to the trust doctrine, the Legislature passed 1913 PA 326, CL 1915 §606 *et seq.* (*See* Appendix 7) The stated purpose of the Act was "to provide for the leasing, control and taxation of certain lands owned and controlled by the state." *Id.* The statute provided:

> All of the unpatented overflowed lands, made lands and lake bottomlands belonging to the State of Michigan or held in trust by it, shall be held, leased and controlled by the State Board of Control (emphasis added).

Id.; *see also Nedtweg* v *Wallace*, 237 Mich at 18. The Act was remedial, its provisions benefiting those who had applied for leases under previous acts in 1899 or 1909, and those "in occupancy of any land under the definition set forth herein prior to January one, nineteen hundred thirteen [1913]." 1913 PA 326, §13, 14.

In 1955, another legislative remedy was deemed necessary. The GLSLA was a legislative response to the State Department of Conservation's efforts, including 15 lawsuits in 1955 for injunction and a possible class action suit, to remove hundreds of persons who had, once again, filled in shallow-water areas along Lake St. Clair. Haller, *Michigan's Purloined Shorelines*, 34 Mich St B J, 36 (May 1955) (*See* Appendix 8).[34] *See also* Brief of Tip of the Mitt,

[34] Amicus Tip of the Mitt asserts, without citation of authority, that the Great Lakes Submerged Lands Act was "enacted in response to the federal Submerged Lands Act...," and that the federal law "used the ordinary high water mark as the boundary line for state bottomlands." Tip of the Mitt Brief, p 12. Amicus herein is unaware of any legislative history linking the two acts, and the connection is not mentioned in Haller's article. Further, such a proposition is unlikely, since the 1955 Act was akin to the 1913 Act. Finally, the assertion that the federal law "used the ordinary high water mark as the boundary line for state bottomlands" is simply false, and the presentation of amicus is misleading. The statute cited in fact reads:

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

p 13. By passage of the Act, the Legislature intended to curtail the Department of Conservation, and to "get these people off the hook." *Id.* The Legislature did this by once again authorizing state grants of title to filled-in shallow water areas which the Department of Conservation claimed as state public trust lands. Like the 1913 Act, the purpose of the GLSLA was logically limited to lands owned by the state:

> An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented submerged lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state of Michigan or held in trust by it; to provide for the disposition of revenue derived therefrom; and to appropriate funds for the administration of the provisions of this act (emphasis added).

See 1955 PA 247 (Appendix 9).[35]

Like the 1913 Act, the GLSLA of 1955 applied to lands "belonging to the state of Michigan or held in trust by it," but only those lands "which have heretofore been artificially

---

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof (emphasis added).

43 USC §1311. Thus, because under Michigan law riparians own to the water's edge, the federal Submerged Lands Act confirms title above the water's edge in the riparian up to the ordinary high water mark. The Act "creates no new rights for the states," and "is not a grant of title to land, but only a quitclaim of federal proprietary rights in the beds of navigable waterways." *Bonnelli Cattle Co* v *Arizona*, 414 US 313; 94 S Ct 517; 38 L Ed 2d 526 (1973).

[35] As this Court knows, Const 1963, art 4, §24 provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE . P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

filled in and developed with valuable improvements." *Id.*, §2. Applications were to be "filed within 3 years from the effective date" of the Act. *Id.*, §4(b). Thus, owners had a small window to secure legal rights to their realty improvements, a window that was extended indefinitely when the Legislature amended the Act in 1958. *See* 1958 PA 94, §(4)(b) (Appendix 10). While providing a remedy for past sins, the 1958 Act made future filling and dredging on state lands a criminal offense, presumably in exchange for extending the Act's window indefinitely. The Act's title was shortened. Nothing in the Act suggested that it defined a boundary.

(2) Efforts to Amend the GLSLA to Define The Ordinary High Water Mark as a Boundary Failed.

The 1960's saw the Department of Conservation participate in an aggressive—but ultimately unsuccessful—campaign to establish the ordinary high water mark as a legal boundary between riparians and the state. That campaign offered a revisionist interpretation of *Hilt* v *Weber*, *supra*, and efforts to amend the GLSLA, consistent with its views. Because the Department has caused its interpretation of the law to be well publicized, it has caused great confusion among the public, commentators, and the courts, including the Court of Appeals in this case. As a result, a studied analysis of the development of the Department of Conservation's position is warranted.

(a) State Departments Acknowledged Hilt's Holding of Riparian Title to the Water's Edge.

For thirty years after the Department suffered defeats in both *Hilt* and the subsequent reversal of *Kavanaugh* v *Baird*, *supra*, the state's position on riparian ownership was fairly consistent. With the *Kavanaugh* cases, the attempted legislative correction, and the 1930 *Hilt*

This constitutional provision was "designed to prevent the Legislature from passing laws not fully understood . . ." 22 Michigan Civ Jur, Statutes, §22. *See also Pohutski* v *City of Allen Park*, 465 Mich 675, 691; 641 NW2d 219 (2002).

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

decision still within recent memory, Michigan's Attorney General issued a contemporary opinion acknowledging the holding which the Department argued against three years earlier:

> At the outset, I wish to advise you that the general rule as set forth in 23 ALR 778 prevails, which is as follows: ". . . the true rule should be that the riparian title (on the Great Lakes) goes to the water at whatever stage, the shore being subject to the public use when it becomes covered with water. This preserves the rights of both public and riparian owners, and avoids the conflicts which otherwise must necessarily arise." The foregoing mentioned rule is the general law that does prevail. All states bordering the Great Lakes have now adopted the theory that the riparian owners along the Great Lakes own to the water's edge . . .

OAG, 1932-34, p 287 (July 13, 1933).

Eleven years later, the Attorney General opined on whether the state had authority to grant an oil and gas extraction lease to presently submerged land along a Great Lakes shoreline. The Attorney General cautioned that because "lands formerly submerged . . . would become by reliction lands owned and controlled by the riparian owner," the "consent of the riparian owner should be obtained." OAG No 0-2249 (May 12, 1944). The Attorney General so held despite that it was "conceivable that the lands thus obtained by reliction could again become owned by the state in trust by again becoming submerged." *Id.*[36]

The then-acquiescent interpretations of both *Hilt* and the GLSLA by the Department of Conservation were revealed in *People* v *Broedell*, 365 Mich 201; 112 NW2d 517 (1961), where this Court noted that the Department followed the "philosophy" of *Hilt* v *Weber* "that the dividing line between the state's and the riparian owner's land follows the water's edge or shoreline at whatever level it may happen to be from time to time." *Id.* at 206. That decision quoted, but did not do justice to, the actual testimony of Charles E. Millar, Chief of the Lands

[36] But *see* OAG No O-3984, p 506 (October 25, 1945). In determining that a riparian could not erect a channel and dike on submerged lands that at times is part of the dry shore, the Attorney General states that *Hilt* "does not cover land temporarily made bare by periodic fluctuations in the level of the water, but only land made bare by gradual imperceptible accession or recession of the water." *Id.*

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE . P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Division, Department of Conservation, which was not philosophical, but was clear and unequivocal:

> It is my understanding that the state has absolute title to the land submerged from the water's edge of the lake, lakeward, and that the land owner has title to the upland down to the water's edge, wherever it may be. It is a fluctuating boundary between the upland owner and the State of Michigan. It is my understanding also that the upland owner's title is a qualified title below what would be determined to be the high water mark.

Broedell Appellant's Appendix, p 105b (*see* Appendix 11).

(b) The State Offers a Revisionist Interpretation for *Hilt* v *Weber* Based on a Faulty Reading of the Decision.

Unfortunately, the state's resultant acceptance of the result in *Hilt* did not last. Just two months after the *Broedell* decision suggested in *dictum* that the law as to boundary was open to question, 1962 HB 548 would have amended the GLSLA by confirming riparian title at the water's edge, but granting the state an easement to the ordinary high water mark. (*See* Appendix 12). When hearings on the bill revealed criticism of the establishment of an ordinary high water mark, the Department responded with a four page legal memorandum to legislators dated March 9, 1962. (*See* Appendix 13). That memorandum referred to *Hilt* as the "outstanding" case on the issue, but like Plaintiff and her amici herein, the memo argued that the Court failed to "take cognizance of the fact that the levels of the waters of Lake Huron[37] . . . rise or fall to some degree, from time to time." *Id.*, p 1. Disregarding the first 24 pages of the *Hilt* Court's carefully crafted decision, the memorandum concludes that the ordinary high water mark separates the public trust from riparian lands. To support its analysis, the memorandum first extracts out of context the following language from the Court's lengthy discussion at page 226:

> The riparian owner has the exclusive use of the bank and shore and may erect bathing houses and structures thereon for his business or pleasure (45 C J p.505;

[37] At least portions of the memorandum were revised to change the reference from Lake Huron to Lake Michigan.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE . P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

> 22 L R A [N S] 345; *Town of Orange* v *Resnick, supra)*, although it also has been held that he cannot extend structures into the space between low and high-water mark, without consent of the state (*Thiesen* v *Railway Co*, 75 Fla 28 [78 South 491 L R A 1918E, 718 (1917)] And it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the state. *Doemel* v *Jantz, supra.*

Id.

A careful study of both the *Doemel* decision and the *Hilt* Court's reference to it reveals the error in reading the above language out of context. For twenty-four pages, the *Hilt* Court discusses its legal analysis, concluding that riparians own to the water's edge. Beginning at the bottom of page 224, the *Hilt* v *Weber* decision attempts to allay the concerns of public rights advocates:

> Perhaps, also, some of the apprehension of the extent of the injury to the state and its citizens [from lack of "public control of the lake shores"] would be allayed if the scope of the *Kavanaugh* decisions were not so misunderstood and misrepresented.

Hilt, 252 Mich at 224. The Court then embarked upon a demonstration that, in view of the *Kavanaugh* holdings that the upland owner has riparian rights, the difference between those cases and the *Hilt* decision of riparian ownership to the water's edge was, as a practical matter, "negligible." *Id.* at 225. This was because of the doctrine of riparian rights, most of which are "included the general right of access, which is quite broad." *Id.* at 226.

It was in listing those broad riparian rights that the Court referred to the riparian's right to exclude the public, "although title is in the state." *Id.* at 226. By this quote, the *Hilt* Court was demonstrating that even if title was in the state, as the *Kavanaugh* cases had held (but which the *Hilt* decision denied), the riparian could exclude the public, among his other rights. This was the same analysis as the *Doemel* Court went through prior to concluding in favor of ownership to the water's edge:

> [W]hether the title to the shore between ordinary high and low water marks be deemed in the public, or whether it rests in private ownership, the rights of the

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

> riparian owner are equally well fixed and established, and any invasion of such rights on the part of a stranger necessarily works an injury to the rights of the riparian owner, for which the law affords proper redress.

Id., 193 NW at 397. The *Doemel* Court had cited *Illinois Central R Co* v *Illinois*, 146 US 387, for the proposition that the riparian's right of exclusive control applies "whether the riparian owner owns the soil under the water or not." *Doemel*, 193 NW at 395, 396. Of course, after these observations, the *Doemel* Court found title between high and low water mark in the riparian. Read in context, it is clear why the *Hilt* Court cited this language from *Doemel.* That case had considered the same proposition that *Hilt* was addressing in this portion of its analysis: the extent of riparian rights when the state has title, as the *Kavanaugh* cases held.

Having demonstrated the absence of practical value to a state title to shoreland burdened by riparian rights, the *Hilt* Court then concentrated on the benefits of finding title in the riparian. Such placement would aid "in working out the recreational aspirations of the state," while title in the state would seem "destructive of the development of the lake shores." *Id.* at 226, 227. Moreover, the state "gains the right to levy and collect taxes on the relicted land, the great value of which supports the argument that such taxes will more than compensate the people for the loss of an empty title." *Id.* at 227. That empty title effected by the *Kavanaugh* cases—which by the Court's reference to *Doemel* includes the area between low and high water marks—was in *Hilt* made valuable by restoring it to the riparian.

The Department of Conservation's March 9, 1962 memorandum, by pulling the reference to *Doemel* out of context, stood the *Hilt* decision on its head, taking Justice Fead's carefully crafted presentation, and turning it into nonsense. Consider the memorandum's footnote:

> The Michigan court gave slight misinterpretation to the *Doemel* v *Jantz* case when it said that "title is in the State" below the high water mark. As seen in the following quote from this case, the Wisconsin court actually said that title is in the riparian to the water's edge, and that the state holds an easement to the high water mark.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

March 9, 1962 Memorandum, p 1 (Appendix 13). It was not Justice Fead's carefully crafted 30-page decision that misinterpreted *Doemel*, but the memo writer that misinterpreted the Court's reference to it. It would be odd indeed that an opinion of 30 printed pages on the issue of riparian title, quoting numerous authorities on the topic, reflecting substantial research and analysis, and critically analyzing the cases, would leave so important a holding to a simple reference to what another case held. It would be even more odd that such a holding be premised on a case which stands for the opposite proposition from the one asserted by the Court, as occurs by the memorandum's interpretation of Justice Fead's reference to the *Doemel* case. Finally, it is unlikely that the *Hilt* Court misunderstood a decision which it cited several times in its decision. Contrary to the conclusion of the memorandum, by his reference to *Doemel*, Justice Fead made clear his ruling was placing title to the water's edge in the riparian, including that area between high and low water marks.

The memorandum next departs from logic by jumping to the concurring opinion in *Hilt* and its view that a trust existed between high and low water marks. Of course, that view was rejected by the *Hilt* majority, resulting in Justice Potter's need to write separately. As stated above, had Justice Potter's views been accepted by the majority, they could have easily included some or all of his ten-sentence concurrence in their opinion. That they did not further clarifies their holding (if it could be any clearer).[38]

---

[38] The memorandum also asserts that under *Hilt*, there are "limitations" to what a riparian can do between low and high water marks. Department of Conservation March 9, 1962 Memo, p 3 (Appendix 13). *Hilt* creates no such limitations. Further, the state has myriad ways, including the police power, to accomplish this purpose if deemed necessary by the Legislature. Of course, public trust advocates such as Tip of the Mitt and its counsel do not wish the state or its administrative departments to be confined to the police power, which is the unstated purpose of their participation herein. They prefer that the state exercise public trust rights, which "allows the state to manage these resources as a property owner without having to exercise either its regulatory police powers or its powers of eminent domain. *See* Putting the Public Trust Doctrine to Work, 2nd edition, p 8 (Coastal States Organization, 1997).

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

Apparently convinced of its position as outlined in the March 9, 1962 memorandum, the Department of Conservation commissioned in May of 1962 an engineering survey to locate the ordinary high water mark along Michigan's Great Lakes shores. (*See* Appendix 15). That study was conducted in 1963. Also in 1963, the Department's files reflect a "transcript of part of the Proposed Legislation for 1963," which reflects the conclusions of the 1962 memorandum. The legislative proposal provided in part:

> Ordinary high water mark means the dividing line between the upland and the lake bed which separates the public trust area from the upland; this line is not intended to interfere with the inherent riparian rights but to fix the lakeward limits of permanent upland installations; the elevation of the ground at the line of the ordinary high water mark established for each of the Great Lakes shall be referenced to the low water datum as determined by the U.S. Lake Survey Corps of Engineers; the ordinary high water mark for Lake Superior shall be 1.5 feet above the low water datum established for Lake Superior; the ordinary high water mark for Lake Michigan-Huron shall be 3.0 feet above the low water datum established for Lake Michigan and Lake Huron; the ordinary high water mark for Lake St. Clair shall be 3.0 feet above the low water datum established for Lake St. Clair; the ordinary high water mark for Lake Erie shall be 3.0 feet above the low water datum established for Lake Erie; any structures or fill lakeward of the ordinary high water mark are subject to the provisions of this act.

(*see* Appendix 16). Finally, the Department received in November of 1963 a memorandum from the Department of Attorney General asserting that the state "has the authority to establish its rules of property at times expedient in respect of ownership of lands under navigable waters of

---

A word is in order about the foregoing authority, which Tip of the Mitt characterizes as a "well respected treatise." Tip of the Mitt Brief, p 3. The Coastal States Organization is an organization of governors of coastal states dedicated to "improved [governmental] management of the nation's coasts, oceans, and Great Lakes." In his role with the Michigan Department of Natural Resources, Professor Shafer served as one of a seven-member steering committee for that work's predecessor, and was a contributor to the second edition cited above. See Powers, "Unveiling the Truth Behind the Shoreline Controversy," p 7 (Lansing Bar Briefs November 2004) (Appendix 14). The publication is not a treatise, but a tool of advocacy. For example, the work laments that "over 90 percent of the adjacent uplands [in the nation] are privately owned, raising difficulties for the public to access the trust shorelands below the ordinary high water mark." *Id.* at 2. Further, it advocates the public trust doctrine as "a useful tool" that can be used to "improve the stewardship of state trusteees" over the lands the authors believe come under the doctrine. *Id.* at xiii. In other words, the focus of the work is to use the public trust doctrine to expand governmental control of property so that such property can be "managed" by the government, to the exclusion of private citizens.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

the state." (*See* Appendix 17, p 1). It notes that in "Michigan it has been held that one owning property abutting on the Great Lakes has title both to the meander line and to the water's edge," citing *Staub*, 253 Mich 633, and *Hilt*, *supra*. *Id.* at 2. After noting a few holdings of boundary from other jurisdictions, the memo concludes:

> It is suggested that in Michigan that the ordinary high water mark used [sic] as the separation line in determining the extent of the public trust on inland waters and also the extent of the state ownership on the Great Lakes.

Id. at p 3. With the engineering study completed, the Department of Conservation in 1964[39] prepared a memorandum containing the elevations determined in the study. (*See* Appendix 18). The memorandum asserts—again without citation of authority—that "Michigan Courts have ruled that a riparian on the Great Lakes owns to the "ordinary high water mark." *Id.* at 2.

The Legislature once again amended the GLSLA in 1965, authorizing agreements for the filling of patented lands. 1965 PA 293 (*See* Appendix 19). The amendment modifies slightly the title. The Act also provides for the Department to grant certificates indicating a riparian's "lakeward boundary or indicating that the land involved has accreted to his property as a result of natural accretions or placement of a lawful, permanent structure." *Id.* Nothing in the 1965 amendment reflects an intent that the state set a boundary at the ordinary high water mark or otherwise. Clearly, the Department of Conservation's proposal to statutorily define the ordinary high water mark as a boundary was not part of the 1965 amendments.

Finally, the GLSLA was amended in 1968, and it is this amendment upon which Plaintiff and her amici rely. 1968 PA 57 (*See* Appendix 20). Notably, the title of the Act was unchanged, thus containing no hint that the purpose of the Act would be to define a boundary. The amendment changed only section 2, which defined the lands and waters covered by the Act, the

[39] The memorandum is undated, but refers to "the last 104 years reliable stage records," which records date to 1860.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

amendment further limiting the Act to lands "lying below and lakeward of the natural ordinary high water mark." *Id.*, §2. Accordingly, land had to meet each of three requirements to come within the Act. It must be:

(1) unpatented bottomland or made lands in the Great Lakes;
(2) belonging to the state or held in trust by it; and
(3) lying below and lakeward of the natural ordinary high water mark.

Id. Once again, since Defendants' land is not owned by the state or held in trust by it, it does not come within the Act. A late change to the bill assured that it would not apply to "rights as may be acquired by accretions occurring through natural means or reliction."[40]

This legislative history demonstrates that despite the efforts and opinions of the Department of Conservation, the Legislature did not amend the GLSLA to define a boundary between the state and the riparian, and the matter remains one of the common law as reflected by *Hilt* and its progeny.[41]

(3) The Errant Interpretation Given the GLSLA By State Agencies Is Not Binding On This Court.

Unfortunately, both Departments continue to broadly assert and publish their claims of title in the state up to the ordinary high water mark. (*See* Appendix 21). An "agency interpretation cannot overcome the plain meaning of a statute." *In re Complaint of Consumers Energy Co*, 255 Mich App 496; 660 NW2d 785 (2002), citing *Ludington Service Corp* v *Acting Comm'r of Insurance*, 444 Mich 481; 511 NW2d 661 (1994). If ambiguous, this Court gives some deference to an administrative interpretation, but "ultimately it is this Court's duty to

---

[40] By differentiating between "accretions occurring through natural means" and simply "reliction," the statute excludes relicted lands due not only to natural water level changes, but to man-made changes such as diversion and dredging.

[41] Amicus Tip of the Mitt has provided a press release asserting that the release is "from" Representative Raymond L. Baker, the proponent of the bill. The press release quotes the Representative, but amicus offers no other proof it is "from" him. Several copies appear in the

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

construe statutes and to determine the legislative intent underlying them." *Lakeshore Public Schools Board of Education* v *Grindstaff*, 436 Mich 339, 359; 461 NW2d 651 (1990).

The faulty legal reasoning and interpretations of the GLSLA proffered by the Department of Conservation and the Attorney General were well followed in a 1978 published opinion of the Attorney General. *See* OAG 1977-1978, No 5327 (July 6, 1978). The opinion also asserts that the GLSLA "indicates the dividing line between the upland and the submerged land is the ordinary high water mark," and that "the riparian ownership extends to this line." *Id.* Yet the opinion offers no analysis to support this conclusion, nor does it explain how the Legislature could redefine the riparian border in favor of the state without compensating the riparian. An attorney general opinion is not binding on this Court, and this Court should reject the 1978 opinion in that regard. *Danse Corporation* v *City of Madison Heights*, 466 Mich 175; 644 NW2d 721 (2002).

III. REAFFIRMING *HILT* WILL NOT HAVE THE ADVERSE EFFECTS WHICH PLAINTIFF AND AMICI ASSERT.

If this Court reaffirms *Hilt* v *Weber*, Plaintiff and her amici warn of grave consequences for this state. Plaintiff asserts such a ruling will "compel Plaintiff and other members of the public to walk in the waters of the Great Lakes to avoid trespassing on private property rights." (Plaintiff's Brief, p 49), implying that the traditional Michigan "beachwalk" will suddenly become a thing of the past. Such is not the case.

In Michigan, criminal trespass requires continued entry after being notified to depart. MCL 750.552. Although much of Lake Huron's wild and unenclosed beaches have been private for perhaps Plaintiff's entire lifetime, she relates free and uninterrupted use of the Lake's

---

Department's file. A press release certainly shows the intent of the proponent, but not necessarily that of the Legislature.

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

beaches for decades. Plaintiff's Brief, p 1. That she has used Lake Huron's beaches for decades, apparently without previously being asked to depart, is the best evidence of what will occur if this Court reaffirms *Hilt*: riparian owners will continue allowing the public to walk Michigan's shores.

This Court has wisely adopted rulings which encourage private owners to allow public access. For example, in *Du Mez* v *Dykstra*, 257 Mich 449; 241 NW 182 (1932), in rejecting a claim of prescriptive easement, the Court said:

> One may acquire a right of way by prescription over wild and uninclosed lands. But, while use alone may give notice of adverse claim of inclosed premises, the weight of authority is that it raises no presumption of hostility in the use of wild lands. This distinction is in recognition of the general custom of owners of wild lands to permit the public to pass over them without hindrance. The custom had been particularly general as to logging roads over timber lands until the carelessness of hunters and campers produced such fire hazards that the protection of timber required the permission to be circumscribed. The tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other's lands by way of legal presumption, but it requires that he bring home to the owner, by word or act, notice of a claim of right before he may obtain title by prescription (emphasis added).

Id. at 451. Thus, this Court has acknowledged the general custom which Plaintiff has observed for decades. Reaffirming title to Michigan's shores in riparians will not change the long-established custom of riparians to allow the public to walk the beaches unimpeded. Continued protection of private rights, as the Court of Appeals did in *Kempf* v *Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976) (rejecting establishment of public beach use rights by prescription), assures the continuation of this custom.

Vesting Michigan's shores in the public does not necessarily assure Plaintiff's continued beach walks, but merely subjects them to public control. For example, like Michigan's state

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

parks, if vested in the public, Michigan's beaches would be subject to the imposition of user fees and public regulations that are enforced criminally.

Nor will reaffirmation of *Hilt* threaten Great Lakes ecology, as suggested by Amicus Tip of the Mitt. Tip of the Mitt Brief, pp 27-31. Both the Legislature and local governments have police power to reasonably regulate activities on Michigan's shores, as on all other Michigan lands. Indeed, the Legislature has enacted numerous such laws. For example, the Shorelands Protection and Management Act, MCL 324.32301, specifically regulates riparian beaches designated in the Act.

CONCLUSION

The lake shore which the Circuit Court wrongfully appropriated from the Defendants in this case belongs to the Defendants as riparian owners, as clarified in the last century by the Michigan Supreme Court in *Hilt* (1930) and *Peterman* (1994), and by the U.S. Supreme Court in *Massachusetts* v *New York* (1925). No reported decision has since held to the contrary. The Great Lakes Submerged Lands Act does not, and constitutionally could not, change the ownership of Defendants' riparian property, and again, no case has ever held to the contrary. The legislative history provides no support for a conclusion that the Act established a boundary, and Department of Conservation efforts to do so failed.

The Court of Appeals reached the proper result, but in an otherwise well-reasoned decision, erred in declaring title to dry land below the high water mark as being held in fee by the state (and by failing to find the Great Lakes Submerged Lands Act inapplicable as a result). The Court was no doubt led astray by the well-publicized but inaccurate administrative interpretations of the law. Under Michigan law, at least when not covered by water, fee title is held by the riparian owner, free of the public trust. Whether the state's right of navigation has any applicability to that title is not before the Court. But in no case does the right of navigation

SMITH, MARTIN, POWERS & KNIER, P.C. 900 WASHINGTON AVENUE, P.O. BOX 219 BAY CITY, MICHIGAN 48707-0219
(989) 892-3924 FAX (989) 892-3926

grant Plaintiff any right to interfere with Defendants' exclusive use of their dry land by traversing upon it. The erroneous declaration of fee title by the Court of Appeals was *dicta* in direct conflict with this Court's rulings in *Hilt* and *Peterman.*

Michigan's 3,288 miles of shoreline is perhaps some of the most cherished and expensive real estate in the world. Taxes generated by this property have long served, and continue to serve, to fund local governments and schools, and the property supports our nation's number one industry (and our state's number two industry), travel and tourism, of which beaches are the primary factor (*See* Houston, "The Economic Value of Beaches—A 2002 Update," Appendix 22). Assertions of ownership by state and federal agencies, as well as Plaintiff and those similarly situated, cloud riparian titles, negatively impacting real estate values and the resulting tax base.

Amici Save Our Shoreline and IGLC respectfully request that this Honorable Court affirm the result of the Court of Appeals, but vacate portions of the decision, including that language at pages 7 and 9, which assert that the state holds title to dry land between low and high water mark, in trust or otherwise, and issue a decision holding that the Great Lakes riparian owner holds title in fee to the water's edge, at whatever stage, free from the public trust.

Dated: February 9, 2005

Respectfully submitted,

SMITH, MARTIN, POWERS & KNIER, P.C.
Attorneys for Save Our Shoreline and
Great Lakes Coalition, Inc.

By: 

DAVID L. POWERS (P39110)
900 Washington Avenue
P.O. Box 219
Bay City, MI 48707-0219
(989) 892-3924

H:\dswartzendruber\DLP\SOS\GLASS V GOECKEL\Supreme Court\Glass-Goeckel SOS SC Amici Brf.doc

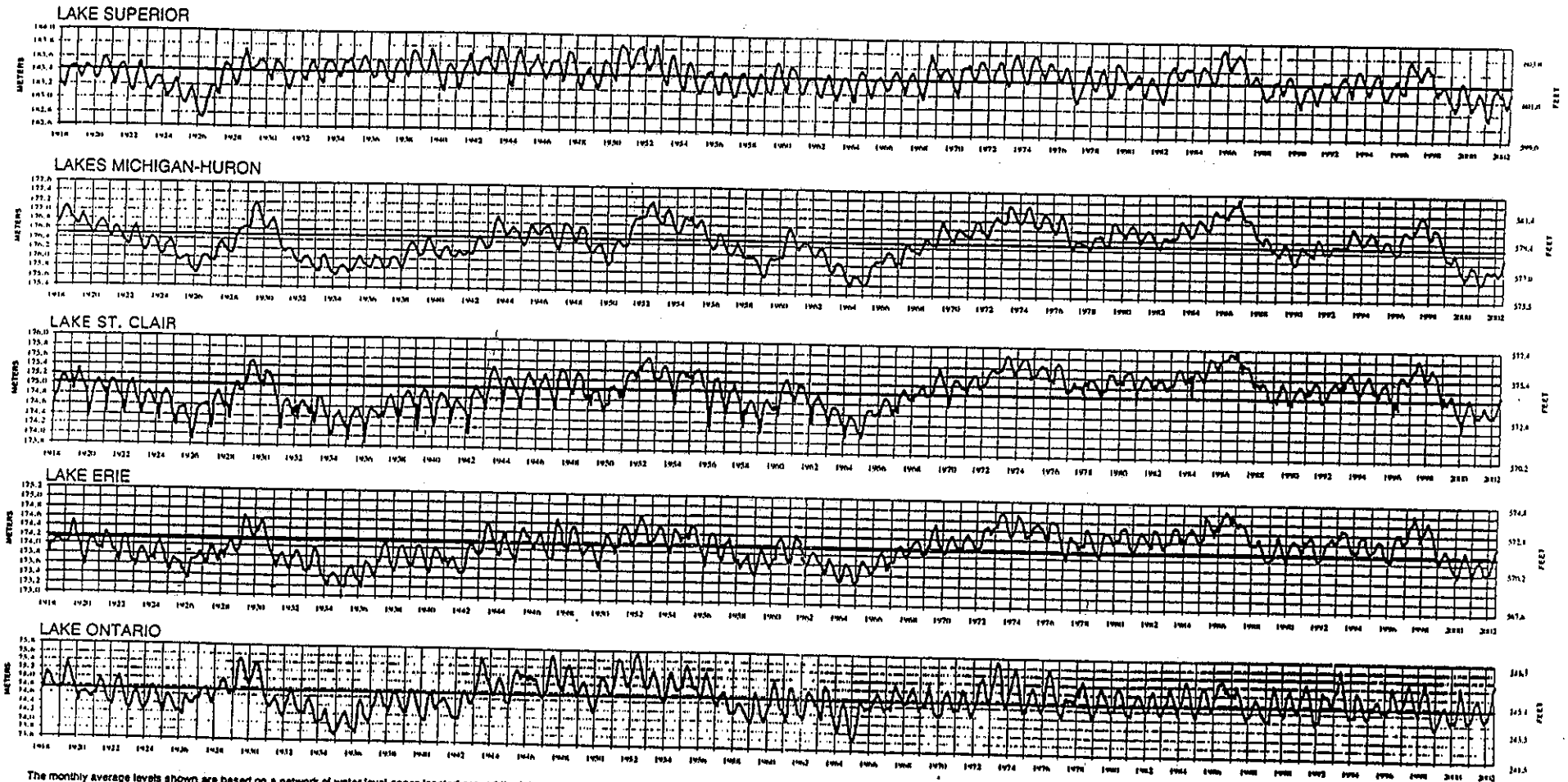
INDEX TO APPENDICES

APPENDIX 1:

Lake Water Level Data

US Army Corps
of Engineers
Detroit District

HYDROGRAPH OF GREAT LAKES WATER LEVELS



The monthly average levels shown are based on a network of water level gages located around the lakes.
Elevations are referenced to the International Great Lakes Datum (1985).

LAKE HURON – MICHIGAN

O. H. W. 579.8 I.G.L.D.

12/12/63 W.L.P.

MONTHLY AND ANNUAL
MEAN ELEVATIONS

OF LAKE HURON

AT Harbor Beach, Michigan

U. S. ARMY ENGINEER DISTRICT, LAKE SURVEY
CORPS OF ENGINEERS
630 Federal Building
Detroit 26, Michigan

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	MEAN
1860	581.02	581.20	581.23	581.36	581.43	581.60	581.64	581.45	581.25	580.94	580.61	580.45	581.19
1861	580.34	580.43	580.82	580.92	581.34	581.50	581.63	581.67	581.56	581.44	581.21	581.04	581.18
1862	580.83	580.68	580.98	581.14	581.39	581.52	581.42	581.41	581.34	581.23	580.84	580.70	581.12
1863	580.63	580.68	580.67	580.67	580 88	580.97	580.92	580.79	580.61	580.52	580.34	580.42	580.68
1864	580.18	580.04	580.29	580.44	580.51	580.50	580.40	580.22	579.95	579.56	579.39	579.26	580.06
1865	579.05	579.14	579.31	579.80	579.96	580.00	580.43	580.45	580.33	580.09	579.53	579.22	579.78
1866	578.95	578.71	578.76	579.21	579.39	579.68	579.94	580.00	579.85	579.74	579.65	579.39	579.44
1867	579.37	579.42	579.60	579.89	580.11	580.42	580.57	580.50	580.23	579.90	579.44	579.09	579 68
1868	578.92	578.88	579.56	579.46	579.74	579.95	579.98	579.64	579.40	579.17	579.10	578.82	579.38
1869	578.72	578.79	578.53	578.90	579.23	579.76	580.14	580.40	580.29	579.93	579.61	579.53	579.50
1870	579.59	579.68	579.98	580.40	580 74	580.88	580.99	580.90	581.04	580.64	580.24	579.89	58 .41
1871	580. 3	579.95	580.55	580.75	581.10	581.14	581.17	580.94	580.27	579.58	579.53	578.94	580.33
1872	578.81	578.81	578.59	578.84	579.09	579.46	579.79	579.77	579.70	579.56	579.29	578.63	579.20
1873	578.62	578.66	578.97	579.54	580.10	580.43	580.39	580.49	580.30	580.24	580.01	579.97	579.81
1874	579.93	580.22	580.37	580.27	580.25	580.62	580.55	580.56	580.31	580.04	579.50	579.65	580.19
1875	579.36	579.30	579.34	579.53	579.88	580.19	580.38	580.35	580.39	580.20	580.09	579.82	579.90
1876	579.94	579.92	580.05	580.35	580.93	581.42	581.86	581.80	581.69	581.29	581.14	580.95	580.94
1877	580.66	580.65	580.58	580.66	580.83	580.79	580.97	580.87	580.60	580.46	580.41	580.36	580.65
1878	580.26	580.09	580.26	580.19	580.59	580.76	580.80	580.78	580.41	580.42	580.23	580.03	580.40
1879	579.73	579.49	579.45	579.48	579.61	579.75	579.79	579.66	579.58	579.34	579.22	579.20	579 52

Remarks: Elevations are in feet above mean water level at Father Point, Rimouski, International Great Lakes Datum (1955). To convert to U. S. Lake Survey Datum add 1.7 feet.

Elevations prior to September 1874 were computed from Milwaukee Records.

File CBD 1-1

MONTHLY AND ANNUAL
MEAN ELEVATIONS

OF LAKE HURON

AT Harbor Beach, Michigan

U. S. ARMY ENGINEER DISTRICT, LAKE SURVEY
CORPS OF ENGINEERS
630 Federal Building
Detroit 26, Michigan

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	MEAN
1880	579.35	579.19	579.18	579.19	579.59	580.09	580.49	580.28	580.17	579.81	579.69	579.49	579.69
1881	579.36	579.75	579.76	579.79	580.12	580.27	580.42	580.35	580.29	580.34	580.47	580.30	580.07
1882	580.15	579.92	580.06	580.28	580.45	580.58	580.82	581.38	580.75	580.53	580.34	580.13	580.42
1883	579.94	579.88	579.92	579.93	580.55	580.92	581.47	581.76	581.28	580.95	581.06	580.95	580.69
1884	580.76	580.81	580.65	580.96	581.12	581.24	581.47	581.36	580.85	581.01	580.60	580.40	580.90
1885	580.67	580.58	580.59	580.69	581.09	581.38	581.44	581.21	581.49	581.26	581.07	580.87	581.06
1886	580.87	580.94	581.13	581.42	581.75	581.94	581.78	581.53	581.35	581.22	580.95	580.65	581.28
1887	580.46	580.65	580.86	580.77	580.97	581.29	581.17	580.76	580.61	580.39	579.94	579.65	580.63
1888	579.54	579.43	579.62	579.76	[illegible]	580.50	580.53	580.57	580.27	579.48	579.86	579.59	579.98
1889	579.45	579.37	579.35	579.28	579.42	579.79	580.21	579.95	579.78	579.41	579.07	578.91	579.46
1890	578.98	578.86	578.84	578.99	579.29	579.72	579.91	579.91	579.64	579.45	579.23	578.96	579.31
1891	578.73	578.52	578.59	578.92	579.10	579.11	579.14	579.04	578.95	578.42	578.17	578.11	578.74
1892	578.13	578.07	578.13	578.22	[illegible]	578.67	579.15	579.24	[illegible]	578.58	578.55	578.29	578.58
1893	578.04	577.99	578.07	578.45	579.05	579.41	579.59	579.41	579.11	578.92	578.27	578.48	578.70
1894	578.43	578.44	578.59	578.60	579.22	579.52	579.57	579.41	579.21	578.97	578.79	578.40	578.96
1895	578.24	578.11	578.12	578.21	578.50	578.46	578.44	578.24	578.25	[illegible]	577.52	577.29	578.12
1896	577.36	577.46	577.35	577.41	577.21	578.19	578.26	[illegible]	[illegible]	[illegible]	577.76	577.54	577.79
1897	577.72	577.63	577.74	578.10	[illegible]	[illegible]	578.20	578.11	578.61	578.55	578.24	577.57	578.40
1898	577.93	577.99	578.22	578.71	578.95	578.99	[illegible]	578.98	578.77	578.40	578.40	578.21	578.55
1899	577.95	577.81	577.96	578.13	578.68	579.76	579.39	579.26	579.06	[illegible]	578.51	578.30	578.50

Remarks: Elevations are in feet above mean water level at [illegible] Datum (1955). [illegible]

CHD 2-1

MONTHLY AND ANNUAL
MEAN ELEVATIONS

OF LAKE HURON

AT Harbor Beach, Michigan

U. S. ARMY ENGINEER DISTRICT, LAKE SURVEY
CORPS OF ENGINEERS
630 Federal Building
Detroit 26, Michigan

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	MEAN
1900	578.09	578.10	578.14	578.29	578.46	578.57	578.82	578.91	578.99	578.93	578.93	578.73	578.57
1901	578.49	578.35	578.34	578.60	579.03	579.16	579.34	579.36	579.13	578.91	578.68	578.36	578.83
1902	578.25	578.00	577.98	578.16	578.41	578.74	579.01	579.09	578.77	578.52	578.43	578.18	578.47
1903	577.94	578.04	578.17	578.52	578.66	578.80	579.00	579.07	579.05	579.08	578.86	578.57	578.61
1904	578.16	578.16	578.33	578.66	579.21	579.61	579.80	579.79	579.61	579.32	579.20	578.75	579.09
1905	578.63	578.55	578.54	578.91	579.20	579.65	579.83	579.82	579.72	579.49	579.20	578.94	579.21
1906	578.79	578.95	579.02	579.20	579.47	579.60	579.78	579.62	579.39	579.14	578.95	578.92	579.23
1907	578.92	578.93	578.93	579.15	579.33	579.54	579.89	579.74	579.47	579.46	579.08	578.87	579.30
1908	578.77	578.63	578.83	579.10	579.54	579.86	580.01	579.92	579.52	579.11	578.71	578.46	579.21
1909	578.15	578.17	578.28	578.39	579.00	579.31	579.57	579.20	579.04	578.64	578.36	578.32	578.69
1910	578.24	578.23	578.24	578.34	578.64	578.78	578.89	578.80	578.48	578.35	578.10	577.80	578.37
1911	577.63	577.60	577.60	577.63	577.92	578.24	578.19	578.11	577.84	577.82	577.70	577.64	577.83
1912	577.59	577.48	577.47	577.70	578.15	578.71	578.87	578.79	578.62	578.79	578.60	578.53	578.29
1913	578.38	578.31	578.33	578.98	579.24	579.50	579.55	579.43	579.13	578.96	578.76	578.64	578.92
1914	578.32	578.36	578.23	578.27	578.54	578.83	579.02	578.34	578.78	578.49	578.21	577.92	578.47
1915	577.62	577.62	577.84	577.72	577.79	577.95	578.09	578.29	578.15	578.02	577.78	577.66	577.89
1916	577.53	577.74	577.68	578.09	578.66	579.12	579.37	579.33	579.12	578.85	578.89	578.83	578.80
1917	578.73	578.60	578.65	578.95	579.32	579.79	580.13	580.13	579.84	579.54	579.38	579.09	579.34
1918	578.97	579.05	579.28	579.57	579.83	580.17	580.14	579.90	579.75	579.38	579.35	579.17	579.55
1919	579.06	578.83	578.87	579.14	579.52	579.58	579.51	579.36	579.04	578.51	578.60	578.49	579.07

Remarks: Elevations are in feet above mean water level at Father [illegible] International Great Lakes Datum (1955). [illegible]

File CBD 3-1

MONTHLY AND ANNUAL
MEAN ELEVATIONS

OF LAKE HURON

AT Harbor Beach, Michigan

U. S. ARMY ENGINEER DISTRICT, LAKE SURVEY
CORPS OF ENGINEERS
630 Federal Building
Detroit 26, Michigan

YEAR	JAN	FEB	MAR	APR	MAY	JUNE	JUL	AUG	SEP	OCT	NOV	DEC	MEAN
1920	578.31	578.16	578.22	578.72	578.97	579.03	579.24	579.17	579.06	578.79	578.48	578.29	578.70
1921	578.17	578.03	578.11	578.41	578.72	578.72	578.66	578.45	578.30	578.10	577.80	577.76	578.27
1922	577.57	577.42	577.57	578.12	578.53	578.76	578.86	578.77	578.54	578.16	577.81	577.44	578.13
1923	577.16	577.07	577.12	577.38	577.77	578.04	578.05	577.95	577.83	577.60	577.28	577.05	577.52
1924	576.87	576.87	576.88	577.04	577.45	577.60	577.72	577.59	577.82	577.42	576.97	576.66	577.27
1925	576.39	576.35	576.51	576.51	576.61	576.66	576.75	576.61	576.38	576.15	575.92	575.86	576.39
1926	575.66	575.61	575.73	576.04	576.34	576.61	576.75	576.74	576.66	576.59	576.46	576.51	576.31
1927	576.44	576.56	576.67	576.96	577.34	577.66	577.82	577.74	577.41	577.38	577.12	577.11	577.18
1928	577.08	577.07	577.24	577.70	578.14	578.31	578.64	578.72	578.70	578.70	578.86	578.86	578.17
1929	578.85	578.72	578.86	579.56	580.23	580.43	580.58	580.43	580.09	579.63	579.45	578.94	579.65
1930	578.83	578.79	578.96	578.99	579.13	579.25	579.48	579.36	578.93	578.58	578.05	577.74	578.85
1931	577.40	577.26	577.21	577.25	577.29	577.30	577.38	577.11	576.82	576.75	576.58	576.51	577.07
1932	576.43	576.50	576.43	576.54	576.71	576.82	576.90	576.76	576.60	576.30	576.17	575.93	576.51
1933	575.79	575.80	575.78	576.10	576.62	576.92	576.94	576.79	576.40	576.15	575.95	575.79	576.25
1934	575.71	575.69	575.65	575.84	576.06	576.13	576.24	576.17	576.07	575.98	575.73	575.96	575.94
1935	575.85	575.89	575.93	576.20	576.36	576.56	576.84	576.81	576.59	576.42	576.34	576.23	576.34
1936	576.19	576.10	576.22	576.46	576.72	576.93	576.85	576.66	576.74	576.71	576.48	576.03	576.50
1937	576.08	576.10	576.22	576.21	576.66	576.85	576.90	576.84	576.75	576.46	576.29	576.06	576.45
1938	575.84	576.21	576.41	576.94	577.19	577.58	577.79	577.92	577.76	577.58	577.36	577.11	577.14
1939	576.94	576.95	577.02	577.20	577.63	577.95	578.18	578.21	578.12	577.87	577.60	577.31	577.58

Remarks: Elevations are in feet above mean water level at Father [illegible] International Great Lakes Datum (1955).

CBD 4-1

MONTHLY AND ANNUAL
MEAN ELEVATIONS

OF LAKE HURON

AT Harbor Beach, Michigan

U. S. ARMY ENGINEER DISTRICT, LAKE SURVEY
CORPS OF ENGINEERS
630 Federal Building
Detroit 26, Michigan

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	MEAN
1940	577.02	576.85	576.90	576.85	577.02	577.34	577.51	577.51	577.56	577.31	577.08	576.95	577.16
1941	576.95	576.90	576.91	576.95	577.22	577.27	577.23	577.07	576.98	577.12	577.25	577.19	577.09
1942	577.12	577.20	577.24	577.65	577.91	578.32	578.40	578.32	578.14	577.96	577.83	577.57	577.81
1943	577.54	577.63	577.77	578.13	578.52	579.20	579.61	579.75	579.62	579.33	579.18	578.97	578.77
1944	578.58	578.52	578.45	578.55	578.77	578.94	579.05	578.94	578.82	578.71	578.38	578.24	578.66
1945	577.94	577.79	577.65	578.16	578.50	579.00	579.06	579.15	578.97	578.91	578.72	578.58	578.57
1946	578.57	578.61	578.81	578.99	579.35	579.13	579.22	579.07	578.65	578.32	578.13	577.85	578.68
1947	577.68	577.70	577.64	577.65	578.58	579.03	579.38	579.35	579.25	579.10	578.84	578.59	578.59
1948	578.39	578.10	578.22	578.66	579.07	579.47	579.10	578.95	578.56	578.01	577.71	577.53	578.44
1949	577.35	577.34	577.38	577.58	577.71	577.79	577.85	577.82	577.49	577.15	576.77	576.51	577.40
1950	576.60	576.65	576.75	577.24	577.57	577.82	578.12	578.23	578.20	578.06	577.91	577.85	577.58
1951	577.83	577.85	578.05	578.62	579.20	579.41	579.75	579.91	579.74	579.76	579.80	579.84	579.14
1952	579.81	579.91	579.87	580.32	580.58	580.73	580.85	580.86	580.76	580.28	579.77	579.71	580.30
1953	579.53	579.46	579.42	579.73	579.95	580.17	580.41	580.41	580.14	579.77	579.41	579.14	579.79
1954	578.80	578.67	578.95	579.06	579.44	579.71	579.86	579.69	579.69	579.91	579.85	579.67	579.47
1955	579.45	579.25	579.29	579.40	579.62	579.70	579.61	579.38	578.84	578.40	578.15	577.97	579.10
1956	577.79	577.75	577.78	577.95	578.34	578.59	578.76	578.76	578.57	578.18	577.93	577.73	578.18
1957	577.49	577.44	577.30	577.40	577.65	577.87	578.18	578.02	577.85	577.54	577.35	577.26	577.60
1958	577.28	577.34	577.23	577.21	577.19	577.17	577.21	577.18	576.99	576.71	576.44	576.14	577.01
1959	576.20	575.94	576.45	576.49	576.90	577.14	577.13	577.11	577.07	577.04	577.13	577.08	576.76

Remarks: Elevations are in feet above mean water level at Father P[illegible] ... International Great Lakes Datum (1955).

File CBD 5-1

MONTHLY AND ANNUAL
MEAN ELEVATIONS

OF LAKE HURON

AT Harbor Beach, Michigan

U. S. ARMY ENGINEER DISTRICT, LAKE SURVEY
CORPS OF ENGINEERS
630 Federal Building
Detroit 26, Michigan

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	MEAN
1960	577.21	577.??	[illegible]	577.46	578.2?	[illegible]	5??.10	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	57?.2?
1961	577.98	577.73	577.5?	5?7.?0	578.1?	578.18	[illegible]	5?8.??	[illegible]	577.??	[illegible]	577.56	577.97
1962	577.34	577.19	[illegible]	[illegible]	577.82	577.9?	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1963	576.35	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	577.45
1964											576.11		
1965													
1966													
1967													
1968													
1969													
1970													
1971													
1972													
1973													
1974													
1975													
1976													
1977													
1978													
1979													

Remarks: Elevations are in feet above mean water level at Father Point, Quebec, International Great Lakes Datum (1955). [illegible] U. S. Lake Survey [illegible] feet.

File [illegible]

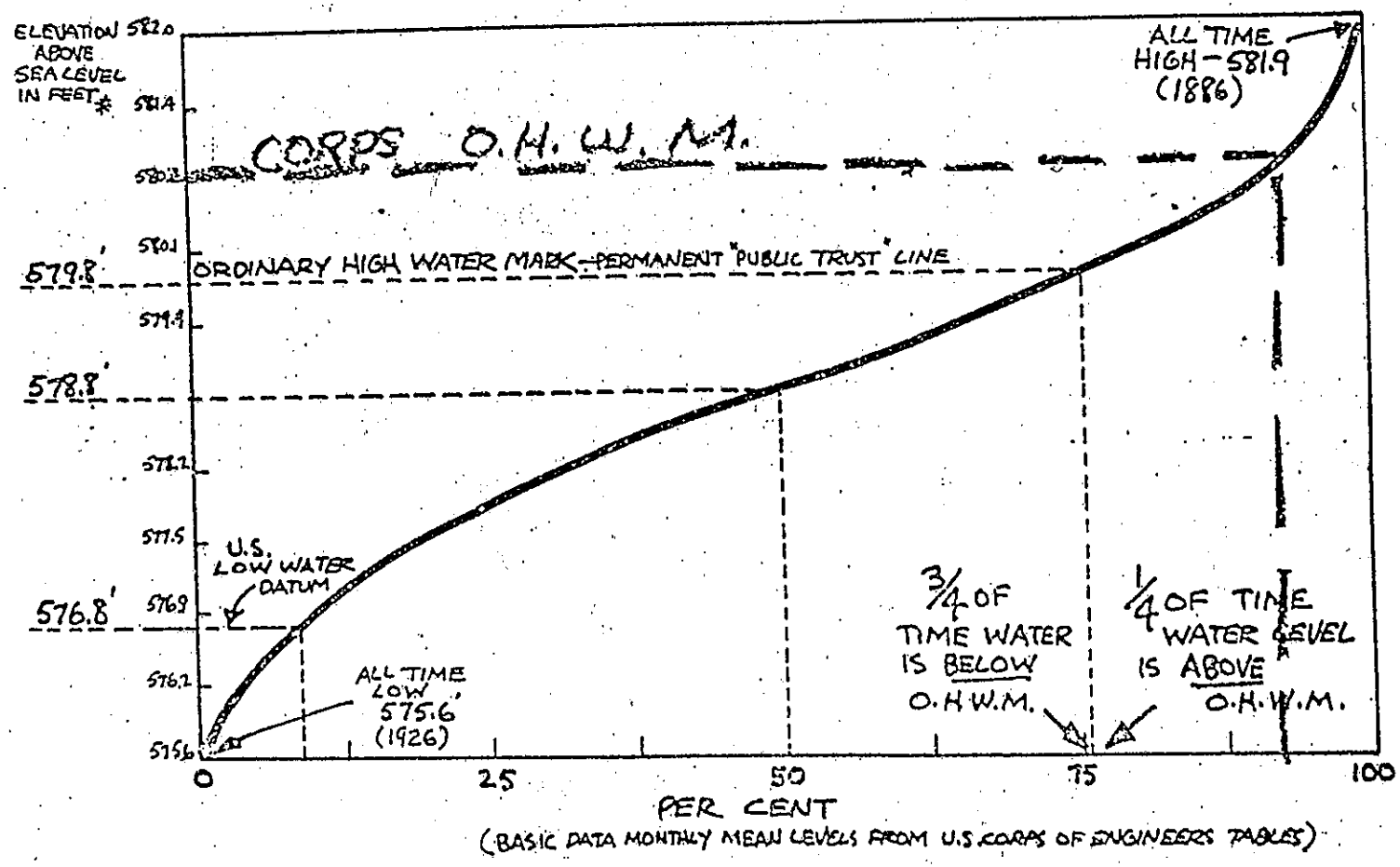
PERCENTILE GRAPH CALCULATIONS FOR
LAKES MICHIGAN-HURON LEVELS, 1860 - 1962

Level	Cumulative	Percent	Level	Cumulative	Percent	Level	Cumulative	Percent
575.7	5	.4	78.3	456	36.9	80.9	1164	94.2
.8	11	.9	.4	486	39.3	81.0	1179	95.4
.9	17	1.4	.5	512	41.4	.1	1188	96.1
76.0	24	1.9	.6	542	43.9	.2	1198	96.9
.1	34	2.8	.7	579	46.8	.3	1207	97.7
.2	42	3.4	.8	613	49.6	.4	1216	98.4
.3	50	4.0	.9	660	53.4	.5	1222	98.9
.4	58	4.7	79.0	700	56.6	.6	1229	99.4
.5	74	6.0	.1	741	60.0	.7	1231	99.6
.6	84	6.8	.2	770	62.3	.8	1234	99.8
.7	97	7.8	.3	797	64.5	.9	1235	99.9
.8	110	8.9	.4	830	67.2	82.0	1236	100.0
.9	124	10.0	.5	866	70.1			
77.0	140	11.3	.6	887	71.8			
.1	154	12.5	.7	913	73.9			
.2	176	14.2	.8	942	76.2			
.3	203	16.4	.9	976	79.0			
.4	220	17.8	80.0	994	80.4			
.5	234	18.9	.1	1012	81.9			
.6	255	20.6	.2	1033	83.6			
.7	278	22.5	.3	1052	85.1			
.8	303	24.5	.4	1077	87.1			
.9	332	26.9	.5	1099	88.9			
78.0	358	29.0	.6	1117	90.4			
.1	389	31.5	.7	1134	91.7			
.2	421	34.1	.8	1147	92.8			

Larry Ryel
8/13/63

FIGURE 5

PER CENT OF TIME LAKES MICHIGAN-HURON WERE AT OR BELOW GIVEN WATER LEVELS DURING PAST 103 YEARS OF RECORD - 1860 THRU 1962.



(BASIC DATA MONTHLY MEAN LEVELS FROM U.S. CORPS OF ENGINEERS TABLES)

MICH. DEPT. OF CONS. L. RTEL. 8/63

APPENDIX 2:

"Region's Disappearing Resource,"
Detroit Free Press (January 25, 2005)

2

Detroit Free Press – 01/25/05

REGION'S DISAPPEARING RESOURCE: Riverbed gouging takes Great Lakes down a foot

BY HUGH McDIARMID JR.
FREE PRESS STAFF WRITER

January 25, 2005

Lakes Michigan and Huron have permanently lost a foot of water because of erosion in the St. Clair River caused by dredging and other man-made meddling, according to a study released Monday.

WHAT'S AT ISSUE

Water is permanently being sucked from Lakes Huron and Michigan because of ongoing erosion caused by dredging and other human activities in the St. Clair River — the drain that funnels water out of the lakes — according to a study released Monday.

If the data is accurate, the lakes may have already lost 12 inches of water in addition to natural lake level fluctuations. The data would also help explain the low water levels that have plagued boaters and beachfront landowners during the last few years.

Policy makers may need to explore ways to slow the outflow to protect the environment as well as Great Lakes shipping interests that depend on deep river channels.

The decline will continue for the foreseeable future, it warns, battering boaters, marinas, property owners and the shipping industry struggling with water levels at the bottom of historical cycles.

The low water was troublesome, but temporary, experts had assured those struggling with dried-out boat canals.

Now, they're not so sure.

The reason: Erosion created gouges in the river bottom up to 19 feet deep between 1970 and 2000, enlarging the bottleneck at the bottom of Lake Huron where water drains into the lower Great Lakes and Niagara Falls.

"It's like a drain hole at the bottom of a bathtub," said Rob Nairn, a principal with W.F. Baird & Associates Coastal Engineers of Toronto, which conducted the study for the Georgian Bay Association, a civic organization representing about 4,200 Canadian families who live on Georgian Bay islands and shores. "The drain hole is getting bigger, and the water is going out faster. It's something very alarming that no one has talked about or reported until now."

Jim Weakley, president of the Lake Carriers' Association that represents domestic shipping companies, said he had not seen the report Monday, but that a solution must protect both commerce and the environment: "Any loss of Great Lakes water is of concern for us. Each additional inch allows between 250 and 270 tons of cargo" on a larger freighter, he said.

Experts agree that dredging to deepen the St. Clair River for commercial ships reduced the volume of water in Huron and Michigan. Three such projects, the last one completed in 1962, account for a 19-inch reduction in lake levels, Nairn said.

That was believed to be a one-time drop. Until now.

Monday's report found Lakes Michigan and Huron -- considered one body of water because they are connected at the Straits of Mackinac -- have lost an additional 12 inches since 1970 because of erosion that has gone undetected since the 1962 dredging.

All told, the dredging and erosion has accounted for a water loss from the lakes equivalent to 28 Lake St. Clairs, according to the Baird report.

Because the extra water moves so quickly through Lake St. Clair, the Detroit River and Lake Erie on its way over Niagara Falls, it has not raised the levels of those waters appreciably, Nairn said.

A modest resurgence in Great Lakes water levels during the past two years is part of a natural cycle, but doesn't mask the fact that the Huron/Michigan waters are still a foot below where they would be without the erosion, Nairn said.

And the problem can't be explained by natural forces, he said. Geologists say erosion in the St. Clair River basin stopped between 2,000 and 3,000 years ago. But it began again in the 1900s because of man-made factors including:

•Dredging of the channel to 27 feet deep to accommodate ships.

•Erosion at the sites of sand mining that took place in the river in early part of the 1900s.

•Erosion control structures protecting beaches on lower Lake Huron that deprive the St. Clair River of sediment that normally would have washed into it and filled holes in the river bottom.

The lakes' water loss went unnoticed because it was masked by high water levels of the 1970s and 1980s, the report suggests. But when Lake Huron receded in the 1990s and early 2000s, residents of the archipelago of Canadian islands in Georgian Bay suspected more than just the usual 30-year, high-to-low water levels cycles were in play.

"In recent years, we have had a significant number of wetlands dry up on Georgian Bay, and the aquatic life forced out onto steep granite shorelines," said Mary Muter, the Georgian baykeeper who monitors the area's natural resources.

The residents commissioned the study at a cost of about $163,000 to find out.

The results have alarmed scientists and policy makers across the region.

"We take it very seriously," said Dennis Schornack, U.S. chair of the International Joint Commission, which oversees boundary waters linking the United States and Canada. "It's definitely of concern and the kind of thing that is supposed to be part of an Upper Great Lakes study that has not been funded yet by Congress."

Schornack said the potential for dredging-related trouble was apparent as early as 1921, when a deepening of the St. Clair River was approved by the IJC, with one condition: that weirs -- underwater barriers -- be installed to slow the velocity of water that would be increased by the channel deepening.

Those barriers were never built, said Schornack.

Underwater barriers or other methods to combat the erosion need to be considered quickly, Nairn and a coalition of environmental groups said Monday. The report did not suggest solutions.

The data also must be part of an ongoing binational study of the future of commercial navigation on the Great Lakes, said the environmental groups.

"The Great Lakes are more than simply a navigation corridor, and the time has come for the management of the lakes to reflect that," said Jennifer Nalbone, habitat and biodiversity coordinator for Great Lakes United, a binational lakes advocacy group.

*Contact **HUGH McDIARMID JR.** at 248-351-3295*

3

APPENDIX 3:

"God's Terminus: Boundaries, Nature, and Property on the Michigan Shore" by Theodore Steinberg

3

The AMERICAN JOURNAL *of* LEGAL HISTORY

Volume XXXVII | January 1993 | No. 1

ARTICLES

BOOK REVIEWS

God's Terminus: Boundaries, Nature, and Property on the Michigan Shore

by THEODORE STEINBERG*

Man marks the earth with ruin—his control
Stops with the shore.
Lord Byron, *Childe Harold's Pilgrimage*

The view from overhead is impressive, one of the tidiest landscapes in history. It's as if a giant grid descended over a seemingly endless expanse of land, the vast majority of the continental United States parceled out into neat little boxes. The logic of those boxes rests on simple arithmetic. Each one measures six miles by six miles and is itself divided into thirty-six smaller boxes, one mile square. Over one billion acres of land were disposed of in such a fashion. What obsessed institution or culture could be responsible for such utter rationalism? That grid was the work of the United States government, which sought to conquer the land through subdivision and sale largely during the nineteenth century. And it remains to this day a uniquely American way of conversing with the land. For there is no greater testament to the will to make boundaries, no more vivid and enduring mark on the landscape than that created by the United States rectangular survey.[1]

The quest to order the land in America has a very long history, much of which is tied up with the concept of property. From the moment some obscure New England colonist began dragging stones about and mounting them into fences, property rights in nature have rested on the construction and maintenance of boundaries—on the ground and in the law. In early New England, settlers walked the boundaries of their towns from time to time, a ritual that created a communal sense of limits and helped to guard against encroachment.[2] But in those places that fell within the scope of the rectangular survey, settlers need not

*Postdoctoral Scholar, Michigan Society of Fellows and Assistant Professor of History, University of Michigan, Ann Arbor.

1. For an excellent discussion of the geographical and ecological implications of the survey, see Hildegard Binder Johnson, *Order Upon the Land: The U.S. Rectangular Land Survey and the Upper Mississippi Country* (New York, 1976).

2. See John R. Stilgoe, "Jack O'Lanterns to Surveyors: The Secularization of Landscape Boundaries," *Environmental Review* 1 (1976): 23-4.

have muddied their shoes. Government surveyors had already done so for them. Packed up with compass and chain, surveyors fanned out over the land, etching straight boundary lines, inscribing them on maps, recording them with due precision in public documents for anyone to see. In the straight lines that surveyors planted across the landscape, lines that were backed up by the law, there could be little doubt. Or could there be?

Beginning in 1815, the grid came to Michigan.[3] In the years that followed, surveyors did exactly as they were supposed to do, organizing the land into townships that measured thirty-six square miles. The boundary lines that they sketched on the land had a great deal of authority. But not all lines are created equal and some of those lines carried less weight than others. What follows is just one short episode in the history of boundary law. It deals with a series of Michigan legal cases from the 1920s that determined what role a special type of boundary line would play in property relations. This is the story of the making and unmaking of a boundary along the Michigan shore—a story that says something about the meaning of private property.

Legal historians have not had a whole lot to say about boundaries. What accounts for this is not entirely clear, but it may have something to do with how they understand the term property. To most historians, and legal scholars in general, property is a *concept*.[4] It probably would be fair to say that the word "concept" is used in reference to property more than any other single term. Thus when Morton Horwitz, for example, discusses the transformation of property law in nineteenth-century America, it is a change in the "conception" of property from a stable agrarian notion to a more dynamic and instrumental one that concerns him.[5] For Horwitz and perhaps most legal scholars, the words "concept" and "conception" seem to mean essentially the same thing, an idea. Had Horwitz titled the much discussed second chapter of his book, "A Transformation in the *Idea* of Property," readers would still no doubt have understood the thrust of his argument. The word

---

3. C. Albert White, *A History of the Rectangular Survey System* (Washington, D.C., 1983), 65.

4. The literature here is voluminous, but see, e.g., James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, Wis., 1956), 23; William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Bloomington, Ind., 1977); Frank Snare, "The Concept of Property," *American Philosophical Quarterly* 9 (1972): 200-6; Joseph L. Sax, "Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property," *Utah Law Review* 1983 (1983): 313-26; Bruce A. Ackerman, *Private Property and the Constitution* (New Haven, Conn., 1977); Gregory S. Alexander, "The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis," *Columbia Law Review* 82 (1982): 1545-99; and Stephen R. Munzer, *A Theory of Property* (Cambridge, 1990).

5. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass., 1977), 31.

"conception" is used loosely. Another word—idea, view, understanding—probably would have done the job.[6] But if property is understood as an idea, an abstraction, it is understandable why boundary matters, which are played out on the ground in rituals and social practices, have received so little attention. Moreover, the focus on legal doctrine has tended to obscure the way that property works outside the courtroom. It seems that boundaries are a minor detail of no great relevance to those interested in the history of property law.

What little discussion there is about boundaries has not, for the most part, focused on their importance for property relations. Consider, for example, Jonathan Chu's study of a boundary dispute in colonial New England.[7] In a richly detailed analysis, Chu explores the intricate history of a single farm in Essex County, Massachusetts, a history that leads us through even the smallest aspects of how the land was bounded, right down to the hemlock tree that was the source of the trouble in the first place. Chu discovered that local courts sought to resolve boundary disputes as practically as possible. Thus those who possessed and used the land for profit seemed to be favored over those who staked a claim based on the abstractions written down in deeds, however precise.[8] But even though boundaries play a major role in the story Chu tells, he is chiefly interested in them for what they reveal about the colonial legal order. It is not boundaries per se that seem to concern him, but their importance for understanding how the law functioned to resolve disputes. Chu takes us on a complex tour of boundary relations, but he is searching to say something not about property law, so much as the meaning of litigation in colonial New England.

Perhaps the most common meaning attributed to boundaries has to do with their political importance. Here Peter Onuf's work looms large, but for him too, it is not the role of boundaries in property relations that is the main concern.[9] Onuf has set off after the high culture of boundaries, not the struggles between two neighboring farmers haggling in a field over where a fence ought to go, but boundary matters of state and national importance. According to Onuf, there are lessons to be learned by looking at how the states configured their boundaries

---

6. I am not saying that Horwitz or other legal scholars understand the term property only as a concept. I am simply pointing out that there is a tendency to use the word "concept" in reference to property, and that when so used "concept" is taken to mean an idea.

7. Jonathan M. Chu, "Nursing a Poisonous Tree: Litigation and Property Law in Seventeenth-Century Essex County, Massachusetts, The Case of Bishop's Farm," *American Journal of Legal History* 31 (1987): 221-52.

8. Ibid., 240.

9. See, e.g., Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia, 1983); idem, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington, Ind., 1987), especially ch. 5.

in the late eighteenth century, lessons that have something to teach us about the nation's political culture. It is not property but politics—how Americans came to understand the meaning of statehood and union, for instance—that has spurred Onuf to study boundaries.

There thus exists an odd silence on the matter of boundaries and property. Yet one would expect that in discussing property, historians would want to say something about its limits, about the boundaries set up to define what ownership can mean. If property is founded on the right to possess and exclude, a point many legal scholars would probably agree with in principle, then the limits of that right—and how it may have changed over time—ought to be considered.

In the broadest sense, this essay explores what boundaries tell us about how property works to order and control the land. To do this, it will be necessary to examine more than just legal doctrine, to delve beyond it to the social and environmental context in which the law of boundaries in Michigan took on meaning. For something terribly profound was happening as boundaries were used to mark off the American landscape. As the land was slowly settled and enveloped in a pastiche of lines, a stunning change was in the works: the transformation of nature into property. It was through boundaries that the land came to be ordered, controlled, and ultimately, owned. The land in all its diversity and richness was thus invested with meaning, drawn into the world of boundaries, property, and ownership.

That world, it must be said, was a symbolic one.[10] For boundaries are symbols that work to conquer and own by signifying possession. The lowly line—sketched out in deeds, marked out on maps, staked out on the ground—turns out to be a mighty thing, a powerful means for laying claim to the natural world. But that power is never completely effective, thorough, or victorious—not when it comes to dominating nature. The control of nature is never a simple task and whatever the power of lines, they were unable to totally possess the land. For the natural world, in truth, knows no boundaries. The study of boundaries along the Michigan shore suggests the ways in which property worked—with varying degrees of success—to order and control nature. In the end, it will tell us something about how the natural world shaped the history of property relations. It will also speak to the terribly elusive nature of private property, to the issue of just how *real* real estate is.

I

What could be more pleasing to a man of property than to see his land grow larger, without a nickel changing hands? That is not

10. For a general statement on the symbolic nature of property, see Carol M. Rose, "Possession as the Origin of Property," *University of Chicago Law Review* 52 (1985): 73-88.

merely a landowner's fantasy, conjured up in a more calculating moment. It is at times a reality, a dream come true. For the landholder, the lake shore can be a very fickle place. Like it or not, his fortune rests at the mercy of a boundary, where land and water come together. That boundary is forever moving, shifting this way and that, dividing terra firma from the not so firm. When water licks at the land, breaking it down and carrying it off, there is every reason for the shore owner to despair. But when the opposite happens, when the land just inches along, becoming bigger as the days go by—that is a gift of God.

It is not every day that a landowner finds himself the beneficiary of such largess. The process of growth is generally slow and incremental, as was true along the shores of lakes Huron and Michigan in the early part of the twentieth century. At that time, a series of environmental changes combined to increase the width of lake front property in parts of the state of Michigan. The newly discovered land was truly a gift and a rather timely one at that. With the state's forests cut over and soon to be abandoned, Michigan's beaches were looked to as a new economic frontier. In the 1920s, realtors sold beach front property to prospective home owners, promoting the virtues of the shore to vacation-goers. What better fortune to befall landowners than to see the size of their property increase precisely when developers were seeking to buy prime lake front.

In fact, the shifting shoreline was something that property owners along the lakes would live to regret. With the shoreline on the move, the prevailing system of boundary relations went out of control. Who was to gain title to the newly created land, private landowners or the state? Now that the boundary between land and water had shifted, where exactly was the line that marked the outskirts of one's property? What was to be the true boundary between land and water? Just a small number of people, a handful of Michigan jurists, would answer these questions. But they were hard questions nonetheless and a great deal—the market in real estate, public access to the state's beaches, the future of property relations—rode on the answers.

Land is not generally considered something susceptible to growth. Yet grow it did along portions of Saginaw Bay, which is itself a part of Lake Huron. And as the shore front grew larger, by hundreds of feet according to some estimates, it created its share of both hope and despair. Sometime before the fall of 1919, John Rabior, a local fisherman, fixed his eyes on a triangular piece of such newly formed land along the shore of Saginaw Bay. He had heard about the land from some people around Bangor Township, where the land was located. The land's legal status remained ambiguous, creating what must have been an irresistible opportunity for Rabior. This was land that had as yet escaped the surveyor's eyes and the tax man's rolls, an unclaimed gift just resting by the water. What happened next, as Rabior explained it, was really very simple. In his words, he "just

squatted on the land."[11] Building a small cottage on the shore, Rabior availed himself of what seemed to him to be property free for the taking.

This was not, however, a view shared by William Kavanaugh, a commercial fisherman, who owned the land behind Rabior's new home. He believed that Rabior was trespassing on his property and brought suit in 1920 to force him from it, thus beginning a legal battle that would last the better part of the decade. This turned out to be no ordinary boundary crossing. By the time the dispute was resolved, it had cast doubt over the line between land and water, had undermined the title to hundreds and hundreds of miles of shore front land, and had driven developers and landowners into a frenzy. The Kavanaugh cases, as they would come to be known, were a dark chapter indeed for those wedded to private property.

Both Kavanaugh and Rabior agreed that they had discussed the disputed property in the fall of 1919. At that time, Kavanaugh had not yet purchased the land behind the soon to be built cottage, although he had leased fishing rights there. According to Rabior, he asked Kavanaugh "what he thought about the deal I made down there, taking possession of that ground, and he [Kavanaugh] said it was a good deal."[12] Kavanaugh's memory of that conversation was somewhat hazier. Testifying at the trial, Kavanaugh said he couldn't quite understand the basis for Rabior's claim to the land. After Rabior told him that he was building a cottage, and a fairly costly one at that, Kavanaugh recalled that "I says, Johnny I hope you are right about it, going to such an expense, I hope you are right."[13] Kavanaugh later had second thoughts about this conversation. When Rabior explained his plans to him, Kavanaugh allegedly told him that "I thought he was in Dutch, was making a mistake, [and] had no right out there."[14]

Whatever was said between the two, Kavanaugh was unwilling to tolerate Rabior's presence on the land after January 1920. By that time Kavanaugh had purchased the adjoining property, a move that gave him fishing rights in the bay and title to the land, which he rented to cottagers. Kavanaugh claimed that Rabior's cottage, among other things, interfered with his tenants' view of the bay.[15] He brought suit in Bay County's circuit court, seeking an injunction against Rabior. The injunction was granted, appealed by Rabior, and ultimately overturned by the Michigan Supreme Court on procedural grounds.[16]

---

11. Michigan Supreme Court Records & Briefs, *Kavanaugh v. Rabior* (215 Mich. 231 [1921]), University of Michigan Law Library, Ann Arbor, Michigan, 16, 41.
12. Ibid., 17.
13. Ibid., 18.
14. Records & Briefs, *Kavanaugh v. Rabior* (222 Mich. 68 [1923]), 20.
15. Records & Briefs, *Kavanaugh v. Rabior* (215 Mich. 231 [1921]), 13.
16. See *Kavanaugh v. Rabior*, 215 Mich. 231 (1921). Kavanaugh brought his suit

Kavanaugh next brought an action to settle title to the land and recover the property. Again he won his case in the circuit court, and again the ruling was overturned by the supreme court, sending Kavanaugh home empty handed.[17] But more was at stake here than Kavanaugh's title to a small piece of land on Saginaw Bay. The supreme court's ruling in *Kavanaugh v. Rabior* established an entirely new standard for determining the boundary of shore front property—one that no private property loving citizen would stand for.

The matter of who would get the legal title to the land on Saginaw Bay turned mainly on two questions: What was the legitimate boundary between private and state property? And how did the land on which Rabior built his cottage arrive there? How these questions were answered would determine whether the new land along the shore was public property, as Rabior reasoned, or private property, as Kavanaugh hoped.

The shore—of Saginaw Bay or some other body of water—is an uncertain terrain, a vast and enduring ambiguity that the law has been trying to bring under control for some time. It is a place that is hard to put one's finger on, a place where water washes back and forth, that is here one minute and gone the next. Who, if anyone, ought to own such a place has at times been unclear. In America, however, there is a legal doctrine, with roots in nineteenth-century case law and legal treatises, that says the title to the shore rests in the hands of the individual states. As a matter of federal and most state law, the shore is held by the state in trust for the public. This so-call public trust doctrine has a long and complicated intellectual genealogy, but its application to the shore is relatively clear: The states in America have a lock on the shore, a claim to its title in trust for the people.[18] There are, however, some exceptions to this rule, and the law as it evolved in Michigan happens to be one of them.[19]

---

to settle title to the land in equity when it should have been brought in a court of law.

17. *See Kavanaugh v. Rabior*, 222 Mich. 68 (1923).

18. For a provocative discussion on public trust and the foreshore in Anglo-American law, see Glenn J. MacGrady, "The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water," *Florida State University Law Review* 3 (1975): 513, 547-68. Also see Everett Fraser, "Title to the Soil Under Public Waters—A Question of Fact," *Minnesota Law Review* 2 (1918): 313-38; idem, "Title to the Soil Under Public Waters—The Trust Theory," *Minnesota Law Review* 2 (1918): 429-46; and Michael L. Rosen, "Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction," *University of Florida Law Review* 34 (1981-2): 561-613. On the public trust doctrine more generally, see Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* 68 (1970): 471-566 and Molly Selvin, "The Public Trust Doctrine in American Law and Economic Policy, 1789-1920," *Wisconsin Law Review* 1980 (1980): 1403-42.

19. See Glenn J. MacGrady, "Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where is the Boundary?" *Florida State University Law Review* 1 (1973): 611 n. 100.

Before the *Kavanaugh* case, property owners along Michigan's shores believed that they owned to the water's edge. Unlike the ocean, where the tide rolls in and out, the Great Lakes are largely unaffected by tides, and thus the water's edge, wherever it might be, seemed like a sensible boundary.[20] Although riparian owners had certain rights to use the water of the lakes for fishing, navigation, and other purposes, the state of Michigan claimed the lake bed under the water, which it held in trust for its citizens. Down by the water's edge, out there by the peace and quiet of the shore, state authority ceased and private ownership took control. The water's edge acted as a great dividing line; a very long line that wound its way all over the state's vast shoreline, it was a line that was rich with meaning and authority.[21] But it was also a line that would soon be rendered irrelevant. In *Kavanaugh*, the court held that the *meander line*, not the water's edge, was the legal boundary between private and state-owned property.[22]

Meander lines are a legacy of the nineteenth century. They owe their existence to government surveyors whose task it was to carve the land into squares so that it could be easily sold. When land was all there was, no water, marsh, wetland, or what have you to complicate things, then the task of the federal surveyor was simple. But land that bordered water was another matter. In such cases, surveyors drew meander lines, lines that wended their way along the boundary between land and water. The lines were approximations that helped federal officials compute how much land was available for sale.[23] What settlers wanted of course was land that was safe and dry, and it was toward this end that meander lines were drawn. They were not deemed formal boundaries like the section lines that surveyors laid out across the land. Meander lines were merely guides, roughly sketched lines that allowed for the practical computation of land prices. That at least was the original plan. But still they were lines drawn upon the land, and like other such lines were eligible for status as boundaries.[24]

For decades meander lines had meant very little to property owners, resting in all their innocence on government survey maps, consigned—or so it seemed—to a life of obscurity. Yet with the decision in the *Kavanaugh* case, they soon took on a new life as state surveyors began dusting off old plats and field notes, all in an effort to discover the true course of the now revitalized lines. The ruling in the *Kavanaugh* case transformed these old lines, resurrecting them, elevating them into

20. Technically speaking, land that abuts water unaffected by a tide is not considered "shore" under the law today. See ibid., 611 n. 95.

21. See "Note and Comment," *Michigan Law Review* 26 (1927-8): 906-12.

22. 222 Mich. at 70-1.

23. "Case Notes," *Detroit Law Review* 1 (1931): 47.

24. Instructions regarding the laying of meander lines can be found in the appendix of White, *History of the Rectangular Survey*.

authentic boundaries. In the process, they were given a measure of authority they were never intended to have.

On what then did the supreme court base its decision to promote these lines? In part, at least, it relied on an earlier decision, *Ainsworth v. Munoskong Hunting & Fishing Club* (1909).[25] Quoting from this case, the court wrote: " 'It is the established law of this State that riparian owners along the Great Lakes own only to the meander line, and that title, outside this meander line, subject to the rights of navigation, is held in trust by the State for the use of its citizens.'"[26] Yet the decision in the *Ainsworth* case did not get nearly the attention nor have anywhere near the impact that the court's decision in *Kavanaugh* did. And for a very good reason. In *Ainsworth*, the main issue had nothing at all to do with meander lines.[27] The statement quoted, made at the beginning of the opinion, was gratuitous and had long been interpreted as such—until 1923, that is, when the *Kavanaugh* case made it stick.

The single most important sentence in the *Kavanaugh* opinion reads: "When the meander line was established it fixed the status of the disputed strip [on Saginaw Bay] as lake bottom, and this status in the law would not change even though a portion of it had become dry land."[28] Those words were considered by many to be the key to the case, and they take us to the second main issue involved, the question of how the land arrived there in the first place. It was a long established common-law rule that changes to land that were both gradual and imperceptible would go to the adjoining landowner. Behind this principle rested a simple premise. Since landholders were generally entitled to what their property produced—an owner of an apple tree could claim the apples for example—then the owners of shore front were similarly the rightful owners of whatever small additions came their way. New land could result as water receded or because soil accreted, and the law distinguished between the two processes. But generally speaking, as long as the changes happened gradually and imperceptibly, the landowner gained.[29] The law concerned itself more with the legal result—that the boundary would shift with environmental change—than with the question of how the land developed.[30]

In the *Kavanaugh* case, however, a rather different logic came

25. *Ainsworth v. Munoskong Hunting & Fishing Club*, 159 Mich. 61 (1909).

26. 222 Mich. at 71.

27. The central question there concerned public rights to navigable waters. If the waters of Munoskong Bay were deemed part of Lake Huron, than public rights to hunt and fish in those waters would inhere. Otherwise, if the bay were considered part of a nearby river, then private rights would prevail. See 159 Mich. at 61.

28. 222 Mich. at 70-1.

29. See the discussion of accretion and reliction in MacGrady, "Florida's Sovereignty Submerged Lands," 621-5.

30. See the discussion of the rules for changes to property lines in Milner S. Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison, Wis., 1985), 98.

into play, in part because the land in question bordered navigable water. Since the state claimed the lake bed of navigable bodies of water, some believed that if the bay had receded to create the newly formed land, then the property should remain in state hands. But if the property had developed through accretion, from the build up of sand and other materials over time, then Kavanaugh should be entitled to the additional land. In making these determinations, the changing environment of the area would figure seriously.

What actually accounted for the new land along Saginaw Bay is a factual question worth exploring. But first mention should be made of what was testified to at the *Kavanaugh* trials. A 1919 survey of the area where Rabior built his cottage, established that the meander line fell 280 feet back from the water's edge. The civil engineer who made the survey, Henry C. Thompson, believed that the shore front was now three or four hundred feet out from the original meander line.[31] Stewart M. Powrie, an elected official who had lived in the town since 1895, was familiar with the land in dispute, in part "because it is growing and making every year." In his opinion, the land along the shore had "been coming up, or the water receding, which ever way you choose to call it . . . during the last 12 or 15 or 20 years."[32] There were many contradictory statements made concerning how much land had been created. But there seemed to be agreement that the land along the shore had indeed grown larger, for whatever reasons.

We don't have to dig too deeply to discover what some of those reasons might be. It is important to note that the waters of Saginaw Bay are shallow, so a lowering of the water level in the bay would tend to expose a fairly sizable amount of land. And, indeed, the waters of Saginaw Bay do seem to have been receding in the early years of the twentieth century. Saginaw Bay is part of Lake Huron which in turn is connected to Lake Michigan by a wide, deep channel (the Straits of Mackinac), making all these bodies of water one unit, hydrologically speaking.[33] Thus a change to one lake affects water levels throughout. As it happened, the city of Chicago had been diverting water from Lake Michigan for sanitary and other reasons since 1848. The diversion of water from Lake Michigan into the Mississippi River watershed averaged about 500 cubic feet per second (cfs) until 1900. After that time, the amount of water diverted increased until 1928, when an annual average of roughly 10,000 cfs was reached.[34] Consider that a diversion of 8,800 cfs translated into a drop of .43 feet in lake

31. Records & Briefs, *Kavanaugh v. Rabior* (215 Mich. 231 [1921]), 20.

32. Ibid., 48, 49-50.

33. Ivan W. Brunk, "Changes in the Levels of Lakes Michigan and Huron," *Journal of Geophysical Research* 66 (1961): 3329 n. 2.

34. International Great Lakes Levels Board, *Regulation of Great Lakes Water Levels: Report to the International Joint Commission*, Ottawa and Chicago, 7 Dec. 1973, 44.

level.[35] That sounds small and inconsequential, but it must be remembered that historically, the Great Lakes have varied through a very small range of water levels of less than six feet. The sheer size of the lakes combined with their small outlets mean that they tend to be fairly stable and self-regulating—a fact that spurred landowners to develop the shore front property.[36] Soon shore owners found that even small changes in the water level affected their interests, especially in areas like Saginaw Bay where the depth of the water tended to be very shallow.

But to place the blame for lowering the level of the lake water on Chicago alone would be neither fair nor justified. Another factor—the dredging of rivers—was also at work here, although many at the time may well have been unaware of its impact. Between 1908 and 1925, gravel was mined from the St. Clair River, which connects Lake Huron and Lake St. Clair. The gravel once removed expanded the space available for water to escape from lakes Huron and Michigan. Thus the flow of water out of the lakes increased, lowering the water level, it is estimated, by an additional .3 feet.[37]

Then there is the decline in precipitation to consider. The chief source of water for the Great Lakes basin, precipitation is a key factor influencing lake levels. The years from 1917 to 1923 were drier than usual, with rainfall averaging over 6 percent below the norm of 32 inches, or roughly 14 inches less rain than would be expected in the period.[38] The fall in precipitation combined with diversion and dredging all worked to cause the water in Saginaw Bay to drain away, exposing new land along the shore. The law has a name for the process whereby water recedes from the shore; it is called reliction. But no matter what one called it, there was no doubting the new land that was appearing. Oddly enough, it was not all too long before this time that the great historian Frederick Jackson Turner declared the close of the frontier. One can only imagine what cottagers along Saginaw Bay thought about the Turner thesis.

For the frontier was hardly at an end in Michigan, where fresh land was emerging in part because of a fall in water levels. But the land was also gaining in size because soil was traveling from one place to another. Increasing amounts of silt and sand, driven to shore by wave action, may have been building up the land along the shore.[39]

---

35. Robert E. Horton and C. E. Grunsky, *Hydrology of the Great Lakes*, Report of the Engineering Board of Review of the Sanitary District of Chicago on the Lake Lowering Controversy and a Program of Remedial Measures, pt. 3, app. 2 (Chicago, 1927), 14t.

36. David H. Hickcox, ed. Proceedings of the *Symposium on The Great Lakes: Living With North America's Inland Waters* (Bethesda, Md., 1988), 83.

37. Jan A. Derecki, "Effect of Channel Changes in the St. Clair River During the Present Century," *Journal of Great Lakes Research* 11 (1985): 201-2.

38. Horton and Grunsky, *Hydrology of the Great Lakes*, 23, 85.

39. See the discussion of deposition in William Ashworth, *The Late, Great Lakes:*

The disputed land on Saginaw Bay lay between two rivers—the Saginaw and Kawkawlin—which tended to bring large amounts of sediment into the bay. As lumbermen deforested the area, building haul roads to move the logs to market, they increased the rate and amount of soil loss. That caused the sediment load in the rivers to grow even higher.[40] When the river water reached the bay it dropped the sediment, increasing the height of the lake bed at the rivers' mouths and thereby posing a threat to boat traffic. To improve navigation, the silt was then dredged from the estuaries and deposited in the bay. Depending on where it was dumped and the effect of winds on the current, the silt may well have helped to build new land, a process termed accretion under the law.[41] Thus soil upstream in the Saginaw watershed might travel all the way down to the bay and then back to the shore. And as biomass journeyed, from one point in the basin to another, the dream of an endless frontier lived on, but so did the troublesome questions of property rights and boundaries.

Judge Samuel G. Houghton, author of the circuit court's ruling in *Kavanaugh*, ventured no opinion on how the disputed land on Saginaw Bay got there. Not only that, Houghton even refused to say whether Kavanaugh owned the property in question, despite the testimony on the topic. But that did not stop him from ruling in Kavanaugh's favor, at the same time diminishing the authority—what little it had—of the meander line. What struck Houghton was Rabior's forcible entry onto the property, an action that if condoned would encourage further breaches of the peace. If Kavanaugh did not own the land outright, he did, according to Houghton, have possession of it for many years—an assertion that was hardly backed up by the facts. The defendant, he felt, had no such claim to the land. Even the defendant himself admitted that the land belonged to the state and, in any case, Rabior had never obtained the right to build on it. Besides, Houghton implied that it was unclear whether the state actually owned the land. He obviously was not persuaded by the defendant's argument that the meander line determined the boundary between state and private property. Meander lines were "imaginary," as he put it, "oftentimes looked upon and referred to as the shore line, but frequently we find

---

An Environmental History (New York, 1986), 189-90 and Water Levels Reference Study, Project Management Team, *Living With the Lakes: Challenges and Opportunities*, Washington, D.C., July 1989, 26-7.

40. For a discussion of logging in the Saginaw area, see George E. Butterfield, ed., *Bay County: Past and Present* (Bay City, Mich., 1918), 94-107. A more general treatment of logging and deforestation in the Great Lakes states can be found in Michael Williams, *Americans & Their Forests: A Historical Geography* (Cambridge, 1989), 193-237. For a brief technical explanation of logging and its effect on soil loss, see Thomas Dunne and Luna B. Leopold, *Water in Environmental Planning* (New York, 1978), 538-9.

41. See the discussion of dredging, siltation, and the accretion of land in Records & Briefs, *Kavanaugh v. Baird* (241 Mich. 240 [1928]), 28-9, 72-3, 75, 77-95.

it is out various distances from the shore."[42]

The supreme court had little trouble overruling Houghton, disposing of his decision in a mere five pages. Unlike Houghton, the supreme court did not hesitate to express a view about how the land had developed. "From the testimony," the court wrote in *Kavanaugh*, "we are persuaded that the disputed strip which lies between the meander line and the present shore or water line is, in the law, submerged land and lake bottom." In the court's opinion, the land in dispute had never been surveyed in any formal sense. "We think we may indulge the presumption," the court continued, "that when the meander line was established it followed the then existing shore line."[43] Far from being a figment of the imagination, the supreme court was saying that the meander line was indeed the real thing.

Owners of shore front, who for decades had thought that their land extended to the water's edge, found that boundary to have suddenly washed away like a footprint in the sand. In its place, the court had substituted an alien marking, a line many landowners had never even heard of. But they would soon learn about these meander lines as state surveyors began marching through the region laying monuments, symbols of an entirely new boundary regime that owners of shore front would come to despise.

II

With hundreds and hundreds of miles of Michigan shore now converted to public property, the efforts at damage control began in earnest. As one newspaper noted, renters on Saginaw Bay who hoped to escape the payment of ground rent because of the supreme court ruling could forget it. A careful reading of the Kavanaugh opinion, the paper reported, suggested that not all lands would become state property, only those which were the product of reliction. "Accreted land," the paper pointed out, "according to all decisions, both of the state and the United States supreme courts, becomes the property of the owner of the adjacent land."[44] Yet how many squatters were going to pay attention to the fine points of the law? What the supreme court opinion held, above all else, was clear: The meander line was now the boundary, and private landlords had no right to collect rent on land they did not own. That was all simple enough. And with the law on their side, renters on Saginaw Bay and at other points throughout the state withheld their rent. Indeed, the Department of Conservation's own director, John Baird—the man responsible for this huge addition to

42. Records & Briefs, *Kavanaugh v. Rabior* (222 Mich. 68 [1923]), 30-6.

43. 222 Mich. at 69.

44. "Shore Lands Not All Affected By Regent Decision," *Bay City Times Tribune*, 26 Mar. 1923.

the public domain—advised such a course of action.[45]

By the summer of 1924, with state surveyors now marking the meander line along Saginaw Bay, shore owners banded together to protect themselves. In October, some landowners met with lawyers to form the Shore Owners Equity Association to defend their rights to the shore.[46] Burrall G. Newman, a local real estate developer, was elected as secretary of the organization. In a fit of indignation, Newman described the state's claim to the shore front—which rested on the meander line rule—in these words:

> This is a move on the part of ambitious politicians acting for the state of Michigan, to confiscate farmers' and resorters' property without paying a cent for it. . . . It is a blow at the development of Bay City and the surrounding territory, as substantial summer homes will not be built on land which is open to trespass by everybody, irrespective as to race, color or character.[47]

The meander line, however simple it may have been to mark out on the ground, turned out to have some very complicated consequences. And not least among these was its threat to social relations. As Newman and his colleagues saw it, the meander line compromised private property rights by opening them to racial and class transgressions. But whatever Newman's passion, it was not enough to move shore owners to join in his call to arms and the organization soon floundered for lack of support.[48]

That, however, did not cause William Kavanaugh, rebuffed twice by the state's highest court, from giving up his fight. The decision making the meander line an authoritative boundary seriously threatened his interests. In early 1923, the meander line issue surfaced in proposed legislation concerning fishing in the Great Lakes. The bill, sponsored by Representative A. W. Miles, regulated fishing devices so that they could not extend beyond one mile from the shore. The shore—and this is what enraged Kavanaugh—was defined in the bill as the meander line, a point several hundred feet at places back of where the actual shore was at this time.[49] Thus the effect of the legislation would be even more restrictive to fishing interests, a point sorely noted by Kavanaugh who headed the Commercial Fishermen's Association of Michigan.[50] When the bill finally passed, however, it had been amended, with the average low water mark substituted for the meander line as

---

45. See his testimony in Records & Briefs, *Kavanaugh v. Baird* (241 Mich. 240 [1928]), 113.

46. Information about the Shore Owners Equity Association came out in another case involving shore land on Saginaw Bay. See Records & Briefs, *Newman v. Bump* (245 Mich. 665 [1929]), 397.

47. Quoted in ibid., 378.

48. Ibid., 268-9.

49. Michigan House Bill No. 287, File No. 101, 8 Mar. 1923.

50. "Kavanaugh Takes Issue With Solon Over Fish Bills," *Bay City Times Tribune*, 22 Mar. 1923.

the boundary of the shore.[51] Kavanaugh assumed all along that John Baird was behind the effort to apply the meander line rule here.[52] But whether Baird played a role in the legislation or not, the episode suggested that Kavanaugh's interests were likely to suffer should the meander line continue to be deemed an authentic boundary.

How to deauthenticate that boundary, to undermine the very purpose and existence of these lines became for Kavanaugh a consuming passion. Back to court he went, for a third time, filing suit in December 1923 against John Baird as the representative of the Department of Conservation.[53] The suit sought to quiet title to the property along Saginaw Bay. As the case dragged on over the next four years, it raised the same tough questions about the boundary between land and water.

Interpreting the supreme court's earlier decision to say that only relicted land reverted to state ownership, Kavanaugh's lawyers tried to prove that the land along the bay had been accreted. Many witnesses were brought forth to prove accretion, but the plaintiff's star witness was Irving Scott, a professor of geology at the University of Michigan. An authority on lake shores, Scott spent time before the trial visiting the site, strolling out over it, digging deep holes into the shore land, and inspecting what he found. He concluded that the land was indeed the product of accretion and based his finding on several factors. In the first place, the vegetation growing beyond the meander line was mostly poplar and willow trees, in contrast to the oaks, maples, and elms he found behind the line. The poplar trees toward the shore were about fifty to sixty years of age, meaning that they had grown up after the meander line had been run in 1840. Poplar and willow trees, he made clear, did not grow in submerged water or at points where waves would be crashing into them.[54] Second, it appeared from the holes that he had dug that the land along the shore was composed of several different layers. The stratified nature of the soil again suggested accretion. Indeed, he believed that accretion would be *expected* along parts of Saginaw Bay, especially near the head of the bay. For it was to that point that waves and currents, brought on by northeast winds, carried sand and other deposits. Finally, there was plenty of fresh silt ready to be transported to shore since the land in question sat between the mouths of the Saginaw and Kawkawlin rivers, which regularly brought such matter into the bay.[55]

---

51. Act of 11 Apr. 1923, No. 44 [1923] Mich. Pub. Acts 64.

52. In part, the tension between Kavanaugh and Baird was over fishing regulations. Apparently, Kavanaugh had been paying off a government official for some time in order to ship undersized fish to market in New York. Baird put a stop to this practice. See W. H. Wallace to A. J. Groesbeck, 17 Mar. 1924, Official Correspondence, 1924, RG-48, box 52 file 3, State Archives of Michigan, Lansing.

53. Records & Briefs, *Kavanaugh v. Baird* (241 Mich. 240 [1928]), 1-11.

54. Ibid., 81, 88, 90-1.

55. Ibid., 85-7, 91-3.

It was a very neat and convincing story that the plaintiff had here. But it was a story that Judge Houghton, who first heard the case, was unconvinced by. It was not that he did not believe Scott. For it was hard not to believe him, armed as he was with mountains of evidence and an impressive set of academic credentials. Houghton simply felt that it did not matter whether the land had developed by accretion. There was no need for shore owners to be digging holes and examining layers of soil to determine if there was lake bottom somewhere under their land. And there certainly was no reason for jurists to dirty their hands with such matters. There was a simple rule available in cases such as these. If the meander line was the boundary between private and public property—now the law in the state according to Houghton—then everyone could rest easy.[56]

Everyone, that is, except those who thought they owned waterfront property along the Great Lakes. These people, the plaintiff's lawyers argued, had never considered the meander line an authoritative boundary. It was fiction, felt the lawyers, to hold that the meander line had once marked the true shoreline. Those lines were only approximations used to calculate acreage; purchasers of shore front had never paid any attention to them, except in recent years. Instead, a far more settled boundary, in the plaintiff's view, suggested itself: the low water mark or the water's edge.[57]

That was a boundary that afforded shore owners a large measure of protection for their property. It guarded first against potential boundary transgressions of the kind represented by John Rabior. According to the plaintiff's lawyers, as things now stood: "No home owner, can any longer enjoy his original property if a horde is let in at the front of it to monopolize his water front, simply because it has been somewhat lengthened by accretion or reliction."[58] But if the water's edge were reinstated as the boundary, it would act as a vast no trespassing sign, a demarcation that would bring peace back to the shore or at least help to restore social order.

Such a line would protect not only against the unruly horde—for who ever knew a horde to be anything but unruly—but also against a disorderly natural world. Boundaries, wherever they are drawn, serve a number of different purposes in cultures founded on private property, not the least of which is their role in protecting against the vagaries of nature. The water's edge seemed to offer a flexible boundary for preventing the natural world from disordering property relations. The problem, of course, is that it is not always easy to specify the boundaries of places prone to dramatic environmental changes. Would the meander line or the water's edge give shore owners the best insurance against

56. Ibid., 173-6.

57. See the plaintiff's briefs in ibid.

58. Ibid., "Supplemental and Reply Brief on Behalf of Plaintiff and Appellant," 37.

a shift in the boundary between land and water? Which would be the more stable and enduring boundary line?

One might say that the meander line, because it is fixed, has a veneer of stability about it. What could be more enduring than a line located on a map and marked on the ground with monuments? This was a visible line, a line that could be seen and confirmed. Indeed, it existed only to the extent that it was visible. But a meander line is, at the same time, an imaginary construction. It does not exist in its own right, but is the work of the culture that produced it. And it is this imaginary quality that makes it at best an ephemeral line, a line that can disappear as easily as it appeared—for any number of reasons. If the water level were to rise significantly, the meander line might well vanish, or at least be obscured from view. Were this to happen, were it no longer to be a visible line on the ground or on a map, how would it ever be known again as a boundary?

Of course, the water's edge is also an imaginary line since, when all is said and done, water really has no edge to it. It might be argued that the water's edge is, in some respects, more stable than the meander line. Surely it has the virtue of flexibility on its side, shifting as it would with changes in the line between land and water. And setting the boundary at the water's edge at its lowest mark made eminent sense, at least in the plaintiff's view, because the Great Lakes are not tidal waters subject to high and low water states.[59] Such a boundary would be by definition unfixed in space. But if the waters of Saginaw Bay drained away, if the bay someday became bone dry, then what? To what point would "shore" owners on opposite sides of the bay own?

No one expected the bay's water to disappear completely. But with Chicago diverting a substantial amount of water from lakes Michigan and Huron, the threat of lower lake levels remained. As the *Kavanaugh* case made its way through the courts, the state of Michigan launched a suit against Illinois and the Sanitary District of Chicago to stop them from further depleting the supply of Great Lakes water.[60] The context then made the meander line rule attractive to Michigan officialdom, which risked losing vast amounts of both water and land. And who knows who might have had a judge's ear or even two.

By 1926, with Houghton declaring them as true boundaries, meander lines had taken on a role that the surveyors who hastily scrambled to lay them had surely never foreseen. The meander line was nearing the peak of its legitimacy. It was pushed in that direction by the supreme court's ruling, on appeal, in *Kavanaugh v. Baird*. Displeased with Houghton's decision, the plaintiff appealed to the supreme court—and again he lost. The court was unmoved by the

59. See ibid., "Supplemental Reply Brief of Plaintiff and Appellant on Question Submitted by the Court," 9-11.

60. *Wisconsin v. Illinois*, 278 U.S. 367 (1928). The law suit began in 1926.

plaintiff's plea for title to the low water mark. "We take judicial notice," the opinion reads, "that the meander line correctly delineated the boundary between the water and fast land at the time it was run." The court conceded that the ruling was out of line with the prevailing legal doctrine. But to overturn the meander line rule "would be to turn over to private ownership hundreds of thousands of acres of land which the recent low waters in the Great Lakes have uncovered. . . and exclude the public from any beneficial use of them."[61]

The ruling earned the contempt of the state's real estate interests, still suffering from a slump in shore front sales that began in 1926. According to one report, the Port Huron Real Estate Board "feared the effect of the decision which clearly defines the relicted strip as public property, and subject to public use, such as picnicking by persons who might gain entrance to the shore by public routes." The board contemplated sending a resolution to the state realty association that would have stopped people from using the newly formed beach property.[62] Calling the decision a "grievous injustice," the *Muskegon Chronicle* noted that the decision came just as the tourist and resort industry was set to capitalize on the state's waterfront. The paper demanded legislative action to confirm "waterfront owners in the full use and occupancy of this relicted land"[63]—a suggestion soon taken up by one Michigan senator. In 1929, Senator Orville Atwood introduced a bill to make the "water's edge as from time to time existing" the legal boundary along the state's shore front. The bill managed to make its way to the governor's desk, but was ultimately vetoed.[64] At least for the moment, the meander line remained secure. Yet for all its seeming authority as a boundary, there were weaknesses, cracks in the line's legitimacy—fissures opened up, at least in part, by the line's threat to social relations. In the end, it was perhaps more of a dotted line etched across the landscape, something its supporters were hardly ready to admit.

III

The water's edge had at least one thing recommending it: It looked a lot more natural than the meander lines that trailed off across the land. That is not to say that the water's edge *was* more natural than the meander line. It merely seemed that way at times. For in truth, nature does not come to us with boundaries. Boundaries are nothing if not social constructions, the products of the cultures that imagine

61. *Kavanaugh v. Baird*, 241 Mich. 240, 251, 252 (1928).

62. "Shore Property Decision Attracts Attention Here," *Port Huron Times Herald*, 4 Jan. 1928.

63. "Lawful, But Unfair," *Muskegon Chronicle*, 4 Jan. 1928.

64. Michigan Senate Bill, No. 316, File No. 337, 27 Mar. 1929.

them. But not all boundaries are equally credible, and some will seem—or be made to seem—at times more authentic and reliable than others. For seven years, the meander line, whatever its faults, had marked the boundary of the Michigan shore. But with the important decision of *Hilt v. Webber* in 1930, Michigan law reverted back to an older, and some would say safer, standard.[65] Once again the water's edge became the ruling boundary along the shore.

The disputed land in the *Hilt* case lay due west of Saginaw Bay, on the shores of Lake Michigan's eastern fringe, where sand dunes rise up at points over one hundred feet into the air. It was along this shoreline that Herman Webber purchased some land in Oceana County. By the 1920s, the area was in the grip of entrepreneurial ambition as profit-seekers like Webber tried to cash in on the shoreline's beauty by converting it into a vacation spot. Before buying the land, Webber's life had gone in a number of directions. He had been in farming, lumbering, had briefly owned part of a laundry, and now happened into real estate.[66] In 1925 he bought several parcels of land, beach front property—or so he thought.[67] These were prime pieces of property, wooded, to some extent, complete with spectacular bluffs and dunes with nice level plateaus atop them. Webber intended to plat the land he purchased into lots and sell them to vacation homeowners.

Two years after he bought the land, Webber noticed that some trees had been cut down on it. On further investigation he discovered that a path had recently been forged through his property, the work of a county surveyor. According to Webber, this was the first that he had ever heard of the meander line that cut across his land, marking the western limit of his property at a point some distance from the beach.[68] Cut off from the shore, Webber stopped paying the mortgages he owed on the land, informing those whom he thought had wronged him. He notified John Hilt, the former owner of one piece of land, on 11 October 1927. Shortly thereafter he had a conversation with Homer Bailey, the real estate broker who had handled the deal. Bailey told Webber to go forward with his plans to subdivide the property and sell it. Evidently, whatever the legal rule, some real estate brokers in the area agreed that the water's edge still marked the western line of Lake Michigan shore front. According to Webber, Bailey told him that if he were to raise a fuss over the meander line, "it would kill

65. *Hilt v. Webber*, 252 Mich. 198 (1930).

66. Records & Briefs, *Bankers Trust Co. v. Webber* (244 Mich. 697 [1928]), 55.

67. Ibid., 1-17; Records & Briefs, *Hilt v. Webber* (252 Mich. 198 [1930]), 1-20.

68. When he bought shore front in 1925, Webber claimed he had heard nothing about a meander line. But a little before 1927, a real estate broker mentioned the meander line to him in the course of a conversation about someone who was squatting on Webber's property. See Records & Briefs, *Bankers Trust Co. v. Webber* (244 Mich. 697 [1928]), 54-5 and Records & Briefs, *Hilt v. Webber* (252 Mich. 198 [1930]), 160.

all the Lake Michigan frontage." Four hours later, Webber testified, someone shot him and his wife at their home.[69]

Before purchasing the properties, Webber examined them on foot and consulted blueprints of the area. Convinced that what he was buying was a picturesque piece of beach front, Webber bought by government description. The deeds were exacting, filled with whole numbers and fractions noting the lot, section, township, and range—the typical way of conveying land that had been formally surveyed by the federal government.[70] One might think that such precision would leave little room for error or miscalculation. But one would be wrong. There was nothing in the deeds—nor should one expect there to be—that said where the western boundary of Webber's land fell. That was a question of law.

In 1928, John Hilt sued Webber to foreclose on the land contract they had signed. Webber filed a cross bill that claimed fraud in the sale of the land. Thus began *Hilt v. Webber*, a case that would ultimately test the limits, indeed the very essence and merit of the supreme court's meander line rule. The plaintiff claimed Webber, having been hit by the downturn in the real estate market, was trying to wriggle out of his obligations.[71] Webber, however, maintained that the western boundary of his property had been misrepresented to him. Not only did he not own the land he thought, his riparian rights had been compromised, including his ability to evict a squatter who had built a small place for himself on the land in question.[72] As the case progressed, the boundary issue emerged as a point of singular importance: Had Webber purchased to the water's edge or to the meander line? Which was the operative boundary?

Both sides in the case agreed on one thing: that a stable set of boundaries was needed to mark the shore. But whether the meander line or the water's edge came closer to offering that stability was hard to say. The plaintiffs' lawyers believed the water's edge provided more assurance to shore owners. They reasoned that since the Great Lakes were not subject to a tide, the high water mark, "if such can be said to exist, would be merely seasonal." The low water mark, the brief continued, would essentially be the water's edge. Under these circumstances, the water's edge made sense as "the true, practical and legal boundary." To rule in favor of it would help spur development, the brief maintained, "and forever fix the boundary line of riparian owners on our Great Lakes." The water's edge was "definite and certain and in line with what all persons now owning property on such lakes believe they own."[73]

69. Records & Briefs, *Hilt v. Webber* (252 Mich. 198 [1930]), 153-4.

70. See, e.g., ibid., 1-3.

71. Ibid., "Brief for Plaintiffs and Appellants," 19.

72. Ibid., "Brief for Defendants and Appellees," 1-12.

73. Ibid., "Supplemental Brief for Plaintiffs on Overruling Kavanaugh Cases," 5, 19-20, 31, 49.

Not so, argued the defendants' counsel: "Could anything be more certain than the boundary established by the meander line, which since the survey of 1837 has remained absolutely immutable?"[74] Surely the meander line offered more stability than a line that would fluctuate with water levels, erosion, and other factors. Indeed, no less an authority than the attorney general agreed with the defendants. In his opinion, the meander line rule was founded on the need "to create some fixed and certain line which shall mark the separation of property rights." The meander line rule

> makes for certainty of ownership. There is no variation as the years roll on. The proprietary owner inside of the meander line will know what his land will be twenty years from now if he continues in ownership. Contrasting with this the rule of the other States [that the water's edge would govern], we find under their theory a changing and uncertain line which moves in or out with the lake level.[75]

What could possibly be a more stable line than one that remained fixed in space, no matter what happened? This was the basis for the opposing side's position.

It was not, however, the supreme court's view, at least not the view of the majority. The eight-member court had changed somewhat in the two years since the 1928 *Baird* decision. Three new members joined the court, including Louis H. Fead who would write the majority opinion in the *Hilt* case.

Fead had his reasons for holding for the water's edge. They included, among other things, the fact that the meander line rule articulated in the *Kavanaugh* cases had been based on dictum. Unfortunate language used in the *Ainsworth* case had been uncritically imported into these decisions and made into law. But he had other reasons as well for overturning the meander line rule. Meander lines, he felt, had never accurately represented the shore. They were created and used merely for the practical purpose of computing acreage for sale. As legal boundaries, meander lines were worthless. The boundary of the shore, the line between public and private rights, according to Fead, "was where nature had placed it—at the water's edge."[76] Public opinion, legal authority, and, not least of all, nature itself, dictated such a rule.

Fead tried, as hard as he could, to make the ruling seem as natural and logical as possible. Consider, for a moment, his thoughts on reliction. The *Kavanaugh* cases, he believed, had overturned a settled principle of law—that an upland riparian was entitled to relicted land—thus putting "the Great Lakes in a legal strait-jacket." Fead himself inclined toward the older standard. His reasoning in this regard flowed from

---

74. Ibid., "Defendants' Reply Brief on the Subject of the Possible Overruling of the Kavanaugh Cases," 7.

75. Ibid., "Brief of Attorney General Acting as of Amicus Curiae," 15, 16.

76. 252 Mich. at 212.

his opinion that the law of the sea applied categorically to the Great Lakes. Fead fleshed out his view as follows:

> All maritime nations, recognizing the vagaries of the sea, beyond human control and anticipation, have evolved systems of law, founded upon rational conceptions of common justice, to adjust and compensate its effects. The most ordinary effect of a large body of water is to change the shore line by deposits of erosion gradually and imperceptibly. In such cases it is the general, possible universal, rule . . . that the title of the riparian owner follows the shore line under what has been graphically called 'a moveable freehold.'[77]

In effect, Fead was classifying the Great Lakes, under the law, as oceans instead of lakes. It must be said that the Great Lakes, because of their sheer size, hold an ambiguous position in the law. Too large to be considered merely inland lakes and yet not quite oceans, the Great Lakes have from time to time emerged as aberrant legal entities. The law doesn't really know what to do with them. But Fead did. By classifying them as oceans, he made what happened to them seem rather ordinary, as part of the natural order of things. As Fead represented them, the Great Lakes shaped their own destiny. He implied that whatever happened to them was beyond the power of human control and therefore natural. If the land that emerged along the rim of these large inland seas was simply the product of natural forces "beyond human control," then the benefit ought to accrue to the adjoining landowner's advantage. That all seemed natural enough to him.

Of course what had been happening to the Great Lakes was hardly a natural phenomenon by any standard, a point not completely lost on Fead's colleagues. In a concurring opinion, justices North and Potter wrote that the law of the sea should govern "the Great Lakes only so far as applicable." The doctrine of reliction, in their view, had no relevance to changes to land caused by evaporation and precipitation, or by *diversion and drainage*.[78] The Great Lakes were far more vulnerable to manipulation, they seemed to say, than oceans. And private landowners ought not to be the beneficiaries of what resulted from human contrivance.

Only two justices, McDonald and Wiest, begged to differ with Fead and throw their support behind the meander line. If the water from the Great Lakes receded, for whatever reason, they believed that the adjoining landowner did not lose out entirely. The recession of the water did not deprive private shore owners of their riparian rights—to build wharves, fish, bath, and so forth. What the shore owner did not get, in this view, was title in fee to the relicted land. That, they held, ought to remain in state hands. "My Brother's opinion is far-reaching," Wiest lamented, "for it constitutes the Michigan shore line of 1,624 miles private property, and thus destroys for all time the trust

77. Ibid., 219.

78. Ibid., 228.

vested in the State for the use and benefit of its citizens."[79]

But Wiest's was a lone voice, drowned out by the loud roar of Michigan's realty community. Their response, it need hardly be said, was pure, untrammeled elation. "Yesterday's decision," said A. M. Larson, president of the Muskegon County Real Estate Board, "was the best news we have received here in many years."[80] Louis Webber, secretary of the Michigan Real Estate Association, believed the decision would help spur the sale of Michigan resort land, boosting the prospects for further development on the lakes.[81]

Meanwhile, the meander line drifted off into obscurity, the monuments marking it rusting their way to oblivion. But the lines seemed to fade more quickly from consciousness than from view. One editorial pointed to the "unreliable nature of the meander line itself. A mere sketchy boundary marked by surveyors who plunged through the woods following the general direction of the shore line a hundred years ago, it did not mark the water's edge at all."[82] It is hard to believe that any but a handful ever had much faith in the accuracy of these lines. They were, to be sure, approximations. But their accuracy was really beside the point. The debate was hardly over the reliability of a line. It was rather a question of limits and restraint—the reason why lines are there in the first place. Lines can be drawn on the ground in any number of ways. But some lines are more likely to serve the powerful few than others. And it is how *those* lines are drawn that counts anyway.

If the water's edge was but one way to mark a boundary, if it seemed, at least in some respects, less stable than the meander line, why did it carry the day? The answer, of course, has something to do with the assumptions of an economic culture, desperate to own nature so as to maximize profits. In addition, it must be connected to the need to preserve an existing social order, one that the meander line threatened to upset. But it also has much to do with the seeming naturalness of the water's edge. That point shines through in a brief case note published on the *Hill* decision. The author hailed the outcome, claiming it showed the supreme court's willingness to reason ably in setting down the law. The case brought Michigan back into line with the "general rule" in regard to relicted land. "From a geological standpoint," and this is the key point, "this holding seems to be more satisfactory. It should lessen the litigation on this subject as the water's edge is certainly a visable [*sic*] and practical boundary."[83] Thus the

79. Ibid., 231.

80. "Realtors Jubilant Over New Ruling on Relicted Lands," *Muskegon Chronicle*, 3 Dec. 1930.

81. "Jenks Sees Relicted Land Case Victory For Owners," *Port Huron Times Herald*, 3 Dec. 1930.

82. "The Shore Returns to the Owner," *The Grand Rapids Press*, 3 Dec. 1930.

83. "Case Notes," *Detroit Law Review* 1 (1931): 48.

decision rested not merely on good law, but on sound geology as well. The logic here is not all too hard to follow. The water's edge made eminent geological sense because it was rooted in nature. It marked a boundary as God would have it—very clearly, there on the land for all to see with their own eyes. What could possibly be a better boundary then an already existing one, placed there by the hand of God, lying in wait for the geologist who would venture down the beach to find it?[84]

No matter that the water's edge was just as imaginary as any other boundary. What it seemed to have, something that the meander line could not claim, was nature's imprimatur. Its appeal as a boundary rested in part on simplicity itself. There were no markers necessary here, no stakes, posts, monuments or artificial contrivances of any sort—just water washing against the land. It was a boundary not easily dismissed, at least not by those with the power to do so at the time. For that would have required an act of will, no less strong than the act of God that purportedly put the boundary there in the first place—the will to set limits, to overturn the passion for private property.

IV

What then does the history of boundary relations in Michigan teach us? In the broadest sense, it has something to say about the meaning of that elusive term, property. From time to time, the temptation to pin the word down has arisen, most recently in the work of Jeremy Waldron. Property, it is Waldron's view, "is the concept of a system of rules governing access to and control of material resources."[85] Once again, property is understood to be a concept.[86] If property is a concept, as so many have insisted, then what does it mean to call it such? Concepts, it has been said—most famously by Ludwig Wittgenstein—are rooted in social practices. And it is from such practices that concepts derive their meaning.[87] Thus to speak of the concept of property is to refer

84. A word on the title of this paper is called for here. It derives from a speech that Thomas Hart Benton gave in Congress where he declared the Rocky Mountains to be the proper western limit of the republic. In his words: "Along the back of this ridge [the Rocky Mountains] the western limit of this republic should be drawn, and the statue of the fabled god Terminus should be raised upon its highest peak, never to be thrown down." Speech in Senate, 18th Cong., 2d sess., 1 Mar. 1825, *Register of Debates in Congress*. . . . (Washington, D.C., 1825), 1:712. I thank Donald Worster for mentioning Benton's speech to me.

85. Jeremy Waldron, *The Right to Private Property* (Oxford, 1988), 31.

86. Waldron, however, is making some very careful distinctions between concepts and conceptions of property. See ibid., 47-53.

87. See Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (New York, 1953). Here I am merely echoing what Stephen Toulmin has said about scientific concepts and their roots in scientific procedures. See Stephen Toulmin, *Human*

to a set of social practices having to do with how things are owned. The meaning of property is founded on what people do about ownership—not so much the ideas or rules they claim to uphold—but those that they actually follow with their feet, if you will. In this sense, it is the social practices that people engage in to order and control resources that may tell us the most about what property means.

One thing that people do in regard to *private* property, of course, is to define and guard its boundaries. That is not always a simple task, especially along the shore where land and water meet at times in odd and mysterious ways. But it is nevertheless a task that is central to the way that private property works. The practice of defining, laying, and maintaining boundaries, at least in part, captured the meaning of private property along the Michigan shore. What then is private property? No simple definition can be offered. But this much can be said: Private property rests on the historically constructed sense of boundaries that obtains within a culture.

In other words, private property works with reference to boundaries. However, it is important to note that some things are more easily bounded and owned than others. Not everything is equally susceptible to ownership. The shore happens to be one of those places that at times frustrates possession, a point that highlights just how complicated a place the earth is, and how hard it can sometimes be to wrap boundaries around it.[88]

The will to impose human logic on nature, to transform it into private property by ordering and controlling it with boundaries, has nevertheless been a persistent force in American history. But that transformation is never entirely complete and thorough. For the boundaries themselves are in no way eternal. Easily taken for granted, boundaries—those drawn with the approval of the United States government included—are not nearly as stable and enduring as they seem. No, the history of boundary relations in Michigan at least is much more complex than that. Even with the weight of the law behind them, those boundaries lived out an uneasy existence on the landscape.

Understanding (Princeton, 1972), 155-61. Also see Wynn Schwartz, "What Makes Something Psychoanalytic," *Psychiatry* 51 (1988): 417-8, for a discussion of concepts and how they differ from theories.

88. If anything, shore land subject to a tide presents even more complicated boundary dilemmas than the shore of the Great Lakes. Several years after the decision in *Hilt*, the U.S. Supreme Court ruled in *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935). There the court held that the boundary between upland and tideland was to be the mean high tide as measured over a period of 18.6 years. That standard was the one offered by the United States Coast and Geodetic Survey. But as has been pointed out, whatever the scientific foundation of the new boundary rule, it was to remain a problematic boundary, one that hardly was able to completely order the complicated environment of the shore. See Charles E. Corker, "Where Does the Beach Begin, And To What Extent Is This a Federal Question," *Washington Law Review* 42 (1966): 33, 54-65.

Boundaries are the products of the cultures that create them and for that reason they are hardly etched in stone, no matter how much they are revered. They are, in the end, symbolic constructions and there is little that is inevitable about them. They could be gone in a minute, made to yield before the forces of nature or law, weathered fence posts and faded record books their sole remaining traces.

APPENDIX 4

Excerpts from Record,
Hilt v *Weber*, pp 88-91

Q. And approximately how far from the lake front would you say the scenic road was?

A. Well, that varies I would say from a quarter to three-quarters of a mile.

Q. Did you at any time have any talk with Mr. Hilt about the relation between him and Mr. Huston and Mr. Mahoney?

A. I did not.

Q. So that your knowledge of that relationship is simply what arose from their showing you the property, and the dealings you had with Mr. Hilt's store?

A. Yes.

Q. Did you have anything to do with putting up the "No Trespass" signs?

A. I did not.

Cross-Examination.

By Mr. Penny:

I handled frontage property about six months from Pentwater to Grand Haven. I have known Mr. Weber about three years and dealt with him from time to time in my capacity as a real estate agent. I did not assist him in the fall of 1925 in looking for lake frontage except in a friendly capacity. I was with him on this property on December 1, 1925. Prior to that time I was not much familiar with frontage property in that vicinity. I had been over it on property to the north and knew where Roseville Beach was, and which I had seen prior to December 1. I knew it had been platted prior to that. In the forenoon of December 1, Houston, Mahoney and I were together possibly a couple of hours on this property. We had no blue print and no maps, blue print, sketching of the property, its location or otherwise were shown to us. In

referring to Plaintiffs' Exhibit B, it represents Government lots two and three, the premises in question, being all in section eight of Claybanks township, Oceana county. At the bottom of the map appears "South line of road." In the circle with the "F" underneath is the northwest corner of Roseville plat.

Thereupon the recorded plat of Roseville Beach, recorded in plat book 2 was offered and received in evidence showing approval of plat on January 2, 1926, recorded January 12, 1926.

Note: This plat is Exhibit E in the back of the printed record in Bankers Trust Company v. Weber, Cal. No. 33990, decided December 4, 1928.

(Witness continuing): At point "F" of the northwest corner of Roseville plat there was a post 75 to 100 feet from water's edge. The road, known as the east and west road, being the north boundary of the plat, was then marked out by cement blocks in the middle of the road which was there at the time. We saw from the lines there present what was the south boundary line of the property up to the southeast corner we were purchasing. We were given to understand that the east and west highway, or the old road, was the south boundary of the lands we were buying. We then sought to find out the north line of the property. Mr. Huston was up on a ridge somewhere on the north line of Government lot two to find the line. I see the meander line as indicated on the map and following this line north, it intersects the north line of Government lot two. It has subsequently developed that the meander line on the north line of Government lot 2 was approximately 300 feet from the water's edge I would say. I was then about 140 feet from him and about 100 feet from the shore. He was then standing up higher than I was, he being about 44 feet above the shore of Lake

Michigan. He then held out his hand to the westward to where the north line was. We were then determining the corners. The northwest corner and the southwest corner. We were there and did our measuring for the purpose of determining frontage.

Q. And in determining your frontage you went down in proximity to this shore as you have said somewhere about 75 feet from the water's edge, measuring along the beach south until, that is between the north line of Government lot two extended, and the northwest corner of Roseville Beach extended, that is right, isn't it?

A. We started from the square wooden stake at the northwest corner.

Q. And you measured down to the point, to the northwest corner of Roseville Beach to find the length of the shore line?

A. Exactly.

Mahoney, Weber and myself were there, Huston did not participate. Mahoney and myself measured the distance and determined the frontage. This stake that I speak of was back from the water's edge about 100 feet. I do not know who set the stake, but was told that it was put there by Mr. Buck in the survey of the lands to the north.

The northwest corner of the Roseville Beach plat was a cement block and cement post. I have examined the Roseville Beach plat, which is laid out in lots, blocks and streets and was all staked out at that time with posts and the streets were marked. There is a plain beach of white, washed sand along there, gradually coming out of the water from the north line of Government lot two clear down to this old east and west highway or the south line of the property Weber purchased. This beach extends back from the water's

edge to the base of the dune over 100 feet, which is wash sand and grass grown accretion. It is evident from the character of the sand that the land back to the dune was formerly lake, from the base of the dune the land rises in elevation until we have a ridge as I have described. Back of the dune there is no evidence that the land was formerly lake bottom, because it is wooded, having trees, oak, pine, hemlock, some of the trees being over a foot through. The whole land north from Roseville Beach plat along the dune to the north line of Government lot two is all quite thickly wooded with the character of timber I have spoken of. We looked over this property for about two hours, then went back to Muskegon and before we went to Hilt's office and in the absence of Mr. Hilt we signed these papers, Exhibits F and G. We then went to Hilt's office, procured from him the price and terms. Several days after that we met Mr. Bailey at the Occidental Hotel. There must have been some misunderstanding between Bailey and Hilt, as Bailey left us at the hotel and went down to interview Hilt. Later we went to Hilt's store where the price and terms were talked over and confirmed. The contract, Exhibit 1, was made later, but I was not present.

Re-direct Examination.

By Mr. Geib:

Q. Witness how was your attention attracted to the stake at the northwest corner of the Roseville plat?

A. Our attention was drawn to it by Mr. Mahoney. It was there sticking out of the sand.

Q. What did he say?

APPENDIX 5:

Excerpts from Brief of Attorney General in matter of *Hilt* v *Weber*

STATE OF MICHIGAN

SUPREME COURT

JOHN R. HILT and MARY HILT, *Plaintiffs and Appellants,* vs. HERMAN H. WEBER and ROSA F. WEBER, *Defendants and Appellees.*	No. 34491 Appeal from Oceana Circuit, in Chancery. Hon. Joseph Barton, Circuit Judge.

BRIEF OF ATTORNEY GENERAL ACTING AS OF AMICUS CURIAE

THE QUESTION

The question upon which the Attorney General has been invited to file a brief is: Should the rule of law laid down in the Kavanaugh-Baird and Kavanaugh-Rabior cases be overruled?

ARGUMENT

It is a settled rule of law that each state determines for itself the question of the rights of the riparian owner. It was so held by the Supreme Court of the United States in Hardin v. Jordan, 140 U. S. 371. It may be also con-

Section 337, Compiled Laws 1915 (Act 112, P. A. 1895)
Section 400, Compiled Laws 1915 (Act 171, P. A. 1899)
Section 471, Compiled Laws 1915 (Act 292, P. A. 1907).

III.

Some of the other states have adopted the rule that the riparian owner's title extends to the water's edge at normal level but these states hold to the trust theory for lake bottom land outside the water's edge.

IV.

This rule followed by some of the other states results in a shifting ownership back and forth between the upland owner and the State. But it results in the upland owner being the riparian owner at all times, regardless of either reliction or high water levels. It may result, however, in the riparian owner losing entirely the control of his property by the rising of the water so as to cover the land.

V.

Michigan has adopted the rule that usually obtains in dealing with property rights in other relationships where realty is involved. Michigan follows the rule that the meander line is a fixed boundary line between the upland owner and the State regardless of the stage of the water level. There is no shifting of ownership permitted under the Michigan rule. The State owns the fee outside the meander line in trust for the people. A land owner obtains no greater rights as the water recedes but retains the same upland ownership as before. Likewise the upland owner loses no rights as the water rises, but retains the same ownership as before.

VI.

In these other States access to the water for riparian purposes follows with ownership to the water's edge.

VII.

Under the Michigan rule, the upland owner retains all riparian rights of access to the water for:

(a) Dockage
(b) Wharfage
(c) Bathing
(d) Withdrawing water for domestic purposes.
(e) Watering stock
(f) All other rights based upon access as a riparian proprietor of the upland.

CONCLUSION

If this were a case of first impression, this court might now consider the propriety of adopting the Michigan rule of property certainty or the other rule of riparian certainty. But Michigan has been committed to the doctrine of the Kavanaugh cases. Rights have been adjudicated and countless acts have been done upon the faith and credit of these decisions as the law of the land. Under the familiar rule of *stare decisis*, it should not be disturbed by the Judiciary. The proper remedy lies either with the legislature, the people, or both.

Respectfully submitted,

WILBER M. BRUCKER,
Attorney General,

M. M. LARMONTH,
Assistant Attorney General.

Attorneys for the State of Michigan.

APPENDIX 6:

1929 SB 316

MICHIGAN
FIFTY-FIFTH LEGISLATURE
REGULAR SESSION OF 1929

SENATE BILL No. 316

FILE No. 337

March 27, 1929, Introduced by Senator ATWOOD, ordered printed, and referred to the Committee on Conservation.

A BILL

To provide for the establishment and correction of boundaries of lands bordering on Lakes Superior, Michigan, Huron, St. Clair and Erie and the bays and harbors thereof; to establish the water's edge as from time to time existing as the boundaries thereof instead of the meander line; to confirm and establish the title of occupants of lands lying between the meander lines and the water's edge; to authorize and regulate the taking of sand, marl, clay, stone and earth or gravel from the bed of the lake; and repeal all acts and parts of acts inconsistent herewith.

The People of the State of Michigan enact:

SECTION 1. Unless otherwise distinctly expressed in the conveyance itself, or other instrument of transfer, all conveyances of lands bordering on Lakes Superior, Michigan, Huron, Erie and St. Clair and the bays and harbors thereof heretofore or hereafter made by the United States or the State of Michigan or any officer or department thereof STATES
or by any subsequent grantee where such lands are described or shown OR by
on the survey or map of the Government of the United States as bounded ON THE

by such water's edge shall be construed as conveying the land To the water's edge as from time to time existing and not the meander line of the Government's surveys shall be construed as the boundary of any such lands and the title to any such lands heretofore conveyed is hereby established and confirmed as corrected so far as the rights of the State in opposition thereto are concerned.

Sec. 2. This act shall not be construed to give any upland owner any other or further rights than he already has or than are given by section 1 in the property lying between the meander line and the water edge as against the occupant of such property. In those cases where such lands have been controlled or occupied or the taxes thereon have been paid or improvements thereon prior to January 1, 1929, have been made by any other person, firm or corporation not occupying, controlling, paying taxes thereon or improving same under a lease or agreement with the upland owner, but so far as the rights of the State are concerned the title of such person, firm or corporation occupying, controlling, improving or paying taxes thereon as herein set forth is hereby confirmed and established.

Sec. 3. Any person, firm or corporation owning land to the water edge under the construction of his conveyance as provided in section 1 shall be entitled to the exclusive right to take sand, marl, clay along with or gravel from the bed of the lake for a distance of five

hundred feet from the low water mark: Provided, That when any sand, marl, clay, stone, earth or gravel is taken or removed for the purpose of sale, a permit must be obtained from the Conservation Department, who shall evaluate said sand, marl, clay, stone, earth or gravel and the person or persons removing the same shall pay the price fixed by such evaluation: Provided further, That outside of the said five hundred feet, the Conservation Commission shall have the right to remove any sand, marl, clay, stone, earth or gravel, and may anchor boats or dredges for that purpose, and shall fix the value on the sand, marl, clay, stone, earth or gravel, which shall be paid by any person, firm or corporation removing the same, which said charge shall be a lien on boats, dredges, scows, or other apparatus used for taking said sand, marl, clay, stone, earth or gravel.

SEC. 4. All acts and parts of acts inconsistent herewith are hereby repealed.

JOURNAL

OF

THE SENATE

OF THE

STATE OF MICHIGAN

1929

REGULAR SESSION

Printed by virtue of an act of the Legislature, under the direction and supervision of

DENNIS E. ALWARD
Secretary of the Senate

IN TWO VOLUMES—VOL. II

BY AUTHORITY

PRINTED BY
FRANKLIN DIGLESBE CO.
PRINTERS AND BINDERS
LANSING, MICH. 1929

Messages from the House.

A message was received from the House of Representatives returning Senate bill No. 316 (file No. 837), entitled

A bill to provide for the establishment and correction of boundaries of lands bordering on Lakes Superior, Michigan, Huron, St. Clair and Erie and the bays and harbors thereof; to establish the water's edge as from time to time existing as the boundaries thereof instead of the meander line; to confirm and establish the title of occupants of lands lying between the meander lines and the water's edge; to authorize and regulate the taking of sand, marl, clay, stone and earth or gravel from the bed of the lake; and to repeal all acts and parts of acts inconsistent herewith,

With a substitute therefor, entitled

A bill to provide for the establishment and correction of boundaries of lands bordering on Lakes Superior, Michigan, Huron, St. Clair and Erie, and the bays, harbors and arms thereof; to establish the water's edge as from time to time existing as the boundaries thereof instead of the meander line; and to confirm and establish as against the state the title of certain occupants of lands lying between the meander lines and the water's edge.

The message informed the Senate that as thus substituted, the House of Representatives had passed the bill and had ordered that it be given immediate effect.

The following is the substitute:

A bill to provide for the establishment and correction of boundaries of lands bordering on Lakes Superior, Michigan, Huron, St. Clair and Erie, and the bays, harbors and arms thereof; to establish the water's edge as from time to time existing as the boundaries thereof instead of the meander line; and to confirm and establish as against the state the title of certain occupants of lands lying between the meander lines and the water's edge.

The People of the State of Michigan enact:

Section 1. In every case in which lands bordering on Lakes Superior, Michigan, Huron, St. Clair and Erie, and the bays, harbors and arms thereof, have been or shall hereafter be conveyed by the United States or the State of Michigan, or any officer or department or subsequent grantee thereof, in such manner and by such description, that, but for the passage of this act, the same would be construed as conveying title to the grantee up to the meander line only, such conveyances and instruments of transfer shall be hereafter construed as having conveyed or conveying the land to the water's edge as from time to time existing unless otherwise distinctively expressed in the conveyance itself. The water's edge as from time to time existing and not the meander line of the government survey shall be construed as the boundary of any such lands and the title to any such lands is hereby established and confirmed as corrected, so far as the rights of the State in opposition thereto are concerned: Provided, however, That whenever any person, firm or corporation other than the owner of the contiguous upland and their mesne grantors shall have been in the possession or control of any lands lying between the meander line of the government survey and the water's edge, or shall have made improvements or paid taxes thereon under color of title for a period of fifteen years next preceding the passage of this act, the title of such person, firm or corporation as to such lands shall be deemed paramount to the title of the State thereto, and insofar as concerns the rights of the State only, title to such land is hereby confirmed and established in such person, firm or corporation.

Sec. 2. All lands between the meander line and the water's edge as from time to time existing shall at all times be subject to the public right to open roads in accordance with law along section lines to the lakes and waters above described, and to the free and unobstructed right of pedestrians to walk along the water's edge on the lands immediately adjacent thereto.

Sec. 3. All acts and parts of acts inconsistent herewith are hereby repealed.

The question being on concurring in the passage of the bill as substituted by the House,

The roll was called and the Senators voted as follows:

YEAS—24.

Atwood	Engel	Kolowich	Sink
Branson	Ganssser	Leland	Skinner
Campbell	Harding	Lennon	Stevens
Condon	Heidkamp	Miner	Upjohn

Conlon Howell Richardson Van Eenenaam
Cowan Jankowski Ruhlton Woodruff

NAYS—1.

O'Connell

So, a majority of all the Senators-elect voting therefor,
The substitute bill was concurred in.
The Senate agreed to the title of the substitute bill.
The bill as substituted was referred to the Secretary for enrollment printing and presentation to the Governor.

A message was received from the House of Representatives transmitting
House concurrent resolution No. 31.
A concurrent resolution proposing that the State Capitol be opened to visitors every day throughout the year, and that a sufficient number of Capitol police be employed to act as guides for escorting such visitors.
Whereas, It has come to the attention of members of this Legislature that numbers of citizens from all sections of this State appear at the Capitol Building every day throughout the year desirous of being shown the many objects of interest therein; and
Whereas, It is evident that these citizens have a worthy purpose in so visiting the Capitol on that day in the week which is best suited to their object; and it is further evident that the cordial interest of the people in the affairs of their State and their sympathetic comprehension of its history, its aims and its problems may be promoted and enhanced, and that they may be gratified and entertained to a worthy degree by the privilege of freely inspecting the places which figure in the conduct of the State's business and the exhibits which mark the various stages of the State's history and progress, by and with the attention of competent escorts; therefore, be it
Resolved, By the House of Representatives of Michigan (the Senate concurring), That we do hereby request the State Administrative Board and the State Board of Auditors to open the Capitol Building to such visitors, and that ample and suitable provision be made for the employment of guides for the purpose of accompanying such visitors and entertaining them in the course of their inspection of its places and features of interest.
The message informed the Senate that the House of Representatives had adopted the concurrent resolution; in which action the concurrence of the Senate was requested.
Pending the order that, under rule 59, the concurrent resolution lie over one day,
Mr. Lennon moved that rule 59 be suspended.
The motion prevailed.
The concurrent resolution was considered and adopted.

Rule 37 Suspended.

Mr. Woodruff moved that for the remainder of the present session Senate rule 37 be suspended.
The motion prevailed, two-thirds of the Senators present voting therefor.

Appreciation of Senator Condon's Services.

Mr. Miner submitted resolutions adopted by the Senate Judiciary Committee, expressing appreciation of the service of the Honorable George M. Condon, Chairman of the said committee, and the resolutions were ordered spread at length upon the journal, as follows:
Resolved by the Judiciary Committee of the Michigan State Senate for the year 1929; that
Whereas, Lieutenant Governor Dickinson, benefiting by his long experience as an executive officer, and exercising wisdom appointed Senator George M. Condon of Detroit, Chairman of the Judiciary Committee of the State Senate; and
Whereas, this committee is composed of nine members all of whom are practicing attorneys in the state; and

March 30, printed bill filed. (File No. 336)
April 4, reported favorably without amendment and bill referred to committee of the whole 606
April 8, reported by committee of the whole favorably with amendments; amendments concurred in and bill placed on order of Third Reading 856
April 9, passed, transmitted to House 894-897
May 3, received by Senate the House having passed bill, with amendments; given immediate effect in House; amendments concurred in; given immediate effect in Senate; bill ordered enrolled. 610-11
May 16, presented to Governor (Senate Enrolled Act No. 98) 988
May 21, approved by Governor 1233
Public Act No. 226. 1155

816. A bill to provide for the establishment and correction of boundaries of lands bordering on Lakes Superior, Michigan, Huron, St. Clair and Erie, and the bays, harbors and arms thereof; to establish the water's edge as from time to time existing as the boundaries thereof instead of the meander line; and to confirm and establish as against the state the title of certain occupants of lands lying between the meander lines and the water's edge:
March 27, introduced by Senator Atwood, ordered printed and referred to the Committee on Conservation
March 30, printed bill filed. (File No. 331) 470
April 4, reported favorably without amendment and bill referred to committee of the whole 508
April 8, reported by committee of the whole, favorably with amendments; amendments concurred in and bill placed on order of Third Reading 856
April 9, passed, given immediate effect, transmitted to House 896
May 7, received by Senate, the House having passed bill, with substitute therefor; given immediate effect in House; bill as substituted concurred in; bill ordered enrolled 611
May 17, presented to Governor (Senate Enrolled Act No. 124) 1044-45
May 29, vetoed by Governor 1185
817. A bill to amend section 67 of chapter 17 of Act No. 314 of the Public Acts of 1915, "The Judicature Act of 1915", being section 12555 of the Compiled Laws of 1915: 1170
March 27, introduced by Senator Condon, ordered printed and referred to the Committee on Judiciary
March 30, printed bill filed. (File No. 328) 470
818. A bill to amend sections 5 and 6 of chapter 42 of the Revised Statutes of 1846, entitled "Of the Maintenance of Illegitimate Children", being sections 7757 and 7758 of the Compiled Laws of 1915, as amended by Act No. 161 of the Public Acts of 1925: 696
March 27, introduced by Senator Condon, ordered printed and referred to the Committee on Judiciary
March 30, printed bill filed. (File No. 332) 470
April 2, reported favorably with amendment; amendment concurred in and bill referred to committee of the whole 508
April 4, reported by committee of the whole, favorably without amendment and bill placed on order of Third Reading 539
April 5, passed, transmitted to House 560
May 8, received by Senate, the House having passed bill, with amendment; amendment concurred in; bill ordered enrolled 676-78
May 21, presented to Governor (Senate Enrolled Act No. 183) 1118
May 22, approved by Governor 1139
Public Act No. 263. 1163

819. A bill to amend section 16 of chapter 84 of the Revised Statutes of 1846, entitled "Of Divorce," being section 11407 of the Compiled Laws of 1915:
March 27, introduced by Senator Condon, ordered printed and referred to the Committee on Judiciary
March 30, printed bill filed. (File No. 340) 470
April 4, reported favorably without amendment and bill referred to committee of the whole 508
April 8, reported by committee of the whole, favorably without amendment and bill placed on order of Third Reading 839
April 9, passed, transmitted to House 896

APPENDIX 7:

1913 PA 326

PUBLIC ACTS

OF

THE LEGISLATURE

OF THE

STATE OF MICHIGAN

PASSED AT THE

REGULAR SESSION OF 1913

CONTAINING CONCURRENT RESOLUTIONS AND AMENDMENTS TO THE CONSTITUTION.

COMPILED BY
FREDERICK C. MARTINDALE,
SECRETARY OF STATE

LANSING, MICHIGAN
WYNKOOP HALLENBECK CRAWFORD CO., STATE PRINTERS
1913

recall petition has been filed a petition within fifteen days after said special election is called, signed by not less than three per centum of the qualified electors of the electoral district and said candidates so filing said petition shall be considered nominated for said office. The candidate who has received the highest number of votes for the vacancy created by such recall shall be considered duly elected for the remainder of the term and the votes for said candidates shall be returned.

Election expenses, who to pay, etc.

SEC. 5. After filing such petition and after such special election, no further recall petitions shall be filed against the same incumbent of such office during the term for which he is elected unless such further petitioners shall first pay into the public treasury, which has paid such election expenses, the whole amount of election expenses for the preceding special election held for the recall of said incumbent.

SEC. 6. The laws relating to nominations and elections shall govern all nominations and elections under this act insofar as not to conflict therewith.

SEC. 7. All acts or parts of acts contravening the provisions of this act are hereby repealed.

Approved May 13, 1913.

[No. 326.]

AN ACT to provide for the leasing, control and taxation of certain lands owned and controlled by the State, and the improvements thereon; providing penalties for the violation of certain provisions thereof; and repealing act number two hundred fifteen of the Public Acts of nineteen hundred nine, and all other acts or parts of acts inconsistent herewith.

The People of the State of Michigan enact:

Board of control.

SECTION 1. All of the unpatented overflowed lands, made lands and lake bottom lands belonging to the State of Michigan or held in trust by it, shall be held, leased and controlled by the State Board of Control, hereinafter referred to as the board of control, in the manner hereinafter provided. Said State Board of Control shall be comprised of the Secretary of State, the Auditor General and the Commissioner of the State Land Office. Said board of control shall perform the duties imposed on it under this act until the first day of January, nineteen hundred fifteen, on which day all of the

powers and duties of said State Board of Control shall pass to and be devolved upon the Public Domain Commission, which shall be deemed the successor in office and trust to the said State Board of Control. Whenever the term "board of control" or the term "State Board of Control" is used in this act, it shall be taken to include and mean said Public Domain Commission as successors to said State Board of Control. Said board of control shall convene within fifteen days after this act shall take effect, and elect a chairman and secretary who shall perform the duties usually incumbent upon such officers and such other duties as may be imposed by vote of said board; and shall meet regularly on the first Tuesday of each month thereafter; special meetings of the board may be called at any time by the chairman of the board upon reasonable notice to the other members thereof. In all questions to be determined by said board, a majority vote shall control and be the action of the board.

Transfer of duties to public domain commission.

Election of officers.

Meetings.

SEC. 2. Said board of control shall have no power to deed or convey said lands, but it is vested with the power to lease lands of the character named in section one of this act, to any person, firm, society, association or corporation for the purposes and in the manner hereinafter provided.

Power to lease lands.

SEC. 3. Whenever any person, firm or corporation or society shall be entitled under the terms of this act to lease for the period of ninety-nine years, it shall be the duty of said board of control to divide said term of ninety-nine years into two periods of fifty and forty-nine years each to be known as rental valuation periods, and the consideration or rental to be paid by the lessee for the first period of fifty years is to be determined by the said board of control at the time such lessee is adjudged entitled to said lease; and at the expiration of said first period of fifty years, it shall be the duty of the Public Domain Commission to re-determine the rental value or consideration to be paid by the lessee for the next succeeding rental period of forty-nine years until the expiration of the full term of the lease: *Provided*, That the said board of control in determining said rental value to be so paid by the lessee shall consider the value of the land only and shall not increase the rental value or consideration for any of said rental periods because of the improvements that may have been made on any of said premises by a lessee: *Provided further*, That in determining the rental value or consideration to be paid by the lessee for the second valuation period of forty-nine years, said Public Domain Commission shall not increase such rental value or consideration to any sum in excess of double the rental value or consideration determined for the first valuation period of fifty years: *Provided further*, That the consideration so fixed shall, as applied to the claimants coming within the provisions of this act (section three), be a gross sum and not an annual rental.

Term of lease.

Rental value.

Re-determination of.

Proviso, improvements.

Further proviso, not to double.

Further proviso, not annual rental.

or herein, which said certificate and lease shall thereupon be executed in manner and form as provided for in this act.

Failure to make application, etc.

SEC. 7. All persons, firms or corporations, having been in occupation or possession of lands of the character named in section one for one year or upwards, prior to January one, nineteen hundred thirteen, failing to make application for a lease for the occupation and possession of the same as provided for herein, within nine months after this act takes effect, and all persons, firms or corporations who shall fail after the notification provided for in section six of this act to make payment of the consideration fixed by the said board of control within the time and in the manner specified in this act, shall be deemed trespassers, and an action may be brought in the circuit court for the county in which such lands are situated in the name of the people of the State of Michigan, by the Attorney General of the State to recover possession of said lands.

Blank form of lease.

SEC. 8. It shall be the duty of the Attorney General to prepare a blank form of lease, which shall be used by the Commissioner of the State Land Office in all cases where said board of control has at a regular meeting, determined the rental value and the term of the lease. Every lease shall be executed on behalf of the State of Michigan by the Commissioner of the State Land Office, and shall be duly acknowledged and recorded in the office of the register of deeds for the county in which said lands are situated and such register of deeds shall be entitled to no fees for making such record.

How executed.

Rental value, fixing of.

SEC. 9. In fixing rental values the said board of control shall determine present land values only and shall not increase the rental value because said lands may have been improved by dredging, leveling off, sheet-piling, erecting docks, buildings or structures of any kind.

Occupants and claimants, precedence given.

SEC. 10. The board of control shall lease or rent the lands of the character herein named to occupants and claimants in possession to the exclusion of other persons, firms or corporations, provided such occupants or claimants have made or shall make an application to lease said lands so occupied, claimed or improved within nine months next after this act taxes [takes] effect, in accordance with the provisions hereof.

Lands not to be leased.

SEC. 11. The board of control shall have no power to lease to any person, firm or corporation, lands of the character described in section one of this act, that are now included by any law of the State, within a public park.

Rights of lessees.

SEC. 12. The rights of lessees under this act shall be subject to the paramount right of navigation, hunting and fishing, which rights are to remain in the general public and in the government as now existing and recognized by law.

Application, where filed, form, etc.

SEC. 13. Any person, firm or corporation in possession or occupation of any land of the character described in section one of this act desiring to lease the same from the State, shall file with the Commissioner of the State Land Office

within nine months after this act takes effect, a written application for such lease, which shall state the applicant's full name, postoffice address and all the facts relied upon to establish possession, occupancy and improvement, and every claim so filed shall show the amount claimed to have been expended by said claimant upon said land and the length of time he has been in possession of said land and the character of the improvements made and shall be signed and verified by such claimant, and said application shall not be deemed invalid because of any technical inaccuracy or misdescription, but the same may be permitted to be corrected at any time in the discretion of said board of control: *Provided,* That all persons, firms, corporations, societies or associations that have heretofore made application in accordance with act number one hundred seventy-five of the public acts of eighteen hundred ninety-nine, or act number two hundred fifteen of the public acts of nineteen hundred nine, shall not be required to make any further or additional application, but the application so made shall have the same force as though made under the provisions of this act.

Proviso, former applications.

Prior improvements.

Entitled to lease.

Consideration.

Proviso.

Further proviso.

SEC. 14. Any person, or persons, firm or corporation or association, claiming under this act and having been in occupancy of any of the land described in section one hereof and having improved said land under the definition set forth herein prior to January one, nineteen hundred thirteen, shall be entitled to a lease with valuation periods as herein provided, for ninety-nine years, of the land so claimed and improved, upon payment to the officer authorized to receive the same of such consideration as may be fixed by said board of control and it shall be the duty of said board of control and of the other officers specified in this act, to issue all orders and certificates necessary and to lease to said person or persons, firms or corporations or associations, for a term of ninety-nine years the land so applied for by them: *Provided,* That said persons, firms or corporations or associations have filed or do cause to be filed proper applications therefor, as required by the provisions of this act: And *Provided further,* That said board of control may lease to any of said persons, firms, corporations or associations, any of said lands applied for under the provisions hereof for a term of years equal to or less than the full rental period when so requested by the lessor.

Certain words defined.

SEC. 15. The words "possession," "occupancy" and "improvement" as used in this act shall be construed to include dredging or ditching, the throwing up of embankments, sheat-piling, filling in, the erection of fences, a boat-house, land made by dredging and filling, or building structures.

Priority, when not given.

Proviso.

SEC. 16. The board of control shall not be compelled to give priority to any application for a lease of any lands where the improvements do not exceed in value one hundred dollars: *Provided,* That it shall not be unlawful for said board of control to give such an application priority

over other applicants when in its judgment the facts warrant such a determination.

Surveys governing.

SEC. 17. In describing the lands that may be leased under the terms of this act, said board of control shall be governed by maps, plats and field notes of surveys made by the United States surveyors or by the State of Michigan.

Rights of claim, how ascertained, etc.

SEC. 18. The said board of control shall ascertain and decide upon the rights of persons claiming the benefit of this act, and it shall have power to hear and decide in a summary manner all matters respecting such applications or claims, except as herein otherwise provided and to that end compel the attendance of witnesses and receive such competent testimony by deposition or otherwise as may be produced, and determine thereon, according to equity and justice, the validity and just extent of the claim and respective rights of conflicting claimants making application for a lease. It shall cause minutes of the filing of such claims and all its proceedings to be entered in a book kept for that purpose and keep a record of the evidence from which its decisions are made, and it is authorized when it deems it necessary, or upon request of any of the claimants, to employ a stenographer to assist said board of control. And each of the members of said board of control shall have power to administer oaths, issue subpoenas, compel the attendance of witnesses and the production of papers upon any hearing before said board of control. In case of disobedience on the part of any person or persons, or wilful failure to appear pursuant to any subpoena issued by said board of control or any of its members, or upon refusal of any witnesses to testify regarding any matter pending before said board of control or to produce books and papers which he shall be required by said board of control or by any member thereof to produce, it shall be the duty of the circuit court of any county in this State in which said board of control shall be in session or of a judge thereof, upon the application of said board of control or any member thereof, to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein, and in addition said members of said board of control shall have the powers vested in justices of the peace and notaries public to compel witnesses to testify to any matter pending before said board of control, and each witness who shall appear before said board of control by its order or subpoena shall receive for his attendance the fees and mileage provided witnesses in civil cases in circuit courts, said fees to be paid by the party calling such witnesses.

Record of proceedings, etc.

Members may administer oaths, etc.

Contempt.

Attachment.

Additional powers.

Conflicting claims.

SEC. 19. In all cases where there shall be a contest or conflict between applicants for a lease to the same piece or parcel of land growing out of a prior occupation or improvements, such conflicting claims shall be determined by the board of control at a regular meeting after notice to each

of said claimants of the time and place of hearing, and in such cases depositions may be taken by any claimant in the manner provided for taking depositions in the circuit courts of this State. Any party considering himself aggrieved by any decision of the said board of control refusing to grant him a lease under the provisions of this act whether in case of conflict, contest or otherwise, shall have the right of appeal to the circuit court for the county in which such land is situated and the proceedings to take such appeal and the trial thereof in any of said courts shall be in accordance with the statutes providing for appeals from justice courts of this State, or to take such other action at law or in equity as provided by the statutes and laws of the State of Michigan.

Appeal to circuit court.

Sales or transfers, approved by board.

SEC. 20. All sales or transfers of leases shall contain a specific statement of the purpose for which the property leased is to be used by the purchaser or assignee, and no sale or transfer of any lease for other than club or residence purposes shall be valid, unless and until the sale or transfer is approved by said board of control. The said board of control shall keep a book of record for the purpose of recording all sales or transfers of leases, and no sale or transfer of any lease by any lessee shall be valid unless and until the same is filed for record with said board of control.

Record of sales, etc.

Lessee may sell, etc.

SEC. 21. Any lessee under this act may sell and transfer the improvements on the premises so leased and his leasehold interest therein, provided the rental therefor is not in arrears and all taxes assessed and a lien thereon are fully paid. Any sale or transfer which may be contrary to the provisions of this act shall be absolutely void.

First right to re-lease.

SEC. 22. When any lease shall expire by limitation the last lessee or his assignee, heirs or personal representative or any mortgagee or person having a mortgage interest therein shall have the first right for sixty days next after such expiration of limitation to re-lease said premises.

Accounting of moneys.

SEC. 23. All moneys received from the leasing of said land of the character described in section one of this act shall be paid to the State Treasurer and by him credited to the general fund. All expenses incurred in carrying out the provisions of this act or heretofore contracted in the carrying out of act number two hundred fifteen of the public acts of nineteen hundred nine, shall when audited by the Board of State Auditors, be paid from the general fund in the same manner as other expenses in conducting the State Land Office. Said board of control shall have power to hire such employes as in its judgment shall be necessary to carry out the provisions of this act.

Employes.

Taxation.

SEC. 24. The lessee's interest in all leases made under the terms of this act shall be assessed as real estate by the assessing officer of the township, city or village in which the lands leased may be located and the levy and collection of taxes so assessed on said lessee's interest shall be made and

collected in the same manner and subject to the provisions of law now in force for the levy and collection of taxes upon real estate, and the assessing officers in determining the value of such leasehold interest for taxation purposes shall take into consideration the value of the land together with the improvements thereon. Assessment.

SEC. 25. In all cases where default is made in the payment of taxes, the same shall be returned to the county treasurer according to and subject to the provisions of law for the return and collection of unpaid taxes assessed upon real estate. The county treasurer shall, at the same time when he makes his return of delinquent lands to the Auditor General, make a similar return to the said board of control of all such leasehold interests, the taxes upon which have not been collected, with a statement of the amount thereof. The board of control shall provide suitable books and enter in the same the description of every leasehold interest so returned, and the taxes thereon. The person holding such interest in any parcel of said lands may pay to said board of control at any time within one year after the same becomes a lien on said premises, the taxes assessed thereon, with interest at the rate of one per cent per month or fraction thereof, from the first day of March last preceding: *Provided*, That if said taxes are not paid within the time herein specified, said leasehold interest shall stand forfeited because of the non-payment of such taxes, and it shall be the duty of said board of control to release said premises to any person for any term of years not exceeding ninety-nine years, upon such person paying to the said board of control all unpaid taxes thereon, together with such rental as may be determined upon under the provisions of this act by the said board of control: *Provided, further*, That where default is made by any lessor in the payment of taxes, he shall be notified in writing by said board of control, or its successor, at least three months prior to the date of final forfeiture of the amount due and the penalty for non-payment and the date upon which forfeiture is to occur: *Provided further*, That upon payment to said board of control of taxes and interest as herein provided, such amount shall be credited to the county in which such leasehold interests were assessed, in the same manner as taxes and interest are now credited to counties on part paid State lands. Default in payment of taxes. Return made. Record kept. Period of redemption. Proviso, when forfeited. Further proviso, notice given. Further proviso, credited to county.

SEC. 26. It shall be the duty of the several county treasurers to make a report to the board of control of all descriptions of said lands where the same have been returned for non-payment of taxes and such taxes have not been paid within six months after such return, the said report to be made by such treasurer within thirty days after the said six months shall have expired. County treasurer to report

Act repealed.

SEC. 27. Act number two hundred fifteen of the public acts of nineteen hundred nine, and all other acts and parts of acts inconsistent herewith, are hereby repealed.

Approved May 13, 1913.

4 SECS. Add.
1913-159

[No. 327.]

187/579

AN ACT to provide for a recount of votes canvassed by boards of supervisors.

The People of the State of Michigan enact:

Who and when may petition.

SECTION 1. Whenever a proposition is submitted to the electors, and the votes cast upon said proposition are canvassed by the board of supervisors of the county, any person voting in the county at the election at which such a proposition has been submitted, who conceives himself aggrieved on account of any fraud or mistake in the canvass of the votes by inspectors of election or the returns made by said inspectors, may, on or before the close of the last day of the session of the board of supervisors at which said votes are canvassed, present to, and file with, or cause to be presented to, or filed with, the clerk of said board, a written petition which shall be sworn to, by himself, his agent or attorney, setting forth as near as may be the nature of the mistakes or frauds complained of and the township, ward or district in which they occur, and asking for a correction thereof. He shall at the same time deposit or cause to deposit with the clerk of said board the sum of ten dollars for each and every township, ward or district referred to in his petition: *Provided, however,* That no petitioner shall be required to deposit more than one hundred dollars, which sum shall be paid in case such petitioner does not establish sufficient fraud or mistake to change the result complained of as set forth in his petition by the clerk of the board of supervisors to the county treasurer, for the use of the county.

Where filed.

Deposit.

Proviso, when fraud not established.

Appointment of committee.

SEC. 2. Upon filing the petition and making the deposit required in the preceding section, it shall be the duty of the board of supervisors to appoint a committee from its membership to investigate the facts set forth in said petition. For such purpose the said board shall have power to cause the ballot boxes used in such election districts to be brought before said committee. Said committee shall thereupon in some public place where the persons interested, and their counsel, if they so desire, may be present, proceed forthwith to open the ballot boxes from such districts, townships or wards and to make a recount thereof as to said proposition, and for the purpose of recounting the votes upon said ques-

APPENDIX 8:

Haller "Michigan Purloined Shorelines"

Michigan's Purloined Shorelines

By GEORGE D. HALLER

Newspaper stories have appeared frequently throughout the state in recent months, telling of "wide-spread filling operations in Lake Huron from Saginaw Bay to Alpena, and in Lake Michigan from Benton Harbor to Traverse City",[1] and of "large number of riparian owners who have extended their property by filling in the shallow water areas—especially in Lake St. Clair—."[2]

State is Suing

Alarmed by this illegal appropriation of portions of the public domain, the Michigan Conservation Commission in November 1954 "approved the idea of starting a class suit" against such intruders, and in February 1955 announced that it had started injunction proceedings against twelve defendants in the St. Clair Shores area. One month later its pending suits numbered fifteen.

An idea of the extent and character of the depredations can be gleaned from these instances, mentioned in newspaper accounts: "Charles E. Millar, chief of the Conservation Department lands division, said a railroad has made a right of way on filled-in land near Benton Harbor; a lumber company at Tawas City uses filled-in land as a storage area; private homes are located on filled-in land at Traverse City."[3] Jack Van Coevering, a conservation reporter, writes: "In Lake St. Clair near St. Clair Shores, business establishments thrive on filled-in land."[4] Assistant attorney general Nicholas V. Olds calls attention to Grosse Pointe Shores where the municipality is trying to condemn from the private owners of the riparian land, the submerged soil; and where a private owner has extended boat wells into the lake, by a fill designed to add 600 feet to the shore lot; and where subdividers are actually selling residence lots on lands filled in by bull-dozers along the shallow bottom soil of Lake St. Clair.[5]

Proposed Legislation

The intrusion upon the public domain by trespassers has become so prevalent that it has been actually proposed in the state legislature to legitimatize the illegality, "to permit those occupying such land to purchase it from the state," (so as, according to one legislator "to get these people off the hook.")[6] Even the Conservation Department appears to be dubious about the situation, as Millar

1. Detroit News, Feb. 19, 1955.
2. Detroit Free Press, Dec. 19, 1954.
3. Detroit News, 2/19/55.
4. Detroit Free Press, 12 19 54.
5. Detroit News, 3/4/55.
6. Detroit News, 2/19/55.

George D. Haller holds the degree of Ph.B from Notre Dame, his law degree from the University of Michigan Law School. Professor of law at the Detroit College of Law for the past eight years, he is a member of the Judicial Council of Michigan. A few years ago he served as attorney-in-charge for Michigan for the Office of Price Administration. Today he acts as special legal advisor to the city council of Livonia where he resides.

remarks: "Technically" (*sic*) "the state could force the developers to restore the property to its original condition, but I am doubtful if such drastic action will be taken." The proposed law has been introduced as intended "to halt future filling operations" and "prevent loss of shore lands"; however these seem to be somewhat misleading objectives, as the bill does not appear to provide against loss of submerged lands by the public, but loss of the illegally reclaimed lands by the private persons "squatting" on state property, as the legislation would permit the intruders to acquire title by paying "ten per cent of the value before improvements."[7]

Trust Property

The proposal to permit squatters on reclaimed lake bottoms to acquire title thereto at a small fraction of the actual value, presents serious questions of policy and legality. In the first place, the submerged lands of the Great Lakes, including Lake St. Clair, are held by the state of Michigan in a trust capacity, for the common benefit of all the people, so that "they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[8] As Van Coevering observed in his column "Woods and Waters"[9]: "every hunter and fisherman knows that the marshes are cradles of wildlife. It is the shallow water areas that furnish much of his sport—. The inevitable result of these encroachments is that shallow water areas which are most fruitful for fish and food for ducts are being gradually destroyed."

Character of State Title

The submerged lands of the Great Lakes are held by the state by a unique and peculiar title, which governs the possibility of their alienability. "The character of the title or ownership, by which the state *owns* the statehouse and (its) surrounding grounds—is quite different from that by which it *holds* the land under (the Great Lakes)".[10] It "is a title different in character from that which the state has in lands intended for sale. It is different from the title which the United States holds in the public lands which are open for pre-emption and sale."[11]

This peculiar title has its source "in the theory of the (English law) that the king was lord of the sea, and the owner of soil—covered with water"[12] as a trustee for the public, "to subserve and protect the public right to use (such waters) for commerce, trade and intercourse".[13] "The power exercised by the State over the (submerged) lands and (navigable) waters is nothing more than what is called the jus regium—the right of regulating, improving and securing them for the benefit of every individual citizen."[14] When the state of Michigan acquired this "jus regium" of the British kings, "no proprietary benefit was conferred. On the contrary, a burden was imposed. The subject-matter (of the jus regium) carried with it no emolument or promise of future revenue. The state came under the burden of maintaining and promoting the navigation of the navigable lake."[15]

How Title Was Acquired

"Prior to the (American) Revolution the—lands under the navigable streams of the province of New Jersey belonged to the king of Great Britain as part of the jura regalia of the crown, and devolved to the state by right of conquest."[16] "When the Revolution took

7. Detroit News, 2-24-55.

8. Field, J., in *Illinois Cent. R. Co. v. State of Illinois*, 146 US 387.

9. Detroit Free Press, 12-19-54.

10. Bradley, J., in *Stockton v. Railroad*, 32 Fed. Rep. 9.

11. Field, J., in *Illinois R.* supra.

12. *Lincoln v. Davis*, 54 Mich. 375, 19 NW 103.

13. *People v. N. Y. & S. I. F. Co.*, 68 N.Y. 71.

14. *Arnold v. Mundy*, 6 N. J. L. 1.

15. *Peck v. Construction Co.*, 216 Iowa 519, 243 NW 131, 89 ALR 1147.

16. Bradley, J., in *Stockton*, supra.

place the people of each state became sovereign and in that character hold—the right to the soils under their navigable waters."[17]

In the case of Michigan, after the French surrendered their possessions in the New World to Great Britain, the British crown held the waters of the Great Lakes and the soil under them in trust for the people, for the public uses of navigation and fishing. When, by right of conquest, this same title was transferred to the American states, Virginia, which claimed dominion over the "Northwest Territory", held the "jus regium" in the area now included in Michigan. Virginia ceded this area to the United States, and it, in turn "held the territory in trust for future states to be carved out of it, (holding) the waters of navigable rivers and lakes and the soil under them in trust for the people, just as the British Crown" (had held them;) and "when Michigan entered the union of states, she became vested with the same *qualified* fee that the United States had."[18]

Policy in Michigan

Even before Michigan became a state, it was settled policy in this area that the submerged lands and navigable waters should be a common heritage for the whole people. When a government was set up for the Northwest Territory by the famous Ordinance of 1787, which was a compact between the thirteen original states and the people of the new lands, it was solemnly declared, as a provision which was to "forever remain unalterable, unless by common consent" that the navigable waters of the territory "shall be common highways, and forever free."[19]

The state of Michigan has never deviated from the policy of retaining title to the beds of the Great Lakes, either by "grant or legislative enactment."[20] It is true that in 1860, by force of a judicial decision,[21] the title to the bed of the Detroit river was recognized to be in the riparian owners to the midline, (a holding ultimately extended to all inland navigable rivers). But the fact that as to such streams a bare legal title was declared to be in the abutting riparians, makes no difference with respect to the rights of the public. "The title in the hands of the riparian owner was still burdened with the trust."[22]

Power to Alien

If the State of Michigan, with regard to the submerged lands of the Great Lakes, holds only a "qualified" fee, "under a high public trust, to forever preserve them free as public highways"[23] there would seem to be serious question as to whether the legislature has the power to sell any of this "heritage of the people". While it may be conceded that the state might sell or lease some portions of the submerged lands for the erection of installations, (wharves, piers, breakwaters, lighthouses, etc.,) intended to improve navigation and commerce, it is quite a different thing to legislate so as to permit "any private person (to) appropriate to his own exclusive use either the waters—or the soil beneath. The public right of navigation and fishing in such waters should not be rendered subservient to private occupancy."[24]

It is true that in 1927 the Michigan Supreme Court ruled that the legislature had the power to authorize the Conservation Commission to lease such portions of former submerged lands as had become dry land by reason of the natural forces of reliction and accretion.[25] In

17. Taney, C. J., in *Martin v. Waddell*, 41 U.S. 16.

18. McDonald, J., in *Collins v. Gerhardt*, 237 Mich. 38, 211 NW 1131.

19. Ordinance of 1787, Articles of Compact, Art. IV.

20. *Collins v. Gerhardt*, supra.

21. *Lorman v. Benson*, 8 Mich. 18.

22. *Collins v. Gerhardt*, supra.

23. Harlan, J., in *Scranton v. Wheeler*, 179 U.S. 141.

24. *Lincoln v. Davis*, supra.

25. *Nedtweg v. Wallace*, 237 Mich. 14, 208 NW 51.

comment upon this decision it is to be observed that it dealt only with such areas as had been translated from submerged lands to dry upland by the forces of nature and therefor, had been irretrievably lost to the public trust purposes. The case is no authority for the contention that the State may sell such areas as have been changed from submerged soil to dry upland by the artificial processes of reclamation by adjoining riparian owners. It is also to be noted that there was no recognition of a power to "sell", but only to "lease," even in connection with the relicted areas.

That the state does not have the power to sell the submerged lands is declared in numerous well-reasoned cases of courts of last resort. "The sovereign power itself, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of a state, divesting all the citizens of their common right.[26] "The State cannot divest itself of that trust, cannot sell the land and cannot lease it for any purpose which would injure the trust."[27] The statement of the United State Supreme Court.[28] to the effect that the submerged lands "are not within the jurisdiction of the State so as to be the subject of grant by warrant, survey or patent" was approved by the Michigan Supreme Court, which then added this strong language of its own:

> "—an intruder cannot gain title by occupancy. This would seem to be a reasonable rule, for there is no good reason why the public should be robbed of its domain by trespassers, or put to the expense of patrolling to prevent."[29]

The non-alienability of the submerged lands is strikingly affirmed by the U. S. Supreme Court in these words:

> "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties—than it can abdicate the police power in the administration of government. —The trust is governmental and cannot be alienated."[30]

Justice McDonald of the Michigan Supreme Court summarized the correct propositions as follows:

> The submerged lands "are held in trust by the State.—It cannot, consistently with its trust, make a grant of any portion of such lands to any person for private use.—It is beyond the power of the legislature to enact —a statute (whereby such lands) pass into the hands of a few people for their private uses, to the utter exclusion of the public, whose rights the State must protect or violate its trust.—The legislature has no power to convert public property to private use. It can only legislate for the public good.—The rights of navigation, hunting and fishing are (not) the only rights which the people have in the waters and (submerged) lands of the Great Lakes. The people need these (areas) for parks and playgrounds and bathing."[31]

Conclusion

A state which possesses in the Great Lakes one of the world's greatest recreational assets, which describes itself as a "Water Wonderland", should not permit squatters to usurp its beaches and submerged lands. The white pines forests are a memory; the buffalo gone to the "happy hunting ground". The beaches and submerged lands of the Great Lakes should not be allowed to be plundered in similar fashion by private interests for private purposes, in violation of the trusteeship which the state holds on behalf of all its citizens.

26. *Arnold v. Mundy*, supra.

27. *Hilt v. Weber*, 252 Mich. 198, 233 NW 117.

28. *Freytag v. Powell*, 1 Wharf. 536.

29. *State v. Fishing Club*, 127 Mich. 580, 87 NW 117.

30. *Illinois Cent. R. Co.*, supra.

31. *Nedtweg v. Wallace*, supra.

APPENDIX 9:

1955 PA 247

38.231 Chapter not applicable to school district of the first class. [M.S.A. 15.893(31)]

Sec. 31. This chapter, except as specifically otherwise provided in this chapter, shall not apply to any school district of the first class as defined by the school code.

38.232 Social security program; payment and transfer of funds for retroactive taxes. [M.S.A. 15.893(32)]

Sec. 32. (a) For each public school employee who is a member of the retirement system and who becomes covered under the federal social security old-age and survivors' insurance program on account of his employment as a public school employee, the retroactive social security taxes, if any, to be paid by him shall be deducted and paid from his individual balance in the annuity accumulation fund. In the event the member's said balance is not sufficient to make such payment, his public employer shall promptly collect from the said member and pay to the retirement system the amount of such insufficiency.

(b) The employer's retroactive social security taxes and all future employer social security taxes shall be paid from the pension accumulation fund and the said fund shall be reimbursed by appropriation to be made by the legislature.

38.233 Effective date of amendatory act; referendum on coverage. [M.S.A. 15.893(33)]

Sec. 33. The provisions of this amendatory act relating to social security shall become effective as of the date the governor certifies to the secretary of health, education and welfare that the members of 1 or more coverage groups within the retirement system membership had voted in favor of social security coverage at an election held in conformance with the 1954 amendments to section 218 (d) of title II of the federal social security act, and as provided in Act No. 205 of the Public Acts of 1951, as amended, being sections 38.851 to 38.870, inclusive, of the Compiled Laws of 1948.

38.234 Agreement for extension of federal social security old-age and survivors' insurance coverage. [M.S.A. 15.893(34)]

Sec. 34. On behalf of the state of Michigan the retirement board is hereby authorized to enter into an agreement with the state agency, designated in Act No. 205 of the Public Acts of 1951, as amended, to extend the social security old-age and survivors' insurance coverage to eligible public school employees who are members of the retirement system established under this chapter.

This act is ordered to take immediate effect.

Approved June 22, 1955.

[No. 247.]

AN ACT to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented submerged lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state of Michigan or held in trust by it; to provide for the disposition of revenue derived therefrom; and to appropriate funds for the administration of the provisions of this act.

The People of the State of Michigan enact:

322.701 Great lakes submerged lands act; short title. [M.S.A. 13.700(1)]

Sec. 1. This act shall be known as the "great lakes submerged lands act".

322.702 Unpatented submerged lake bottom lands and unpatented made lands in great lakes; improvements; construction of act. [M.S.A. 13.700(2)]

Sec. 2. The lands covered and affected by this act are all of the unpatented submerged lake bottom lands and unpatented made lands in the great lakes, including the bays and

harbors thereof, belonging to the state of Michigan or held in trust by it which have heretofore been artificially filled in and developed with valuable improvements. It shall be construed so as to preserve and protect the interests of the general public in the aforesaid lands and to provide for the sale, lease or other disposition of such lands whenever it is determined by the department of conservation that such lands have no substantial public value for hunting, fishing or navigation and that the general public interest will not be impaired by such sales, lease or other disposition. The word "land" or "lands" whenever used in this act shall refer to the aforesaid described unpatented submerged lake bottom lands and unpatented made lands in the great lakes and the bays and harbors thereof.

322.703 Same; conveyances, leases and agreements; mineral rights reserved. [M.S.A. 13.700(3)]

Sec. 3. The department of conservation, hereinafter referred to as the "department", after finding that the public interest will not be impaired or substantially injured is hereby authorized to grant and convey by quit claim deed, after approval of the state administrative board, the lands described in section 2 of this act or to enter into leases or other suitable agreements in regard thereto. The lands surveyed under Act No. 175, Public Acts of 1899 and subject to the control of the department under Act No. 326 of the Public Acts of 1913, as amended, being sections 322.401 to 322.429, inclusive, of the Compiled Laws of 1948, are excepted from the operation of this act. Such deeds, leases or agreements may be granted or entered into by the department with any person, firm, society, association, corporation, the United States of America and any governmental unit of the state of Michigan in the manner herein prescribed and shall contain such terms and conditions and requirements which shall be deemed just and equitable and in conformity with the public interest as determined by said department. The department shall reserve to the state of Michigan all mineral rights, including but not limited to coal, oil, gas, sand, gravel, stone and other materials or products located or found in said lands.

322.704 Same; conveyances, application, contents, approvals, deposit. [M.S.A. 13.700(4)]

Sec. 4. (a) Application for a deed or lease to said lands or other agreement in regard thereto shall be on forms provided by the department. Such application shall include a surveyed description of the lands applied for, together with a surveyed description of the riparian and/or littoral property lying adjacent and contiguous to said lands, certified to by a registered land surveyor, which description shall show the location of the water's edge at the time it was prepared and such other information that shall be required by the department. Said applicant shall be a riparian and/or littoral owner or owners of property touching the unpatented land applied for or an occupant of said land. Said application shall include the names and mailing addresses of all persons in possession or occupancy or having any interest in the adjacent or contiguous riparian and/or littoral property or having riparian and/or littoral rights or interests in the lands applied for and such application shall be accompanied by the written consent of all persons having an interest in the lands applied for in said application.

(b) Before an application can be acted upon by the department, it must be filed within 3 years from the effective date of this act, and the applicant must secure approval of or permission for his proposed use of such lands from any federal agency as provided by law, the Michigan waterways commission and the legislative body of the local unit or units of government within which such land is or will be included, or to which it is contiguous or adjacent, and no deed, lease or agreement shall be issued or entered into by the department without such approvals or permission. The department may also require the applicant to furnish an abstract of title and ownership, and a 20 year tax history on the riparian and/or littoral property which is contiguous or adjacent to the lands applied for, as well as the lands applied for, if available.

(c) The department shall require the applicant to deposit a fee of not less than $50.00 for each application filed, which fee shall be deposited with the state treasurer to the credit of the state's general fund. Should a deed, lease or other agreement be approved by the

department, the applicant shall be entitled to credit for said fee against the consideration which shall be paid for such deed, lease or other agreement.

322.705 Same; consideration for conveyances; fills. [M.S.A. 13.700(5)]

Sec. 5. Should the department determine that it is in the public interest to grant an applicant a deed or lease to such lands or to enter into any other agreement in regard thereto, it shall be the duty of the department to determine the amount of consideration to be paid to the state by such applicant.

(a) If, prior to the effective date of this act, the lands applied for have been artificially filled in or in any manner changed from their original character by filling, sheet piling, shoring, or by any other means, and such aforesaid lands are used or occupied in whole or in part for uses other than rightful riparian and/or littoral purposes, the consideration to be paid to the state by such applicant shall be not less than the fair, cash market value of the aforesaid lands determined as of the date of the filing of such application, minus any improvements placed thereon but in no case shall the sale price be less than 30% of the value of the land. In determining the fair, cash market value of the lands applied for, the department may give due consideration to the fact that such lands are connected with the riparian and/or littoral property belonging to the applicant, if such is the case, and to the uses, including residential and commercial, being made or which can be made of said lands.

(b) Deeds, leases or agreements may be granted to or entered into with local units of government for such consideration and containing such terms and conditions which may be deemed just and equitable in view of the public interest involved including the granting of permission to make such fills as may be necessary in order to complete any unfinished public project existing at the time this act takes effect.

322.706 Same; evaluation by department of conservation; appraisal by state tax commission. [M.S.A. 13.700(6)]

Sec. 6. The fair, cash market value of lands approved for sale under the provisions of this act shall be determined by the department: Provided, however, That in the event the applicant is not satisfied with the value determined by the department, said applicant within 30 days after the receipt of such determination may petition in writing the state tax commission for an appraisal of said lands and decision of said commission shall be final.

322.707 Moneys credited to general fund; accounting; employees. [M.S.A. 13.700(7)]

Sec. 7. All moneys received by the department from the sale, leasing or other disposition of lands under this act shall be paid to the state treasurer and be credited to the state's general fund. The department shall comply with the accounting laws of this state and the requirements with respect to submission of budgets. The department is hereby authorized to hire such employees, assistants, and services that may be necessary within the appropriation made therefor by the legislature and to delegate such authority as may be necessary to carry out the terms of this act.

322.708 Taxation of lands conveyed. [M.S.A. 13.700(8)]

Sec. 8. All lands conveyed or leased under this act shall be subject to taxation and the general property tax laws and other laws as other real estate used and taxed by the governmental unit or units within which the land is or may be included.

322.709 Rules and regulations. [M.S.A. 13.700(9)]

Sec. 9. The department is hereby authorized and empowered to promulgate and adopt such rules and regulations, in accordance with the requirements of law, consistent with this act, that may be necessary to carry out its provisions. Such rules and regulations shall be adopted and promulgated in accordance with Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.82, inclusive, of the Compiled Laws of 1948, and Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110, inclusive, of the Compiled Laws of 1948.

Approved June 22, 1955.

APPENDIX 10:

1958 PA 94

Description.

Sec. 2. e land to be conveyed under this act is described as follows:
Lots 28 through 37 and lots 39 through 45, in block 118;
Lots 25, 26 and 38 through 48, in block 119;
All of block 121;
Lots 1 through 21, 27, 29, 31, 33 through 38, 40 through 42, 44, and 46 through 48, in block 122;
Lots 3, 5, 7 through 11, 13, 15, 17 through 21, 27, 34, 36 and 38 in block 131;
All of block 132;
Lots 1 through 24 in block 134;
of the Third Addition to Michigan Central Park, township of Lyon, county of Roscommon, state of Michigan.

Uses; approval of conveyance.

Sec. 3. The conveyance authorized by this act shall be by quitclaim deed and shall be made subject to the express condition subsequent that said conveyed premises shall be used only for educational and recreational purposes by the grantee, and upon ceasing or failure to use said premises for the aforesaid purposes the title thereto shall immediately vest and revert to the state of Michigan. The form of instrument of conveyance shall be subject to the approval of the attorney general of this state.

Approved April 14, 1958.

[No. 94.]

AN ACT to amend the title and sections 2, 3, 4, 5 and 6 of Act No. 247 of the Public Acts of 1955, entitled "An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented submerged lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state of Michigan or held in trust by it; to provide for the disposition of revenue derived therefrom; and to appropriate funds for the administration of the provisions of this act," being sections 322.702, 322.703, 322.704, 322.705 and 322.706 of the Compiled Laws of 1948; and to add a new section 10.

The People of the State of Michigan enact:

Title and sections amended and added.

Section 1. The title and sections 2, 3, 4, 5 and 6 of Act 247 of the Public Acts of 1955, being sections 322.702, 322.703, 322.704, 322.705 and 322.706 of the Compiled Laws of 1948, are hereby amended, and a new section 10 is added, the amended title and amended and added sections to read as follows:

TITLE

An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state of Michigan or held in trust by it; and to provide for the disposition of revenue derived therefrom.

322.702 Unpatented submerged lake bottom lands and unpatented made lands in great lakes; construction of act. [M.S.A. 13.700(2)]

Sec. 2. The lands covered and affected by this act are all of the unpatented lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it, including those lands which have heretofore been artificially filled in. This act shall be construed so as to

preserve and protect the interests of the general public in the aforesaid lands and to provide for the sale, lease, exchange or other disposition of such lands whenever it is determined by the department of conservation that such lands have no substantial public value for hunting, fishing, swimming, pleasure boating or navigation and that the general public interest will not be impaired by such sales, lease or other disposition. The word "land" or "lands" whenever used in this act shall refer to the aforesaid described unpatented lake bottom lands and unpatented made lands in the great lakes and the bays and harbors thereof.

322.703 Same; conveyances, leases and agreements; exceptions; reservation of mineral rights. [M.S.A. 13.700(3)]

Sec. 3. The department of conservation, hereinafter referred to as the "department", after finding that the public interest will not be impaired or substantially injured is hereby authorized to grant and convey by quitclaim deed, after approval of the state administrative board, the lands described in section 5 of this act or to enter into leases or other suitable agreements in regard thereto. The lands surveyed under Act No. 175, Public Acts of 1899, and subject to the control of the department under Act No. 326 of the Public Acts of 1913, as amended, being sections 322.401 to 322.429, inclusive, of the Compiled Laws of 1948, are excepted from the operation of this act. Such deeds, leases or agreements may be granted or entered into by the department with any person, firm, society, association, corporation, the United States of America and any governmental unit of the state of Michigan in the manner herein prescribed and shall contain such terms and conditions and requirements which shall be deemed just and equitable and in conformity with the public interest as determined by said department. The department shall reserve to the state of Michigan all mineral rights, including but not limited to coal, oil, gas, sand, gravel, stone and other materials or products located or found in said lands.

322.704 Same; application for conveyance, contents, qualifications of applicant; consent. [M.S.A. 13.700(4)]

Sec. 4. (a) Application for a deed or lease to said lands or other agreement in regard thereto shall be on forms provided by the department. Such application shall include a surveyed description of the lands applied for, together with a surveyed description of the riparian and/or littoral property lying adjacent and contiguous to said lands, certified to by a registered land surveyor, which description shall show the location of the water's edge at the time it was prepared and such other information that shall be required by the department. Said applicant shall be a riparian and/or littoral owner or owners of property touching or situated opposite the unpatented land applied for or an occupant of said land. Said application shall include the names and mailing addresses of all persons in possession or occupancy or having any interest in the adjacent or contiguous riparian and/or littoral property or having riparian and/or littoral rights or interests in the lands applied for and such application shall be accompanied by the written consent of all persons having an interest in the lands applied for in said application.

Approvals required; abstract of title and tax history of riparian land.

(b) Before an application can be acted upon by the department, the applicant must secure approval of or permission for his proposed use of such lands from any federal agency as provided by law, the Michigan waterways commission and the legislative body of the local unit or units of government within which such land is or will be included, or to which it is contiguous or adjacent, and no deed, lease or agreement shall be issued or entered into by the department without such approvals or permission. The department may also require the applicant to furnish an abstract of title and ownership, and a 20 year tax history on the riparian and/or littoral property which is contiguous or adjacent to the lands applied for, as well as the lands applied for, if available.

Deposit with application.

(c) The department shall require the applicant to deposit a fee of not less than $50.00 for each application filed, which fee shall be deposited with the state treasurer to the credit

of the state's general fund. Should a deed, lease or other agreement be approved by the department, the applicant shall be entitled to credit for said fee against the consideration which shall be paid for such deed, lease or other agreement.

322.705 Same; consideration for conveyances. [M.S.A. 13.700(5)]

Sec. 5. Should the department determine that it is in the public interest to grant an applicant a deed or lease to such lands or to enter into any other agreement in regard thereto, it shall be the duty of the department to determine the amount of consideration to be paid to the state by such applicant.

Artificial changes in land; standards for determining consideration.

(a) If the lands applied for have been artificially filled in or in any manner changed from their original character by filling, sheet piling, shoring, or by any other means, and such aforesaid lands are used or occupied in whole or in part for uses other than rightful riparian and/or littoral purposes, the consideration to be paid to the state by such applicant shall be not less than the fair, cash market value of the aforesaid lands determined as of the date of the filing of such application, minus any improvements placed thereon but in no case shall the sale price be less than 30% of the value of the land. If the application is filed after October 14, 1960, for changes in use made before October 14, 1955, the department may add 25% to the consideration to be paid the state. If the application relates to changes in use made after October 14, 1955, and prior to the effective date of this act, the department shall add 50% to the consideration to be paid to the state. In determining the fair, cash market value of the lands applied for, the department may give due consideration to the fact that such lands are connected with the riparian and/or littoral property belonging to the applicant, if such is the case, and to the uses, including residential and commercial, being made or which can be made of said lands.

Conveyances to local units of government, consideration.

(b) Deeds, leases or agreements may be granted to or entered into with local units of government for such consideration and containing such terms and conditions which may be deemed just and equitable in view of the public interest involved including the granting of permission to make such fills as may be necessary in order to complete any unfinished public project existing at the time this act takes effect.

Flood control, shore erosion control, drainage and sanitation control, minimum consideration.

(c) If the lands applied for have not been filled in, or in any way substantially changed from their natural character at the time the application is filed with the department, and the application is filed for the purpose of flood control, shore erosion control, drainage and sanitation control or to straighten irregular shore lines, the consideration to be paid to the state by the applicant shall be the fair, cash value of such land, giving due consideration to land being adjacent to and connected with the riparian and/or littoral property owned by the applicant. The minimum consideration to be paid to the state by any applicant shall be not less than $100.00.

Leases for marina purposes; definition.

(d) Leases or agreements may be granted or entered into with riparian or littoral proprietors for commercial marina purposes or for marinas operated by municipalities, corporations, clubs or associations for such consideration and containing such terms and conditions which are deemed by the conservation department to be just and equitable. Such leases may include either filled or unfilled lake bottom lands, or both. Rental shall commence as of the effective date of Act No. 247 of the Public Acts of 1955, unless the marina operations were commenced at a later date, in which case rental shall commence as of the date operations were started or the effective date of the lease.

The term "marina purposes" as used in this act shall be construed as an operation-ing use of great lakes [illegible]

of service to boat owners or operators which may restrict or prevent the free public use of the affected bottomlands or filled in lands.

Fraud, consideration; hearing on determination.

(e) If the department after investigation determines that an applicant has wilfully and knowingly filled in or in any way substantially changed the lands applied for with an intent to defraud, or if the applicant has acquired such lands with knowledge of such fraudulent intent and is not an innocent purchaser, the sale price shall be the fair cash market value of the land. An applicant may request a hearing of any determination made hereunder. The department shall grant a hearing if requested.

322.706 Same; evaluation by department of conservation; appraisal by state tax commission. [M.S.A. 13.700(6)]

Sec. 6. The fair, cash market value of lands approved for sale under the provisions of this act shall be determined by the department. If the applicant is not satisfied with the value determined by the department, within 30 days after the receipt of such determination he may submit a petition in writing to the state tax commission for an appraisal of said lands. Decision of the state tax commission shall be final.

322.710 Lands filled, excavated or altered without approval, penalty, consideration. [M.S.A. 13.700(10)]

Sec. 10. Any person who excavates or fills, or in any manner alters or modifies any of the land subject to the provisions of this act without the approval of the department shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $1,000.00 or imprisoned not more than 1 year, or both such fine and imprisonment. Lands, the use of which are so changed, shall not be sold to any person convicted under this section at less than fair cash market value.

Effective date of amendatory act.

Section 2. This act shall become effective July 1, 1958.

This act is ordered to take immediate effect.

Approved April 14, 1958.

[No. 95.]

AN ACT to authorize the state administrative board to sell certain land in Kalamazoo and Lapeer counties; to provide terms and conditions of the conveyances hereby authorized; to provide for the disposition of the revenue received hereunder; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

Conveyance to Kalamazoo board of education, consideration, description, time.

Sec. 1. The state administrative board is hereby authorized to sell to the Kalamazoo board of education, in consideration of the payment of not less than the value thereof as determined by the state tax commission and approved by the state administrative board, the following described land in the county of Kalamazoo and state of Michigan:

Beginning at the South quarter post of Section 21, Town 2 South, Range 11 West; thence Northerly 330.00 feet along the North and South quarter line of Section 21; thence Westerly 660.00 feet parallel to the South line of Section 21; thence Southerly 330.00 feet parallel to the North and South quarter line to the South line of Section 21; thence Easterly 660.00 feet along the South line of Section 21 to the place of beginning; containing 5.0 acres of land.

APPENDIX 11:

Broedell Appellant's Appendix, p 105b

not the area out into the lake. * * * St. Clair Flats has been determined as lake bottom land. * * * There are times when there is a lot less water in the Flats area than at other times, but the lower part of St. Clair Flats Delta is submerged nearly all the time. The upper part is unsubmerged most of the time. * * * The Conservation Department is presently engaged in buying back leases on the St. Clair Flats. * * * This has been during the last ten years anyway. * * * The purpose has been to preserve their natural character for wildfowl habitat. * * * The Department has now adopted a policy of attempting to preserve intact as much as possible submerged areas for waterfowl habitat, whenever it has value for that purpose. * * * (121) The cost of buying these leases would run into several thousand dollars, I am sure of that.

Redirect Examination

BY MR. YOE: (121)

Q. In administering the procedures defined in the Submerged Lands Act, you claim as fill or property of the state any lands below the high-water mark, is that true?

A. It is my understanding that the state has absolute title to the land submerged from the water's edge of the lake, lakeward, and that the land owner has title to the upland down to the water's edge, wherever it may be. It is a fluctuating boundary between the upland owner and the State of Michigan. It is my understanding also that the upland owner's title is a qualified title below what would be determined to be the high water mark.

Q. (122) Now assuming that the plat to the lands involved in these proceedings was recorded May 1924 and assuming that the testimony is correct, that at the time of platting it was dry land to the easterly boundary of the lots involved in these proceedings, then the level at that time would have been 574.60 according to the Defendant's Exhibit T-E, a hydrograph of monthly mean levels of the Great Lakes as prepared by the U.S. Corps of Engineers, is that true?

A. According to this hydrograph, yes, sir.

Q. If that same plat had been recorded in the next year, in 1925, the plat would have been dry land to the extent of 11/12 of a foot?

A. That is right.

Q. So if the lands had been platted in 1925, it would have been west of the highest lake level for that year. So it would have been an absolute ownership in 1925? * * *

A. No. * * * My understanding of it would be that his plat is below (123) the all-time high. * * * That is the highest that the lake has ever been, according to these hydrographs, and therefore his title to that property, even though it was unsubmerged at the time, was a qualified title; in other words, this plan lies between the high and low water mark.

Q. Everything between 572.9, the lowest point, and 578.9, the highest point, about six feet, is subject to a qualified title?

A. I would say so in accordance to the holding of the Michigan Supreme Court. * * *

Q. * * * (124) Is the action of the water on Lake St. Clair from your observation the same as the other Great Lakes * * * with regard to the changing of the levels?

A. All of the Great Lakes have changes in the elevation, monthly changes, some of them. * * * I believe changes are more rapid in Lake St. Clair because the lake is shallow. * * * (125) I know the wind has quite an effect on Lake St. Clair, probably more than the other Great Lakes. I know stoppage of flowage into the lake and out of the lake would be more noticeable on Lake St. Clair than it would be on Lakes Huron and Erie. The rate of evaporation must be a little bit greater on Lake St. Clair because of its shallowness, but the other factors I think would be pretty much the same on all the lakes.

Q. Are there some places around the perimeter of Michigan where the shore line can be discerned * * * due to vegetation extending to a certain point, (126) then some kind of beach, then the water's edge?

A. * * * Yes. * * * The beach where the water has gone up and destroyed the vegetation would indicate the seasonal high water mark. * * * The water's edge would indicate the low water mark.

Q. * * * (127) You know as a matter of fact within the last 20 or 25 years by development along the lake shore, all of the original markings that may have existed to denote the high water and the low water in Lake St. Clair between Windmill Point and Metropolitan Beach have been obliterated, isn't that true?

A. I think that is pretty generally true.

APPENDIX 12:

1962 HB 548

MICHIGAN
71st LEGISLATURE
REGULAR SESSION OF 1962

HOUSE BILL No. 548

February 21, Introduced by Reps. Arnett, Anderson, Bowman, Kowalski and Nill, ordered printed and referred to the Committee on Judiciary.

A bill to amend the title and sections 1, 3 and 10 of Act No. 247 of the Public Acts of 1955, entitled as amended

"Great lakes submerged lands act,"

as amended and added by Act No. 94 of the Public Acts of 1958, being sections 322.701, 322.703 and 322.710 of the Compiled Laws of 1948; and to add 13 new sections to stand as sections 1a, 5a, 5b, 5c, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. The title and sections 1, 3 and 10 of Act No. 247 of the Public Acts of 1955, as amended and added by Act No. 94 of the Public Acts of 1958, being sections 322.701, 322.703 and 322.710 of the Compiled Laws of 1948, are hereby amended and 13 new sections to stand as sections 1a, 5a, 5b, 5c, 11, 12, 13, 14, 15, 16, 17, 18 and 19 are added, the amended title and amended and added sections to read as follows:

EXPLANATION—Matter in CAPITAL LETTERS is new; matter ~~stricken through~~ is old law to be omitted.

TITLE

An act TO PROTECT THE WATERS AND BOTTOM LANDS OF THE GREAT LAKES AND THE PUBLIC TRUST THEREIN AND THE USES THEREOF; TO CLARIFY TITLE TO, AND RIGHTS IN, THE SHORES OF THE GREAT LAKES; to authorize the department of conservation ~~of the state of Michigan~~ to grant, convey or lease certain unpatented lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state ~~of Michigan~~ or held in trust by it; TO AUTHORIZE THE DEPARTMENT OF CONSERVATION TO ENTER INTO AGREEMENTS TO PERMIT DREDGING, PLACEMENT OF STRUCTURES OR DEPOSITION OF MATERIALS ON BOTTOM LANDS OF THE GREAT LAKES; TO PROVIDE PENALTIES FOR VIOLATION OF THIS ACT; and to provide for the disposition of revenue derived therefrom.

Sec. 1. This act shall be known AND MAY BE CITED as the "Great Lakes ~~submerged~~ WATERS AND BOTTOM lands act OF 1955".

SEC. 1A. AS USED IN THIS ACT:

(A) "BOTTOM LAND" OR "SUBMERGED LAND" MEANS ANY AREA, WHETHER OR NOT COVERED BY WATER AT A

PARTICULAR TIME, LYING LAKEWARD OF THE ORDINARY HIGH WATER MARK ON THE GREAT LAKES.

(B) "ORDINARY HIGH WATER MARK" MEANS THE NATURAL LINE BETWEEN THE UPLAND AND THE LAKE BOTTOM LAND WHICH PERSISTS THROUGH SUCCESSIVE CHANGES IN WATER LEVELS AND BELOW WHICH THE PRESENCE AND ACTION OF THE WATER IS SO COMMON OR RECURRENT AS TO MARK UPON THE SOIL A CHARACTER, DISTINCT FROM THAT WHICH OCCURS ON THE UPLAND, AS TO THE SOIL ITSELF, THE CONFIGURATION OF THE SURFACE OF THE SOIL OR THE VEGETATION.

(C) "PIER" INCLUDES DOCK, WHARF OR ANY STRUCTURE HAVING A SIMILAR NATURE OR PURPOSE.

(D) "DEPARTMENT" MEANS THE DEPARTMENT OF CONSERVATION.

Sec. 3. The department ~~of conservation, hereinafter referred to as the "department",~~ after finding that the public ~~interest~~ TRUST OR USES will not be SUBSTANTIALLY impaired or ~~substantially~~ injured ~~is hereby authorized to~~ AND AFTER APPROVAL BY THE STATE ADMINISTRATIVE BOARD, MAY grant and convey by quitclaim deed, ~~after approval of the state administrative board, the lands described~~

~~in section 5 of this act~~ or to enter into leases or other suitable agreements in regard thereto, BOTTOM LANDS THAT HAVE BEEN FILLED IN, OR BOTTOM LANDS DETERMINED TO BE REQUIRED FOR THE PURPOSE OF FLOOD CONTROL, SHORE EROSION CONTROL, DRAINAGE, SANITATION CONTROL OR STRAIGHTENING OF IRREGULAR SHORE LINES. THE DEPARTMENT MAY ENTER INTO LEASES OR AGREEMENTS FOR THE USE OF BOTTOM LANDS AND WATERS OF THE GREAT LAKES FOR MARINA PURPOSES, AND FOR THE OPERATION, MAINTENANCE AND CONSTRUCTION OF PIERS AND MAY CONTROL OTHER STRUCTURES, DREDGING OR DEPOSITS. The lands surveyed under Act No. 175, OF THE Public Acts of 1899, and subject to the control of the department under Act No. 326 of the Public Acts of 1913, as amended, being sections 322.401 to 322.429, ~~inclusive~~, of the Compiled Laws of 1948, are excepted from the operation of this act. ~~Such~~ THE deeds, leases or agreements may be granted or entered into by the department with any person, firm, society, association, corporation, the United States ~~of America and~~, any governmental unit OR AGENCY of the state ~~of Michigan in the manner herein prescribed~~ and shall contain ~~such~~ terms ~~and~~, conditions and requirements which shall be deemed just and equitable and in conformity with the public interest

as determined by ~~said~~ THE department. The department shall reserve to the state ~~of Michigan~~ all mineral rights, including but not limited to coal, oil, gas, sand, gravel, stone and other materials or products located or found in ~~said lands~~ THE BOTTOM LANDS, EXCEPT THAT THE DEPARTMENT MAY DEED SUCH LAND WITHOUT THE MINERAL RESERVATION WHEN IT IS ADJACENT TO OR PART OF A PLATTED RESIDENTIAL AREA OR IS ADJACENT TO OR IN A DISTRICT ZONED BY A GOVERNMENTAL BODY FOR RESIDENTIAL, COMMERCIAL OR INDUSTRIAL PURPOSES, AFTER FINDING THAT A RESERVATION OF MINERALS WOULD BE OF NO FORESEEABLE VALUE AND WOULD INTERFERE WITH THE PLANNED USES OF THE LAND.

SEC. 5A. (A) A LEASE OR AGREEMENT MAY BE ENTERED INTO WITH A RIPARIAN OR LITTORAL PROPRIETOR OR LESSEE, INCLUDING A POLITICAL SUBDIVISION OR PUBLIC AUTHORITY, FOR CONSTRUCTION, OPERATION, MAINTENANCE OR CONTINUANCE OF A COMMERCIAL OR INDUSTRIAL PIER EXTENDING LAKEWARD OF THE ORDINARY HIGH WATER MARK AND MAKING USE OF GREAT LAKES WATER AREA OR BOTTOM LAND, FILLED

OR UNFILLED, FOR THE PURPOSE OF SERVICE TO A COMMERCIAL OR INDUSTRIAL ENTERPRISE. SUCH PIER SHALL NOT BE USED FOR ANY PURPOSE NOT REASONABLY ASSOCIATED OR CONNECTED WITH THE LOADING, UNLOADING, DOCKING, WHARFING OR SERVICING OF VESSELS. NOTHING CONTAINED IN THIS SECTION SHALL APPLY TO A PIER OR OTHER STRUCTURE USED IN CONNECTION WITH A MARINA OPERATING UNDER THE PROVISIONS OF SUBSECTION (D) OF SECTION 5.

(B) A LEASE OR AGREEMENT SHALL NOT BE REQUIRED FOR A PIER EXTENDING OVER OR TO BE EXTENDED OVER GREAT LAKES WATERS BY A RIPARIAN OWNER FOR PERSONAL RECREATIONAL USES RELATED TO THE WATERS, IN WHICH NO FILL IS OR WILL BE INVOLVED AND WHICH WILL NOT CAUSE DEPOSITION OR BE OTHERWISE CONTRARY TO THE PUBLIC TRUST OR USES IN THE WATERS OR BOTTOM LAND.

SEC. 5B. AN APPLICATION FOR A LEASE OR AGREEMENT SHALL BE FILED WITH THE DEPARTMENT WITHIN 1 YEAR OF THE EFFECTIVE DATE OF THIS ACT FOR A PIER EXISTING AS OF SUCH EFFECTIVE DATE. AN APPLICATION

FOR A LEASE OR AGREEMENT SHALL BE FILED WITH THE DEPARTMENT PRIOR TO THE COMMENCEMENT OF CONSTRUCTION FOR ANY PIER TO BE CONSTRUCTED AFTER THE EFFECTIVE DATE OF THIS ACT, OR TO BE MODIFIED IN SUCH MANNER AS TO AFFECT OCCUPANCY OR USE OF THE WATERS OR BOTTOM LAND. BEFORE GRANTING A LEASE OR AGREEMENT THE DEPARTMENT SHALL FULLY CONSIDER THE OTHER LAWFUL PUBLIC USES WHICH ARE TO BE REASONABLY PROTECTED. A LEASE OR AGREEMENT SHALL BE GRANTED IF THE DEPARTMENT DETERMINES THAT THE PIER WILL IMPROVE THE USES OF THE WATERS WITHOUT SUBSTANTIAL IMPAIRMENT OR INJURY TO THE PUBLIC TRUST OR USES IN THE WATERS OR BOTTOM LAND. THE PIER SHALL BE CONSTRUCTED AND USED IN SUCH MANNER AS WILL NOT UNREASONABLY OBSTRUCT NAVIGATION, UNREASONABLY OBSTRUCT FREE MOVEMENT OF WATERS, CAUSE THE FORMATION OF LAND OVER THE BED OF THE LAKE, OR BE OTHERWISE DETRIMENTAL TO THE PUBLIC TRUST OR USES.

SEC. 5C. A LEASE OR AGREEMENT FOR A PIER SHALL PROVIDE AN ANNUAL RENTAL OR FEE BASED ON THE

AREA OF PUBLIC WATER SURFACE AND BOTTOM LAND OCCUPIED OR TO BE OCCUPIED BY THE FACILITY, AND SHALL CONTAIN SUCH OTHER TERMS AND CONDITIONS AS THE DEPARTMENT DEEMS JUST AND EQUITABLE. THE FILING FEE AND ANNUAL FEE OR RENTAL FOR LEASES OR AGREEMENTS ENTERED INTO WITH THE UNITED STATES, ANY POLITICAL SUBDIVISION OR ANY PUBLIC AUTHORITY, MAY BE WAIVED OR REDUCED IN VIEW OF THE CIRCUMSTANCES OR PUBLIC INTEREST INVOLVED. AN APPLICATION FOR A LEASE, AGREEMENT OR MODIFICATION THEREOF SHALL BE MADE ON FORMS AS PROVIDED IN SUBSECTION (A) OF SECTION 4, AND ACCOMPANIED BY A FEE OF $50.00. IF A LEASE OR AGREEMENT IS APPROVED BY THE DEPARTMENT THE FILING FEE SHALL BE CREDITED TO THE RENTAL OR FEE TO BE PAID. THE ANNUAL RENTAL OR FEE SHALL BE DETERMINED BY APPLYING TO THE WATER SURFACE AND BOTTOM LAND AREA USED OR OCCUPIED 1½% OF THE AVERAGE MARKET VALUE PER ACRE, NOT INCLUDING IMPROVEMENTS THEREON, OF UPLAND AREA ASSOCIATED WITH OR IN THE VICINITY OF THE FACILITY. IN DETERMINING THE APPRAISED VALUE,

DUE CONSIDERATION SHALL BE GIVEN TO THE COMBINED USES BEING MADE OR TO BE MADE OF THE UPLAND, THE WATER SURFACE AREA AND BOTTOM LAND. THE TOTAL ANNUAL RENTAL OR FEE SHALL BE NOT LESS THAN $50.00, NOR MORE THAN $150.00 PER ACRE OF WATER SURFACE AREA USED OR OCCUPIED. THE RENTAL OR FEE SHALL BE PAID ON THE BASIS OF THE CALENDAR YEAR OR ANY FRACTION THEREOF. THE RENTAL OR FEE FOR STRUCTURES EXISTING ON THE EFFECTIVE DATE OF THIS ACT SHALL COMMENCE 1 YEAR FROM THAT DATE. THE RENTAL OR FEE FOR STRUCTURES ERECTED AFTER THE EFFECTIVE DATE OF THIS ACT SHALL COMMENCE AS OF THE DATE CONSTRUCTION IS SUBSTANTIALLY COMPLETED.

Sec. 10. Any person who excavates or fills, or in any manner alters or , modifies, ~~any of the land subject to the provisions of this act without the approval of the department shall be~~ USES OR OCCUPIES GREAT LAKES WATER AREA OR BOTTOM LAND CONTRARY TO THE PROVISIONS OF THIS ACT IS guilty of a misdemeanor, and ~~upon conviction~~ shall be fined not more than $1,000.00 or imprisoned not more than 1 year, or both ~~such fine and imprisonment. Lands, the use of which are so changed~~ BOTTOM LANDS WHICH HAVE BEEN

FILLED SINCE THE EFFECTIVE DATE OF THIS ACT shall not be sold to any person convicted under this section at less than fair cash market value OF THE LAND AS FILLED.

SEC. 11. THE LEGISLATURE FINDS AND DECLARES THAT THE TITLE OF LITTORAL OR RIPARIAN OWNERS OF UPLAND ALONG THE GREAT LAKES EXTENDS TO THE WATER'S EDGE AND THAT WHEN THE WATERS RECEDE THE OWNER'S TITLE TO THE EXPOSED LAND IS EXCLUSIVE. THIS TITLE IS SUBJECT TO AND QUALIFIED BY AN EASEMENT FOR THE UNIMPEDED RETURN OF THE WATERS TO THE ORDINARY HIGH WATER MARK. ANY FILL OR PERMANENT STRUCTURE PLACED LAKEWARD OF THE ORDINARY HIGH WATER MARK EXCEPT AS PROVIDED IN THIS ACT IS UNLAWFUL AND SUBJECT TO THE PROVISIONS OF THIS ACT.

SEC. 12. A RIPARIAN OWNER MAY DREDGE A CHANNEL IN THE BOTTOM LAND FRONTING HIS LAND, FOR THE PURPOSE OF PROVIDING REASONABLE ACCESS BY PRIVATE RECREATIONAL WATERCRAFT FROM SHORE OUT TO BOATABLE WATER, WITHOUT EXPRESS PERMIT IF THE MATERIAL IS DEPOSITED ON UPLAND ABOVE THE ORDINARY

HIGH WATER MARK. IF THE MATERIAL IS OF SANDY NATURE IT MAY BE DEPOSITED OR SPREAD IN THE WATERS UNDER THE PROVISIONS OF SUBSECTION (B) OF SECTION 13. A RIPARIAN OWNER, BEFORE DREDGING OR DISPOSING OF DREDGED SPOILS IN ANY OTHER MANNER SHALL APPLY TO THE DEPARTMENT FOR A PERMIT. THE DEPARTMENT SHALL ISSUE A PERMIT IF IT DETERMINES THAT THE PROPOSED WORK WILL IMPROVE THE USES OF THE WATERS WITHOUT SUBSTANTIAL IMPAIRMENT OR INJURY TO THE PUBLIC TRUST OR USES IN THE WATERS OR BOTTOM LANDS.

SEC. 13. (A) A RIPARIAN OWNER, BEFORE INSTALLING, EXTENDING OR MODIFYING LAKEWARD OF THE ORDINARY HIGH WATER MARK ANY GROIN, JETTY, PILING, DIKE OR OTHER STRUCTURE INTENDED TO PREVENT DAMAGE TO UPLAND, SHORE OR BOTTOM LAND BY CONTROLLING OR DIMINISHING THE ACTION OF WATER, WAVE, WIND OR ICE SHALL APPLY TO THE DEPARTMENT FOR A PERMIT. BEFORE ISSUANCE OF A PERMIT THE APPLICANT SHALL OBTAIN APPROVAL OF HIS PROPOSED STRUCTURE IN WRITING FROM THE STATE WATER RE-

SOURCES COMMISSION. THE DEPARTMENT SHALL ISSUE A PERMIT IF IT DETERMINES THAT THE PROPOSED STRUCTURE WOULD IMPROVE THE USES OF THE WATERS WITHOUT SUBSTANTIAL IMPAIRMENT OR INJURY TO THE PUBLIC TRUST OR USES IN THE WATERS OR BOTTOM LANDS OR TO ANY RIPARIAN PROPERTY OR BOTTOM LANDS BY CAUSING DEPOSITION OR EROSION, OR INTERRUPTION OF BENEFICIAL MOVEMENTS OF CURRENTS OR OF BOTTOM OR BEACH MATERIALS IN A MANNER DELETERIOUS TO UPLANDS, BEACHES OR BOTTOM LANDS.

(B) THE DEPARTMENT, AFTER AN APPLICANT OBTAINS APPROVAL OF THE STATE WATER RESOURCES COMMISSION, MAY ISSUE A PERMIT FOR THE PLACEMENT OF A LAYER OF MATERIALS ON BEACH OR BOTTOM LAND FOR PURPOSES OF REDUCING EROSION OF UPLAND OR IMPROVEMENT OF BEACH OR BOTTOM LAND FOR BOATING, BATHING OR SIMILAR RECREATIONAL USES.

SEC. 14. THE DEPARTMENT MAY UNDERTAKE PROJECTS FOR THE BENEFICIAL IMPROVEMENT, DEVELOPMENT AND MAINTENANCE OF THE GREAT LAKES WATERS AND BOTTOM LANDS FOR PURPOSES OF RECREATION, FISH-

ERIES AND WILDLIFE, GIVING DUE CONSIDERATION TO THE PUBLIC TRUST OR THE USES OF THE WATERS. THE DEPARTMENT MAY ALSO ISSUE A PERMIT TO, OR COOPERATE WITH, POLITICAL SUBDIVISIONS, STATE AND FEDERAL AGENCIES AND RIPARIAN OWNERS IN THE ESTABLISHMENT OF SUCH IMPROVEMENTS OR FACILITIES.

SEC. 15. ANY POLITICAL SUBDIVISION OR AGENCY OF THE STATE, BEFORE UNDERTAKING ANY WORK OF PUBLIC IMPROVEMENT IN OR OVER THE WATERS OF THE GREAT LAKES, SHALL CONSULT WITH THE DEPARTMENT TO ASSURE PROTECTION OF THE PUBLIC TRUST AND CONSIDERATION OF THE VARIOUS USES OF THE WATERS CONCERNED.

SEC. 16. THE DEPARTMENT SHALL TAKE SUCH ACTION IN RELATION TO FEDERAL PROJECTS IN AID OF NAVIGATION AND COMMERCE AS MAY BE NECESSARY OR APPROPRIATE TO PROTECT THE PUBLIC TRUST OR USES IN GREAT LAKES WATERS AND BOTTOM LANDS, AND OBTAIN SO FAR AS POSSIBLE SUCH PLANNING AND EXECUTION OF THOSE FEDERAL PROJECTS AS WILL PRESERVE AND ENHANCE THE USES OF THE WATERS.

SEC. 17. THIS ACT SHALL NOT BE CONSTRUED AS RE-

LIEVING ANY PERSON OF HIS RESPONSIBILITY TO OBTAIN SUCH OTHER PERMITS AS MAY BE REQUIRED BY LAW FOR THE USE, OCCUPANCY OR ALTERATION OF ANY GREAT LAKES WATERS OR BOTTOM LANDS.

SEC. 18. THIS ACT SHALL NOT BE CONSTRUED AS DEPRIVING RIPARIAN OR LITTORAL OWNERS OF THEIR RIPARIAN OR LITTORAL RIGHTS, NOR OF THEIR RECOURSE TO PROTECT SUCH RIGHTS THROUGH THE COURTS.

SEC. 19. THIS ACT SHALL NOT BE CONSTRUED AS AFFECTING THE APPLICATION OF ANY MUNICIPAL ZONING, HOUSING OR BUILDING ORDINANCE TO ANY PROPERTY COVERED BY THIS ACT, OR AS AFFECTING ANY EXISTING LAW, STATUTE OR ORDINANCE CONCERNING NUISANCES.

APPENDIX 13:

Department of Conservation
Memorandum to Legislators March 9, 1962.

13

4/62

MEMORANDUM TO THE CHAIRMEN AND
MEMBERS OF HOUSE COMMITTEES ON JUDICIARY AND MARINE AFFAIRS
ON THE TERM "ORDINARY HIGH WATER MARK"

In the course of the March 8, 1962 public hearings on H. B. 547 and 548 before the Judiciary Committee and H. B. 696 and 697 before the Marine Affairs Committee, question was raised by certain opponents of the bills concerning the term "ordinary high water mark".

We believe this term, as defined in these bills, has firm legal precedent and applies a highly practicable concept.

The outstanding Michigan Supreme Court case dealing with division of rights between the riparian owner and the public trust in waters was Hilt v. Weber, 252 Mich 198. In this case, the court referred repeatedly to the water's edge as being the property line on Lake ~~Huron~~ MICHIGAN. In one instance, the court stated (p.219): " . . . the title of the riparian owner follows the shore line under what has been graphically called 'a movable freehold.'"

Under the circumstances of this case, as in others reaching the Supreme Court, the court did not find it necessary to take cognizance of the fact that the level of the waters of Lake Huron, as with practically every lake or stream of the state, rise or fall to some degree, from time to time. It did, however, make the following statement, quoting approvingly from cases in other jurisdictions:

> "The riparian owner has the exclusive use of the bank and shore, and may erect bathing houses and structures thereon for his business or pleasure (45 C.J. p.505; 22 L. R. A. [N.S.] 345; Town of Orange v. Resnick, supra); although it also has been held that he cannot extend structures into the space between low and high-water mark, without consent of the State (Thiesen v. Railway Co., 75 Fla. 28 [78 South. 491; L. R. A. 1918E, 718]). And it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the State.[*] Doemel v. Jantz, supra." 180 Wis. 225.

---

[*] The Michigan court gave slight misinterpretation to the Doemel v. Jantz case when it said that "title is in the State" below the high water mark. As seen in the following quote from this case, the Wisconsin court actually said that title is in the riparian to the water's edge, and that the state holds an easement to the high water mark.

In this case, then, the Michigan court recognized two significant lines: High water mark and low water mark. It recognized the special status of the area between these two lines, which is the area of "movable freehold." It cited the highly significant Wisconsin case of Doemel v. Jantz, which clearly defined the rights of the riparian and the public trust in this area, as follows: " . . . during periods of high water the riparian ownership represents a qualified title, subject to an easement, while during periods of low water it ripens into an absolute ownership against all the world, with the exception of the public rights of navigation, and with these rights no interference will be tolerated where the acts affect or have a tendency to affect the public rights for navigation purposes." The Michigan Attorney General applied this case in rendering an official opinion (O-3984, Oct 25, 1945), stating that the Wisconsin court " . . . found a fee title in the owner of the upland to the water's edge, good against all the world, but subject to the return of the water, and qualified upon that condition."

Many courts over the country have found it necessary to find the dividing line between the title of a riparian owner to his upland, and the interest or trust of the public in the adjoining water area. In the nature of things, there must be such a line. The Michigan "movable freehold" doctrine, with owner's title good to the water's edge wherever it may be at any time, is well settled law. The only clarification needed has to do with that narrow strip of territory over which the water must be "free to move" shoreward or lakeward (or streamward). In speaking of this narrow strip of territory "between the water's edge at high water mark and low-water mark", Justice Potter, in a minority opinion concurring with the majority in the Hilt v Weber case, said that any trust of the State in this strip is "subject to the [riparian] right of access, to wharf and dock out, the right of bathing, the right to use, for domestic and agricultural purposes, the water of the lake, and subject to all other rights of the riparian proprietor. The State has no power to divest itself of this trust. It may not sell and convey

title to this land, interfere with the riparian proprietor's rights, or the beneficial use thereof by such riparian proprietor . . . without condemnation of the rights of the riparian proprietor." It follows also that there are reciprocal limitations as to what the riparian proprietor may do within this "movable freehold" zone below the high water mark. Except as the state may permit, he cannot limit the state's public trust and title interest by preventing readvance of the waters and "movement of the freehold" from a low level, nor may he interfere with the public's right to use the surface of the waters when they have readvanced toward the high water mark.

Use of the adjective "ordinary" before the term "high water mark" is for the purpose of making it abundantly clear that the term is not intended to imply any extreme high water mark, as for instance the extreme annual high of a river under flood conditions. Rather, the intended mark is the one which is so ordinary that it leaves its mark on the soil in nature for all to see. Reasonable men, inspecting riparian property upon the ground, can locate and agree upon such a line without difficulty, since it is a visible and physical thing. Only under extreme cases of flat marshland may there be some difficulty, and here any problem can be solved by making reference to adjacent higher lying shores and by inferring levels. Any such difficulties must and can be overcome, for when an issue arises as between riparian and public trust interests, a dividing line must be found, and respective rights must be established.

Objectors may raise the point that the Hilt v. Weber case applies to Lake Huron, where the state holds the bottom lands, and that the concept of the ordinary high water mark should not apply in inland lakes and streams where bottom land is held to rest with the riparian owner.

In answer to this, it is only necessary to point out that the state has not and cannot completely abandon its trust in the waters. It is settled law that

> "While riparian owners own the fee to the bed of an inland navigable lake, their ownership is subordinate to the right of the public to fre-

and unobstructed use of the waters for navigation and other uses inherently belonging to the people . . ." Headnote No. 2, Morgan v. Kloss, 244 Mich. 192.

"Since both the United States and the State of Michigan held the waters of navigable rivers and lakes and the soil under them in trust for the people, a trust of which neither could divest itself, one acquiring title to the bed of a navigable stream holds it subject to a perpetual trust to secure to the people their rights of navigation, fishing, and fowling." Headnote 8, Collins v. Gerhardt, 237 Mich 38.

Since then, the ownership of bottomland is subordinate to the public trust in the waters, a line must be found separating this trust from the unaffected upland ownership of the riparian. The ordinary high water mark serves as this line on inland waters as well as Great Lakes.

Justice Fellows in a concurring opinion in the Michigan case of Collins v. Gerhardt (237 Mich 38, 1926) involving an inland water said: "And in State v. Venice of America Land Co., 160 Mich. 680, this court followed the Wisconsin court and cited with approval the case of Illinois Steel Co. v. Bilot, 109 Wis 418, 425 (85 N. W. 355m 85 N. W. 402, 83 Am. St. Rep. 905), in which case it was held:

'The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high water mark, within the boundaries of the State, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers . . . '".

The attached memorandum dated December 8, 1960, on "Legal Background for the phrase 'ordinary high water mark'" contains further clarifications of some importance.

Department of Conservation
March 9, 1962

APPENDIX 14

Powers, "Unveiling the Truth Behind Michigan's Shoreline Controversy"

GLASS V GOECKEL CONTROVERSY CONTINUES

Unveiling the truth behind the shoreline controversy

By David L. Powers and Patrick McCollough

"The waterfront boundary line of property abutting the Great Lakes is . . . the naturally occurring water's edge . . ." Michigan Land Title Standards, 5th Edition, Standard 24.6.

In recent articles, without acknowledging the foregoing opinion of the Michigan Bar's Land Title Standards Committee, two attorneys assert that this conclusion of the Committee is wrong. Instead, they proffered their opinions about the meaning of an amorphous phrase: "the Public Trust Doctrine." Claiming an interest merely to have "his children to have the same experience" as he did walking the beach, Patrick Levine Rose asserts that "the Public Trust Doctrine protects the public's access to the Great Lakes beaches," including dry beaches below the ordinary high water mark. Subsequently, Chris Shafer, who as a former head of the MDNR Great Lakes Shoreland Section conceded that "there are few more ardent defenders . . . of the public trust doctrine in Michigan," severely criticized Rose's conclusions. But both writers agreed on a new and novel theory suggested by the Court of Appeals without credible citation of authority in *Glass v Goeckel*, 262 Mich App 29 (2004): that by virtue of the Public Trust Doctrine, there exists a "dual title" to Great Lakes shorelands below the ordinary high water mark.1 Yet neither Rose, Shafer, nor the Court of Appeals cite a single case from any jurisdiction which specifically so holds. Each of them misrepresents the decision in *Hilt v Weber*, 252 Mich 198 (1930), which held that riparians own to the water's edge.2 Indeed, contrary to the assertions of Rose and Shafer, the dissent in *Hilt* lamented that the decision "constitutes the Michigan shoreline of 1,624 miles private property, and thus destroys for all time the trust vested in the state for the use and benefit of its citizens." *Hilt* at 231. And neither Rose nor Shafer mention the 1994 Michigan Supreme Court decision of *Peterman v DNR*, 446 Mich 177 (1994), in which our state's highest court held that the dry beach below the ordinary high water mark belonged to the riparian owner, who was entitled to compensation for its destruction by Mr. Shafer's former agency.3 All of these authorities and more are set out in Save Our Shoreline's Amicus brief in *Glass v Goeckel*, a copy of which can be found at <www.saveourshoreline.org>.

Since the issue of shoreline ownership in Michigan was firmly resolved in Michigan in 1930, why aren't these important authorities raised by these writers?

The truth behind Michigan's current Great Lakes shoreline controversy can be traced back to the 1960's and 1970's, when a new environmental protection movement resulted in the passage of environmental laws. In 1968, Michigan's legislature amended the decades-old Submerged Lands Act to define the so-called "ordinary high water mark" at a point near record high water levels, but the legislature was careful to exclude from the definition "rights acquired by accretions occurring through natural means or reliction." In this way, the legislature carefully excluded riparian property as defined by *Hilt v Weber*. MCL 324.32501. In the 1970's, Congress passed the Clean Water Act and the Coastal Zone Management Act ("CMZA"), both of which, bureaucrats argue, were aimed at placing governmental control over private shoreline property. And from this environmental "big bang," a new entity was formed in 1970: the Coastal States Organization ("CSO"). An organization of representatives appointed by the governors of the now 35 member states, the CSO's purpose is "to shape and advance a national agenda that enhances the protection of coastal and ocean resources." See job description at <http://www.environetwork.com/jobs/detail.cfm?id=3965355>. The State of Connecticut, in 1990, working with CSO, obtained a grant under the CMZA and published a "National Public Trust Study: Putting the Public Trust Doctrine to Work." Among the seven person steering committee for that work was Mr. Chris Shafer. That study outlined how bureaucrats might better utilize the "public trust doctrine" as a legal theory to increase government control over shoreland property, to the prejudice of private individuals that thought they owned the property. While private owners would naturally suffer as a result of this sought-after expansion of public rights, the authors argued that these public rights (somehow amorphously) existed all along, and states cannot be prejudiced merely because they have long slept on those rights.

This work helped to "awaken" bureaucrats and environmentalists alike, who found a new tool—the legal theory of the public trust doctrine—in their arsenal to control private shoreland property. The result soon became evident in Ohio. There, like Michigan, the DNR had long had the power to lease submerged lands to private owners for beneficial uses. In the 1990's, the Ohio DNR increasingly found a new use for this power: requiring shoreline owners with any type of shoreline structure to "lease" the shoreline from the state, with requirements of payment and insurance coverage, even if that structure sat on dry land. Despite contrary case law, a 1917 statute, and a 1993 attorney general opinion holding the riparian owned "above the natural shoreline up to the ordinary high water mark," ODNR nevertheless asserted state ownership up to the ordinary high water mark. This new offensive led to the formation in the late 1990's of the Ohio Lakefront Group, an organization of Lake Erie riparian owners united to oppose this new bureaucratic land grab. After an attempt at a statutory remedy in 2003 failed, the group filed suit against the ODNR to quiet title to their shoreline property in the spring of 2004. ODNR is currently attempting dismissal of that suit on procedural grounds.

Relying on the foundation laid by one of their own—Chris Shafer—Michigan bureaucrats took an approach different from Ohio in "putting the public trust doctrine to work." But like Ohio, the Michigan bureaucrats' approach centered on the assertion that the state, and not the riparian, owned from the water's edge up to the ordinary high water mark. With water levels falling below normal for the first year since 1996, the MDEQ in December of 1999 promptly formulated a plan to rely on state "ownership alone" to preclude beach grooming on dry beaches above the water's edge. Next came MDEQ letters to owners of land "adjacent to" the alleged "state land," telling them their work on these "state bottomlands" was "illegal." These assertions came notwithstanding the *Peterman* decision in 1994 holding quite the opposite, as set forth above. Like what occurred in Ohio, this approach gave birth in 2001 to Save Our Shoreline (SOS), an organization of over 2,000 riparian households committed to fighting the bureaucratic appropriation of their property without just compensation. SOS obtained some legislative relief in 2003 with the beach maintenance bill, which curtailed the MDEQ's earlier unlawful effort to control private shorelands. The MDEQ nevertheless continues its assertion of ownership of Michigan's beaches, although by recent press accounts, the agency and Mr. Shafer appear willing to accept title in the State without its most important element: the right of exclusive use and trespass control. After all, a "title," however clouded or partial it may be, is still more than what the State had prior to *Glass v Goeckel*.

As we can see from what has transpired in Ohio and Michigan, state agencies are so excited about putting the public trust doctrine to work that things like Attorney General opinions and Supreme Court decisions issued as recently as 1993 and 1994, respectively, don't phase them.4 Armed with seemingly unending state money and the substantial power of their office, these agencies and their directors consistently ignore long established state law and tell the media and anyone that will listen that they alone control the beaches of Ohio and Michigan. Since this debate began, media sources have printed the MDEQ's version of the law without question. Their public relations machine has some state legislators and local officials convinced that the state's ownership of Michigan's beaches is firmly established in the law and is beyond question.

As a result of these efforts, private property owners have had their property effectively confiscated without just compensation. In addition, the public must be hopelessly confused. In keeping with long established state law, warranty deeds, such as those held by the authors, grant "to the water's edge," consistent not with the MDEQ's assertions, but with *Hilt v Weber*, supra. Title companies have insured those deeds. The applicable Land Title Standard declares ownership to the water's edge. Michigan real estate lawyers, unaware of the MDEQ's new application of the public trust doctrine to dry beaches, or perhaps disregarding it as unauthoritative, *advise* of ownership to the water's edge. The MDEQ has almost single-handedly clouded title to the 76% of Michigan's 3,288 miles of shoreline that is privately owned, and has wrested control of the shoreline property owned by units of local government. Worse yet, property owners have little recourse to this assault. They can either comply with MDEQ demands over their property or face threatened litigation and the threat of jail. An action for declaratory relief will likely be met with procedural objections. In Ohio, the ODNR responded to the declaratory judgment action filed by shoreline property owners, not with a brief setting forth the alleged basis of state shoreline ownership, but with a motion to dismiss on procedural grounds, including failure to exhaust administrative remedies, lack of justicable controversy, and the like. We anticipate the MDEQ will attempt the same tactics if confronted with a similar suit from shoreline owners in Michigan. The MDEQ has placed shoreline owners in a legal straightjacket. The *Glass v Goeckel* case presents Michigan's Supreme Court with an opportunity to remedy for private property owners the wrong done by the MDEQ, and serves principles of public economy.

Patrick McCollough

David Powers

Our Constitution set up three co-equal branches of government with a system of checks and balances. Students of the *Hilt v Weber* decision know that the decision was a monumental one intended to put to rest in Michigan the issue of shoreline ownership, firmly planting it at the water's edge. The state in 1930 had a vested interest in clearly defining shoreline ownership to promote the development of Michigan's shores, and clarifying riparian rights was good public policy. This Michigan Supreme Court should not sit idly by while a single department of another branch seeks to unravel what the court ruled definitively upon 70 years ago for the benefit of the entire state.

There is much at stake in this debate. People have saved and worked for over a century to invest in and develop Michigan's Great Lakes. A basic constitutional principle—the sanctity of private property—is at issue. Economic progress depends on this important ideal, and our highest court's decision to either clarify the law or let confusion reign will send an important message to the business community, as will the decision on whether to protect long established property rights in this state. Michigan law on shoreline ownership to the water's edge has been crystal clear since at least 1930. Our court should act now to keep it that way for the benefit of all of Michigan.

Footnotes

1 The *Glass* court stated that the riparian has exclusive use and control, but "because it once again may become submerged, title remains with the state pursuant to the public trust doctrine," citing *Hilt* at 226. The *Hilt* decision simply does not say that at page 226, or anywhere else in its opinion, and this citation by the court without further analysis is incredible.

2 The *Hilt* court expressly held that "*Kavanaugh v Rabior* and *Kavanaugh v Baird*, supra, are overruled." *Hilt* at 227. The court instead followed the law prior to those cases, explaining: "it was a settled rule of property that the purchaser of meandered public land on the

Shoreline Controversy, continued on page 6

Shoreline controversy

Continued from page 7

Great Lakes took to the water's edge." *Id.* at 213. But if "private property is *permanently* encroached upon by open waters, the proprietor loses his title and it passes to the state as part of the bed, so that a change of condition during private ownership works a change of title (emphasis added)." *Id.* at 216. This is contrary to the *Glass* decision, which gave title to the state even where the property was *not* permanently covered, but simply "once again may become submerged." *Glass* at 41, 42. Buttressing its opinion, the *Hilt* court noted that the riparian's "general right of access . . . attaches to the whole and every part of *his* shoreline and no one has the right to fetter or impair his enjoyment of *his* property by compelling him to go upon it only at certain points (emphasis added)." *Id.* at 226.

3 "At issue [in *Peterman*] is the erosion of *Plaintiff's* beachfront property (emphasis added)." *Peterman* at 188. The court consistently referred to the "beach below the high water mark" as "plaintiff's beach." Id. at 200, 201. The Michigan Supreme Court in *Peterman* found that the riparian was entitled to compensation from the MDNR for causing the destruction of his beach when constructing a boat launch next door.

4 "The land that lies above the natural shoreline of Lake Erie belongs to the littoral owner," who benefits from a grant of land "above the natural shoreline up to the ordinary high water mark." Ohio Attorney General Opinion No. 93-025 (1993). This opinion is consistent with *Hilt* and *Peterman*, supra.

David L. Powers is a Bay City real estate attorney, Saginaw Bay property owner, and Vice President of Save Our Shoreline. Mr. Powers authored Save Our Shoreline's amicus briefs in Glass v Goeckel before the Court of Appeals and the Supreme Court. Those briefs can be viewed at <http://www.saveourshoreline.org>.

Patrick H. McCollough is a lawyer and government relations counselor in the Lansing firm of Kelley Cawthorne. He is a former Michigan State Senator, candidate for governor, member of President Carter's administration and a 4th generation property owner of Great Lakes shoreline.

APPENDIX 15:

1963 Engineering Survey Authorization

15

RECEIVED
MAY - 9 1962
ENGR. & ARCH.
Conservation Dept.

MICHIGAN DEPARTMENT OF CONSERVATION

INTEROFFICE COMMUNICATION

May 9, 1962

Chief
Arch.
Engineering
Lake Level
Survey
Engineer
Con. & Adm.
Adm. Ass't
All Personnel

TO Mr. E. J. Hanes, In Charge, Engineering & Architecture

FROM George Taack, Lands Division

SUBJECT Location of ordinary Government meander lines and the natural ordinary high water mark on Great Lakes.

File

In recent litigation involving the bottomlands of the Great Lakes, it has become necessary for us to locate the natural ordinary high water mark along the shores of the Great Lakes, especially on Lake St. Clair, in order to establish the upper limits of the state's trust interest. It is requested that we obtain the services of Mr. Lee Paddison and his assistants to obtain data on the location of the natural ordinary high water mark on all of the Great Lakes but with current emphasis on Lakes Huron, St. Clair and Erie.

Mr. Paddison is already familiar with the definition of the O.H.W.M. and should have little difficulty in gathering sufficient information so as to support the legal term which is now adopted in the rules and regulations of the Great Lakes Submerged Lands Act.

It is requested that Mr. Paddison prepare whatever maps are necessary to show the location of the original Government meander lines situated along the shore of Lake Erie, adjacent to both G.L.O. patents and P.C. patents in the following areas:

Wayne County	T5S, R10E, Sections 12, 13, 24
Monroe County	T6S, R 9 & 10 E., Sections 25, 28, 29 and 30.
" "	T7S, R 9 E, P.Cs.
" "	T8S, R 8 E, Sections 2, 11, 14.

It is not necessary that any first order survey be prepared of these meander lines other than possibly scale checking on the ground certain distances contained from aerial photographs or other maps. It would be desirable to place this information on either enlarged aerial photographs or U. S. quadrangle sheets. Paddison has previously prepared similar maps for Lake St. Clair

There is no time schedule for this project; however, it would be well to keep it in mind whenever it is convenient to make field investigations and prepare the necessary maps in the office. Such information will be of substantial assistance in presenting the public interests to the courts and probably used as informative material for legislative committees.

George Taack

GT:kw

Lee: Perhaps [illegible] [illegible]
Please [illegible] WAC [illegible]

Cons. 1603
Rev. 5/60

MICHIGAN DEPARTMENT OF CONSERVATION
ENGINEERING AND ARCHITECTURE

WORK ASSIGNMENT ORDER

Job No. 8-49-S
Division Lands
File No.

Project Name: Great Lakes Ordinary High Water Lines

Location: State of Michigan (CITY, VILLAGE, DEPARTMENT SITE) County:

Request received from: George Kunde — Telephone, Letter, Person (CHECK ONE): X

Request received by: H. J. Hanes and W. L. Paddigan (ENG. & ARCH. REPRESENTATIVE) Date: May 9, 1962

SCOPE OR DESCRIPTION OF PROJECT: Determine the ordinary high water line for each of the Great Lakes, except Lake Ontario, according to "The Rules and Regulations for the Administration of the Great Lakes Submerged Lands Act." Determine the mean sea level datum elevation. These water lines at several locations for each of the Great Lakes. Substantial proof of the findings should be acquired for accession to Circuit Court trials. This work and findings should be exhibited in the form of a report with photographs and notes.

SERVICE REQUIRED

	ARCHITECTURAL		ENGINEERING	
	REQ'D	ASSIGN TO	REQ'D	ASSIGN TO
Preliminary: Investigation, survey, sketches, plans (Check Required).....			X	
Survey.....				
Work Order.....			X	
Final Plans.....				
Estimates and/or Requisitions.....				
Specifications and/or Contract Documents.....			X	
Report.....				
Construction Supervision.....				
_____				

Proposed Method of Doing Work: _____ (CONTRACT, FORCE ACCT., F.A. & INMATES, OR OTHER)

Fiscal: Program Year _____ Appropriation Amount _____
Appropriation Year _____

Assignment Approved: L. A. Rawsey J. Hanes (HEAD, ENG. & ARCH.) Date: June 5, 1962

COPIES TO: ARCHITECTURAL 3
ENGINEERING 1
LAKE LEVEL 1
SURVEY 1
FILES 1

APPENDIX 16:

Transcript of proposed 1963 Legislation

16

TRANSCRIPT OF PART OF THE PROPOSED LEGISLATION
FOR 1963

(B) "ORDINARY HIGH WATER MARK MEANS THE DIVIDING LINE BETWEEN THE UPLAND AND THE LAKE BED WHICH SEPARATES THE PUBLIC TRUST AREA FROM THE UPLAND; THIS LINE IS NOT INTENDED TO INTERFERE WITH THE INHERENT RIPARIAN RIGHTS BUT TO FIX THE LAKEWARD LIMITS OF PERMANENT UPLAND INSTALLATIONS; THE ELEVATION OF THE GROUND AT THE LINE OF THE ORDINARY HIGH WATER MARK ESTABLISHED FOR EACH OF THE GREAT LAKES SHALL BE REFERENCED TO THE LOW WATER DATUM AS DETERMINED BY THE U.S. LAKE SURVEY CORPS OF ENGINEERS; THE ORDINARY HIGH WATER MARK FOR LAKE SUPERIOR SHALL BE 1.5 FEET ABOVE THE LOW WATER DATUM ESTABLISHED FOR LAKE SUPERIOR; THE ORDINARY HIGH WATER MARK FOR LAKE MICHIGAN-HURON SHALL BE 3.0 FEET ABOVE THE LOW WATER DATUM ESTABLISHED FOR LAKE MICHIGAN AND LAKE HURON; THE ORDINARY HIGH WATER MARK FOR LAKE ST. CLAIR SHALL BE 3.0 FEET ABOVE THE LOW WATER DATUM ESTABLISHED FOR LAKE ST. CLAIR; THE ORDINARY HIGH WATER MARK FOR LAKE ERIE SHALL BE 3.0 FEET ABOVE THE LOW WATER DATUM ESTABLISHED FOR LAKE ERIE; ANY STRUCTURES OR FILL LAKEWARD OF THE ORDINARY HIGH WATER MARK ARE SUBJECT TO THE P.O-VISIONS OF THIS ACT.

(7)

SECTIONS 12 THROUGH 16 -- copy from inland waters act.

SECTION 17 --

THE LEGISLATURE HEREBY FINDS AND DECLARES THAT THE ORDINARY HIGH WATER MARK AS HEREIN DEFINED IS LOCATED ON LAKE SUPERIOR AT _____, ON LAKES MICHIGAN AND HURON AT _____, ON LAKE ST. CLAIR AT _____ ,AND ON LAKE ERIE AT _____, MEAN SEA LEVEL DATUM (etc.etc. --- get proper wording).

SECTION 18. NOTHING IN THIS ACT SHALL BE CONSTRUED AS DEPRIVING A RIPARIAN OWNER OF RIGHTS ASSOCIATED WITH HIS OWNERSHIP OF WATER FRONTAGE AND THE REASONABLE EXERCISE AND PEACABLE ENJOYMENT OF THOSE RIGHTS, NOR SHALL ANY CONDITION OF OWNERSHIP OF RIPARIAN LAND BE CONSTRUED AS INVALIDATING THE PUBLIC TRUST. A RIPARIAN OWNER CONTROLS ANY TEMPORARILY OR PERIODICALLY EXPOSED BOTTOM LAND TO THE WATER'S EDGE, WHEREVER IT MAY BE AT ANY TIME, AND HOLDS SUCH LAND SECURE AGAINST TRESPASS IN THE SAME MANNER AS HIS UPLAND, SUBJECT TO THE PUBLIC TRUST AND EASEMENT FOR RETURN OF THE WATER TO THE ORDINARY HIGH WATER MARK. ~~NOTHING IN THIS ACT SHALL BE CONSTRUED AS INVALIDATING ANY PROPERTY RIGHT ASSOCIATED WITH LANDS WHICH WERE, UNDER ACT OF CONGRESS DATED SEPTEMBER 28, 1850, CLASSIFIED AS SWAMP LANDS AND GRANTED TO THE STATE, WHETHER OR NOT SUBSEQUENTLY PATENTED BY THE STATE.~~ Strike Sec. V

THIS IS ANOTHER UNDATED PROPOSED LEGISLATION WHICH AMICI FOUND IN THE MDEQ FILE.

APPENDIX 17:

November, 1963 Memorandum of Attorney General

Original to Shumate

INTER-OFFICE COMMUNICATION

OFFICE OF THE
ATTORNEY GENERAL

Nov. 26, 1963

TO: George Taack, Lands Division, Dept. of Conservation

FROM: Jerome Naslowski, Assistant Attorney General

JN

The attached notes on submerged lands with reference to water marks is transmitted to you for your information. This is a preliminary memorandum. I would like to secure your reaction to it.

JM:v
att.

Submerged Lands - Waters edge as delineating ownership.

Each State generally has the authority to establish its rules of property at times expedient in respect to ownership of lands under the navigable waters of the State. The question of what constitutes the boundary for the private and public lands has been the source of considerable litigation around the country. In various States different water marks have been used to separate such ownership. Some of the marks found are as follows:

1. High water line - ordinarily synonymous with the high water mark.

2. High water mark - the term has been defined variously. Among other definitions is one indicating that it is the line to which high water ordinarily reaches or the line which the water impresses on the soil as a limit of its dominion. The term has been held not to mean the line reached by water in unusual floods.

3. Low water mark - While the term has been held to mean the extreme low water mark or the point which the water recedes at its lowest stage, it has also been held to mean the contrary or low water mark.

4. Ordinary high water mark - It is the point on the bed or shore where due to the presence and action of the water it continues to leave a distinct mark. The term connotes the usual and common or ordinary stage of a river. When the stage of waters are not increased by land or freshets or by drought or other factors.

In defining the division line the Courts have considered other terms. These are found to be defined as follows:

1. Shore at common low - the shore is the area between the ordinary high water mark and low water mark, the land over which the daily tides ebb and flow. Under civil law the shore extends as far as the highest waves reach in the winds. The shore has been used as synonymous with the bed.

2. Shore lands - have been defined by statute as lands bordering on shores of the navigable lakes and rivers below the ordinary high water mark. It is generally held to include all lands lying between the boundary line of the upland and low water.

3. Shoreline of navigable waters sometimes defined as to the edge of the water to the ordinary high but under the civil law it is the line marked by the highest tide.

Title to the shore of navigable waters is in the sovereign except as far as private rights in it have been acquired by express grant. At common law in England the title of all land covered by navigable waters was held by the government in trust for the people of the realm. Such ownership was passed to the 13 states upon their independence. Subsequently, all other states which were thereafter formed acquired similar rights.

It has been held that each State has authority to establish and decide such rules of property as it may deem feasible or expedient with respect to the ownership of the lands which formed the beds and banks of navigable waters within its borders. Such rules and regulations, of course, are subject to the paramount authority of Congress to control navigation. Thus, in effect, the ownerships of these lands would be determined by the State in which they are located. Some States have asserted that ownership of land below the ordinary high water mark shall be governed by laws of the State as the legislature may enact.[3] It has been held that the riparian owner may have title to low water mark.[4]

It has also been held that the State title runs to the ordinary high water mark.[5]

Riparian owner on one of the Great Lakes does not own title to lands under the waters of the lakes. It has been held with respect to private ownership that the title to lands under waters stands to the line of water, stands when unaffected by disturbing causes.[6]

In Michigan it has been held that one owning property abutting on the Great Lakes has title both to the meander line and to the water's edge.[7]

In New York a person abutting on one of the Great Lakes it has been held to hold title to the high water mark. People v. Jones, 20 NE 577. It has also been held that such owner has title in fee to the low water mark. Ransom v. Shaeffer, 274 NYS 570, modified on other grounds 279 NYS 720.

3 Hillebrand v. Knapp, 274 NW 821, 112 ALR 1104
4 Minneapolis S.T.P. & S.S.M. Ry. Co. v. Pike Rapids Power Co., 99 Fed 2d cert. den. 305 US 660, r.h. den. 306 US 667, cert. den. 306 US 640
5 Seibert v. Con. Comm. 159 So. 375; Wenlle v. Easthampton, 99 So 637
6 Diedrich v. Northwestern U.R. Co. 24 Wis. 248
7 Staub v. Tripp, 253 Mich 633; Hilt v. Weber, 252 Mich 238

With respect to navigable lakes other than the Great Lakes it has been held that a riparian proprietor as such does not own the bed of the lake. U.S. v. Ladley, 42 Fed 2d 474. Or that he owns only to the ordinary high water mark. Schmidt v. Marschel, 2 NW 2d 121. But it has also been held that land under the lake shores belongs to the riparian proprietors. Beuman v. Barendregt, 261 Mich 67. To the middle thereof. Webber v. Pere Marquette Boom Co., 62 Mich 626. Also some authorities hold that a riparian proprietor owns to the low water mark. U.S. v. Edlredge, 33 Fed. Supp. 337, But that his title to the strip between high water and low water mark is modified. State v. Deisch, 162 NW 365; Anderson v. Ray, 156 NW 591.

The bed of a river has been held to extend to the high water mark of the stream. Armstrong v. Pincus, 158 P. 662 . Or the land between the ordinary and usual high water mark and the low water mark. Barr v. Spalding, 46 Fed. 2d 798. On the other hand the bed of the river has been held to end at the low water mark. Eastman v. St. Anthony Falls Water-Power Co., 44 NW 882. It has further been held that it includes the soil. Ferry Pass Inspectors etc. Assoc. v. White River Inspectors etc. Assoc., 48 So. 643.

It has also been held that it does not include the shore. State v. Standard Oil Company, 118 So. 167.

The line of separation in Michigan on rivers and streams is not important as far as determining ownership is concerned but it is important in determining the extent of the public trust ownership in the waters of the State. It is indicated that the State ownership extends to various marks. It is suggested that in Michigan that the ordinary high used as the separation line is determining the extent of the public trust on inland waters and also the extent of the State ownership on the Great Lakes.

APPENDIX 18:

1964 Memorandum of Department of Conservation re elevations

THE ORDINARY HIGH WATER CONTOUR ON MICHIGAN'S GREAT LAKES

The physical features and the structural materials which make up Michigan's 3200 miles of Great Lakes shorelines are varied and assorted. The flat marshy areas of Lake Erie, the cobbled agriculture land along Lake Huron, the sand dune escarpments of Lake Michigan and the sheer rock walls of Lake Superior present vast differences in shoreline features. The areas of transition between these extreme features delineate shore conditions varying according to the content of the gacial drift from which they have been formed. The windward shores are subjected to greater forces from the elements than the leeward shores and have different physical features.

The variations in the water levels along with the errosive action of the wind, waves and ice, have molded and formed the Great Lakes shorelines as we see them today. The features and markings of the various water level stages are apparent on natural shorelines not subject to the erasing action of the wind blown sand and the scouring ice. Errosive rock strata mark ~~and~~ record different water levels on Lake Superior shores and Lake Huron in the Thumb area. Permanent vegetation growth also mark the limits of the higher stages altho these elevations may vary according to the type of soil and the windward conditions.

For the last 104 years reliable stage records on M.S.L.D. have been maintained on each of the Great Lakes. These records indicate that several feet variations exist between the extreme high and low stages. Although these extremes may be of relative short duration, they do affect the man made shore installations and the extent of the riparian upland. The extent of the useable upland in Monroe County on Lake Erie and around Saginaw Bay on Lake Huron vary considerably with each foot of vertical fluctuation of the water levels. This is in contrast to the vertical rock walls existing along some parts of Lake Superior shore where the vertical fluctuation in water levels have very little or no effect on the upland area.

Michigan's Great Lakes and its many miles of shore are very attractive to commercial and recreational interests. Uplands along the waterfronts, especially in the Detroit Metropolitan area, have become very desirable and valuable for marinas and

summer homes. Many of these developments were made during the low water stage and have taken advantage of exposed lake bottom area and adjacent shallow water to fill and create land. These encroachments on the lake bottom or public trust area makes it important to decide where the bottom lands end and the upland begins. How far lakeward may a riparian make permanent installations and how may this upland boundary be located are questions of great importance.

Michigan Courts have ruled that a riparian on the Great Lakes owns to the "ordinary high water mark". The courts also define or describe in general terms where the O.H.W. line is located. This legal definition may be applicable along certain reaches of the shoreline but on many places where extreme conditions prevail, such as sand dunes or vertical rock walls, it is difficult to apply and locate an ordinary high water contour. It is highly desirable for equitable purposes, to determine an ordinary high water contour on M.S.L.D. for each of the Great Lakes which comes within the framework of the legal definition. Each of the lakes would then have a locateable contour which would limit the extent of permanent riparian development.

The following definition of the ordinary high water line is in the rules and regulations for the administration of the Great Lakes Submerged Lands Act:

> "Ordinary high water line" shall refer to that natural line between the upland and the lake bottom land which persists through periodic changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character from the upland. This character of the soil, surface shape, or vegetation may be somewhat altered during exposure at low stages in the fluctuations of the water levels, but will be re-established with the return of high stages. When the soil, vegetation, or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occured had such alteration not taken place.

To substantiate the above legal definition and locate a contour which best fits all of its phases it was thought necessary to make observations on the various types

of shorelines on each of the Great Lakes. Many miles of shoreline were observed on each of the Great Lakes and representative locations were selected. Beach profiles were taken on I.G.L.D. and an ordinary high water contour selected and a photograph taken. From this impirical data the following ordinary high water line was determined for each of the Great Lakes on I.G.L.D.

Lake Superior	601.5
Lake Michigan-Huron	579.8
Lake St.Clair	574.7
Lake Erie	571.6

APPENDIX 19:

1965 PA 293

Local registrars; records, evidence.

All records of local registrars of counties, cities and villages authorized under this act, or certified copies thereof, shall be prima facie evidence in all courts and for all purposes of the facts recorded therein pertaining to identity, occurrence, time and place.

This act is ordered to take immediate effect.
Approved July 22, 1965.

[No. 293.]

AN ACT to amend the title and sections 2, 3, 4, 5, 6, 7 and 10 of Act No. 247 of the Public Acts of 1955, entitled as amended "An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state of Michigan or held in trust by it; and to provide for the disposition of revenue derived therefrom," sections 2, 3, 4, 5, 6 and 10 as amended and added by Act No. 94 of the Public Acts of 1958, being sections 322.702, 322.703, 322.704, 322.705, 322.706, 322.707 and 322.710 of the Compiled Laws of 1948; and to add a new section 11.

The People of the State of Michigan enact:

Title and sections amended and added.

Section 1. The title and sections 2, 3, 4, 5, 6, 7 and 10 of Act No. 247 of the Public Acts of 1955, sections 2, 3, 4, 5, 6 and 10 as amended and added by Act No. 94 of the Public Acts of 1958, being sections 322.702, 322.703, 322.704, 322.705, 322.706, 322.707 and 322.710 of the Compiled Laws of 1948, are hereby amended and a new section 11 is added, the amended title and amended and added sections to read as follows:

TITLE

An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it; to permit the private and public use of waters over submerged patented lands and the making of agreements limiting and regulating the use thereof; to provide for the disposition of revenue derived therefrom; and to provide penalties for violation of this act.

322.702 Unpatented submerged lake bottom lands and unpatented made lands in Great Lakes; construction of act; land defined. [M.S.A. 13.700(2)]

Sec. 2. The lands covered and affected by this act are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it, including those lands which have heretofore been artificially filled in. The waters covered and affected by this act are all of the waters of the Great Lakes within the boundaries of the state. This act shall be construed so as to preserve and protect the interests of the general public in the aforesaid lands and waters and to provide for the sale, lease, exchange or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands and to permit the filling in of patented submerged lands whenever it is determined by the department of conservation that the private or public use of such lands and waters will not substantially affect the public use thereof for hunting, fishing, swimming, pleasure boating or navigation or that the public trust in the state will not be impaired by such agreements for use, sales, lease or other disposition. The word "land" or "lands" whenever used in this act shall refer to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the

bays and harbors thereof but the act shall not be construed as affecting property rights secured by virtue of a swamp land grant.

322.703 Conveyances, leases and agreements for water use and filling in of submerged lands; exceptions; reservation of mineral rights; exceptions; permit for dredging or placing spoil. [M.S.A. 13.700(3)]

Sec. 3. (1) The department of conservation, hereinafter referred to as the "department", after finding that the public trust in the waters will not be impaired or substantially affected, is hereby authorized to enter into agreements pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands, after approval of the state administrative board. Quitclaim deeds, leases or agreements may be issued or entered into by the department with any person, firm, or corporation, public or private, or the United States of America covering unpatented lands, and shall contain such terms and conditions and requirements which shall be deemed just and equitable and in conformity with the public trust as determined by the department. The department shall reserve to the state of Michigan all mineral rights, including but not limited to coal, oil, gas, sand, gravel, stone and other materials or products located or found in said lands, except where lands are occupied or to be occupied for residential purposes at the time of conveyance.

(2) After the effective date of this amendatory act of 1965, a riparian owner shall obtain a permit from the department, for which no charge shall be made, before dredging or placing spoil or other materials on bottomland.

322.704 Application for conveyance of unpatented lands; contents; qualifications of applicant; consent. [M.S.A. 13.700(4)]

Sec. 4. (a) Application for a deed or lease to unpatented lands or agreement for use of water areas over patented lands shall be on forms provided by the department. Such application shall include a surveyed description of the lands or water area applied for, together with a surveyed description of the riparian or littoral property lying adjacent and contiguous to the lands or water area, certified to by a registered land surveyor. The description shall show the location of the water's edge at the time it was prepared and such other information that shall be required by the department. The applicant shall be a riparian or littoral owner or owners of property touching or situated opposite the unpatented land or water area over patented lands applied for or an occupant of said land. The application shall include the names and mailing addresses of all persons in possession or occupancy or having any interest in the adjacent or contiguous riparian or littoral property or having riparian or littoral rights or interests in the lands or water areas applied for and such application shall be accompanied by the written consent of all persons having an interest in the lands or water areas applied for in the application.

Approvals required; abstract of title and tax history of riparian land.

(b) Before an application can be acted upon by the department, the applicant shall secure approval of or permission for his proposed use of such lands or water area from any federal agency as provided by law, the Michigan waterways commission and the legislative body of the local unit or units of government within which such land or water area is or will be included, or to which it is contiguous or adjacent. No deed, lease or agreement shall be issued or entered into by the department without such approvals or permission. The department may also require the applicant to furnish an abstract of title and ownership, and a 20-year tax history on the riparian or littoral property which is contiguous or adjacent to the lands or water area applied for, as well as on the lands applied for, if available.

Deposit with application.

(c) The department shall require the applicant to deposit a fee of not less than $50.00 for each application filed, which fee shall be deposited with the state treasurer to the credit of the state's general fund. Should a deed, lease or other agreement be approved by the department, the applicant shall be entitled to credit for the fee against the consideration which shall be paid for such deed, lease or other agreement.

322.705 Consideration for conveyance or lease of unpatented lands. [M.S.A. 13.700(5)]

Sec. 5. Should the department determine that it is in the public interest to grant an applicant a deed or lease to such lands or enter into an agreement to permit use and improvements in the waters or to enter into any other agreement in regard thereto, the department shall determine the amount of consideration to be paid to the state by such applicant for the conveyance or lease of unpatented lands.

Lease or agreement to fill submerged lands; permanent improvements; artificial changes in land; consideration; cash market value.

(a) The department may permit, by lease or agreement, the filling in of patented and unpatented submerged lands and permit permanent improvements and structures after finding that the public trust will not be impaired or substantially injured.

The department may issue deeds or may enter into leases if the unpatented lands applied for have been artificially filled in or are proposed to be changed from the condition that exists on the effective date of this act by filling, sheet piling, shoring, or by any other means, and such lands are used or to be used or occupied in whole or in part for uses other than existing, lawful riparian or littoral purposes. The consideration to be paid to the state for the conveyance or lease of unpatented lands by such applicant shall be not less than the fair, cash market value of the lands determined as of the date of the filing of such application, minus any improvements placed thereon but in no case shall the sale price be less than 30% of the value of the land. In determining the fair, cash market value of the lands applied for, the department may give due consideration to the fact that such lands are connected with the riparian or littoral property belonging to the applicant, if such is the case, and to the uses, including residential and commercial, being made or which can be made of said lands.

Agreements for lands or water areas with local units.

(b) Agreements for the lands or water area described in section 2 may be granted to or entered into with local units of government for public purposes and containing such terms and conditions which may be deemed just and equitable in view of the public trust involved and may include the granting of permission to make such fills as may be necessary.

Flood control, shore erosion control, drainage and sanitation control.

(c) If the unpatented lands applied for have not been filled in, nor in any way substantially changed from their natural character at the time the application is filed with the department, and the application is filed for the purpose of flood control, shore erosion control, drainage and sanitation control or to straighten irregular shore lines, the consideration to be paid to the state by the applicant shall be the fair, cash value of such land, giving due consideration to its being adjacent to and connected with the riparian or littoral property owned by the applicant.

Leases or agreements for marina purposes; definition.

(d) Leases or agreements covering unpatented lands may be granted or entered into with riparian or littoral proprietors for commercial marina purposes or for marinas operated by persons, corporations, clubs or associations for such consideration and containing such terms and conditions which are deemed by the conservation department to be just and equitable. Such leases may include either filled or unfilled lake bottomlands, or both. Rental shall commence as of the date of use of such unpatented lands for the marina operations. Dockage and other uses by marinas in waters over patented lands on the effective date of this act shall be deemed to be lawful riparian use.

The term "marina purposes" as used in this act shall be construed as an operation making use of Great Lakes submerged bottomlands or filled in bottomlands for the purpose of service to boat owners or operators which may restrict or prevent the free public use of the affected bottomlands or filled in lands.

Fraud, consideration; hearing on determination.

(e) If the department after investigation determines that an applicant has wilfully and knowingly filled in or in anyway substantially changed the lands applied for with an intent to defraud, or if the applicant has acquired such lands with knowledge of such fraudulent intent and is not an innocent purchaser, the sale price shall be the fair cash market value of the land. An applicant may request a hearing of any determination made hereunder. The department shall grant a hearing if requested.

322.706 Determination of minimum valuation; circuit court appraisal. [M.S.A. 13.700(6)]

Sec. 6. The fair, cash market value of lands approved for sale under the provisions of this act shall be determined by the department. In no instance shall the consideration paid to the state be less than $50.00. If the applicant is not satisfied with the value determined by the department, within 30 days after the receipt of such determination he may submit a petition in writing to the circuit court of the county in which such lands are located and the court shall appoint an appraiser or appraisers as the court shall determine for an appraisal of said lands. Decision of the court shall be final.

322.707 Moneys credited to general fund; accounting; employees. [M.S.A. 13.700(7)]

Sec. 7. All moneys received by the department from the sale, leasing or other disposition of lands and water areas under this act shall be paid to the state treasurer and be credited to the state's general fund. The department shall comply with the accounting laws of this state and the requirements with respect to submission of budgets. The department is hereby authorized to hire such employees, assistants and services that may be necessary within the appropriation made therefor by the legislature and to delegate such authority as may be necessary to carry out the terms of this act.

322.710 Lands or waters filled, excavated or altered without approval, penalty, consideration. [M.S.A. 13.700(10)]

Sec. 10. Any person who excavates or fills, or in any manner alters or modifies any of the land or waters subject to the provisions of this act without the approval of the department shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $1,000.00 or imprisoned not more than 1 year, or both such fine and imprisonment. Lands, the use of which are so changed, shall not be sold to any person convicted under this section at less than fair, cash market value.

322.711 Application for certificate denoting boundary or accretion; fee. [M.S.A. 13.700(11)]

Sec. 11. A riparian owner may apply to the department for a certificate suitable for recording indicating the location of his lakeward boundary or indicating that the land involved has accreted to his property as a result of natural accretions or placement of a lawful, permanent structure. The application shall be accompanied by a fee of $200.00 and proof of upland ownership.

This act is ordered to take immediate effect.
Approved July 22, 1965.

[No. 294.]

AN ACT to protect the public health; to regulate the drilling of water wells and the installation of well pumps; to register and regulate water well drillers and well pump installers; to provide drilling records for the department of conservation; to prescribe the powers and duties of the state health commissioner; to create an advisory board; to prescribe penalties for violations of this act; and to provide an appropriation therefor.

APPENDIX 20:

1968 PA 3 and 1968 PA 57

the production of books and papers. The orders and subpoenas issued by the state treasurer or by a deputy state treasurer, in pursuance of the authority in them vested by provisions of this section, may be enforced upon their application to any circuit court by proceedings in contempt therein, as provided by law.

141.431 Disclosure of statutory violations, criminal or civil proceedings; procedure. [M.S.A. 5.3228(31)]

Sec. 11. If any audit or investigation conducted under this act discloses statutory violations on the part of any officer, employee or board of any local unit, a copy of such report shall be filed with the attorney general who shall review the report and cause to be instituted such proceeding against such officer, employee or board as he deems necessary. The attorney general, within 60 days after receipt of the report, may institute criminal proceedings as he deems necessary against such officer or employee, or direct that the criminal proceedings be instituted by the prosecuting attorney of the county in which the offense was committed. The attorney general or the prosecuting attorney shall institute civil action in any court of competent jurisdiction for the recovery of any public moneys, disclosed by any examination to have been illegally expended or collected and not accounted for; also for the recovery of any public property disclosed to have been converted and misappropriated.

141.432 Verification of transactions; ascertainment of bank deposits; nonliability for disclosures. [M.S.A. 5.3228(32)]

Sec. 12. (1) For purposes of verifying any transactions disclosed by an audit or investigation, any person or firm authorized to conduct an audit under this act may ascertain the deposits, payments, withdrawals and balances on deposit in any bank account or with any contractor or with any other person having dealings with the local unit.

(2) A bank, contractor or person shall not be held liable for making available any of the information required under this act.

141.433 Access to books and records; duty to produce records for audit or investigation. [M.S.A. 5.3228(33)]

Sec. 13. (1) Any authorized employee of the state treasurer, certified public accountant or firm of certified public accountants conducting an audit under this act shall have access to and authority to examine all books, accounts, reports, vouchers, correspondence files and other records, bank accounts and moneys or other property of any local unit.

(2) An officer of a local unit upon demand of persons authorized under this act, shall produce all books, accounts, reports, vouchers, correspondence files and other records, bank accounts and moneys or other property of the local unit under audit or investigation and shall truthfully answer all questions related thereto.

This act is ordered to take immediate effect.

Approved February 20, 1968.

[No. 3.]

AN ACT to amend Act No. 247 of the Public Acts of 1955, entitled as amended "An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it; to permit the private and public use of waters over submerged patented lands and the making of agreements limiting and regulating the use thereof; to provide for the disposition of revenue derived therefrom; and to provide penalties for violation of this act," as amended, being sections 322.701 to 322.711 of the Compiled Laws of 1948, by adding 4 new sections to stand as sections 12 to 15.

The l

Sections added.

Section 1. Act No. 247 o
to 322.711 of the Compiled I
as sections 12 to 15 to read

322.712 Great Lakes sul
thorization. [M.S.A.

Sec. 12. Unless a permi
been granted by the legislatu
noncommercial, recreational l
not disposed of below the or
connected, it is unlawful:

(a) To construct, dredg
canal, channel, ditch, lagoon,
connection thereof with any

(b) To connect any natu
lagoon, pond, lake or similar
Clair, for navigation or any o

322.713 Application for

Sec. 13. (1) Before an
person shall file an applicatio

(a) The name and addre

(b) The legal description

(c) A summary statemei

(d) A map or diagram s
cross-section profiles of the

(e) Other information r

(2) A fee of not less th
transmitted to the state trea

322.714 Application; co
jections; hearing, time

Sec. 14. Upon receipt c
state department of public
and drain commissioner of t
in which the project or bod
owners, accompanied by a
department within 20 days
action to grant the applicatio
At least 10 days' notice of
circulated in the county and
section.

322.715 Permit; issuanc
13.700(15)]

Sec. 15. If the departm
interest including fish and ga
law for sanitation, and that
any body of water affected
enlargement of the waterway
way shall be a public waterw
owned, controlled, and used
conditions in the permit tha

The People of the State of Michigan enact:

Sections added.

Section 1. Act No. 247 of the Public Acts of 1955, as amended, being sections 322.701 to 322.711 of the Compiled Laws of 1948, is amended by adding 4 new sections to stand as sections 12 to 15 to read as follows:

322.712 Great Lakes submerged land; construction or dredging without authorization. [M.S.A. 13.700(12)]

Sec. 12. Unless a permit has been granted by the department or authorization has been granted by the legislature, or except as to boat wells and slips facilitating private, noncommercial, recreational boat use, not exceeding 50 feet in length where the spoil is not disposed of below the ordinary high-water mark of the body of water to which it is connected, it is unlawful:

(a) To construct, dredge, commence or do any work with respect to an artificial canal, channel, ditch, lagoon, pond, lake or similar waterway where the purpose is ultimate connection thereof with any of the Great Lakes, including Lake St. Clair.

(b) To connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake or similar waterway with any of the Great Lakes, including Lake St. Clair, for navigation or any other purpose.

322.713 Application for permit; contents; fees. [M.S.A. 13.700(13)]

Sec. 13. (1) Before any work or connection specified in section 12 is undertaken a person shall file an application with the department setting forth the following:

(a) The name and address of the applicant.

(b) The legal description of the lands included in the project.

(c) A summary statement of the purpose of the project.

(d) A map or diagram showing the proposal on an adequate scale with contours and cross-section profiles of the waterway to be constructed.

(e) Other information required by the department.

(2) A fee of not less than $50.00 shall accompany the application which fee shall be transmitted to the state treasurer for credit to the state's general fund.

322.714 Application; copies to local units and adjacent riparian owners; objections; hearing, time, notice. [M.S.A. 13.700(14)]

Sec. 14. Upon receipt of the application, the department shall mail copies to the state department of public health, clerks of the county, city, village and township, and drain commissioner of the county or if none the road commissioner of the county, in which the project or body of water affected is located, and to the adjacent riparian owners, accompanied by a statement that unless a written objection is filed with the department within 20 days after the mailing of the copies, the department may take action to grant the application. The department may set the application for public hearing. At least 10 days' notice of the hearing shall be given by publication in a newspaper circulated in the county and by mailing copies of the notice to the persons named in this section.

322.715 Permit; issuance; conditions; maintenance of waterway. [M.S.A. 13.700(15)]

Sec. 15. If the department finds that the project will not injure the public trust or interest including fish and game habitat, that the project conforms to the requirements of law for sanitation, and that no material injury to the rights of any riparian owners on any body of water affected will result, the department shall issue a permit authorizing enlargement of the waterway affected. The permit shall provide that the artificial waterway shall be a public waterway, except intake or discharge canals or channels on property owned, controlled, and used by a public utility. The department may impose further conditions in the permit that it finds reasonably necessary to protect the public health,

safety, welfare, trust and interest, and private rights and property. The existing and future owners of land fronting on the artificial waterway are liable for maintenance of the waterway in accordance with the conditions of the permit.

This act is ordered to take immediate effect.

Approved February 27, 1968.

[No. 4.]

AN ACT to amend section 19 of chapter 18 of the Revised Statutes of 1846, entitled "Of fences and fence viewers; of pounds and the impounding of cattle," being section 43.19 of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Section amended.

Section 1. Section 19 of chapter 18 of the Revised Statutes of 1846, being section 43.19 of the Compiled Laws of 1948, is amended to read as follows:

43.19 Township trustees to be fence viewers. [M.S.A. 5.229]

Sec. 19. Two township trustees in each township shall be designated by the township board as fence viewers in their respective townships.

Effective date.

Section 2. This act shall take effect January 1, 1969.

This act is ordered to take immediate effect.

Approved March 8, 1968.

[No. 5.]

AN ACT to authorize the state administrative board to convey certain lands in the county of Kalamazoo; and to provide for the disposition of revenues.

The People of the State of Michigan enact:

Land conveyance, Kalamazoo county; description.

Sec. 1. The state administrative board is authorized to convey to the city of Kalamazoo, at not less than the appraised value as determined by the state tax commission, a certain portion of land now owned by the department of social services, described as follows:

The land located in section 21, town 2 south, range 11 west, city of Kalamazoo, county of Kalamazoo, Michigan and is more particularly described as follows: Commencing at a point on the south line of section 21, town 2 south, range 11 west, city of Kalamazoo, county of Kalamazoo, Michigan distant north 89° 58′ west 1214.85 feet from the south quarter post of said section; thence north 0° 02′ east, at right angles to said section line 33 feet to the north line of Howard street for the place of beginning; thence north 89° 58′ west, parallel to said south section line 200.00 feet; thence north 60° 13′ 13″ west 92.94 feet to the southeasterly right of way line of Oakland drive; thence north 22° 47′ east along said right of way line 166.87 feet; thence south 89° 58′ east parallel to the south line of said section, 216.16 feet; thence south 0° 02′ west, at right angles to the south line of said section 200.00 feet to the place of beginning. Containing 1.13 acres.

Approval of attorney general.

Sec. 2. The conveyance authorized by this act shall be by quitclaim deed approved by the attorney general.

Proceeds of sale, d

Sec. 3. The revenue
general fund of the state

This act is ordered t
Approved March 20,

AN ACT to amend s
"An act to provide a syst
classification, organizatior
prescribe their rights, po
districts, and to prescribe
scribe the powers and du
to repeal certain acts and
of 1956, being section 34

T.

Section amended.

Section 1. Section 94
Act No. 215 of the Publi
1948, is amended to read

340.947 School censu
mission to superint

Sec. 947. In all other
The boards of the respec
districts in the county and
who are under 20 years o
districts, the names of th
villages and cities, in such
The census enumeration n
and mentally handicapped
verified by the oath or aff
therewith, or in such othe
persons taking the census
thereof canvassed by the
children of the ages afore
any officer authorized by
filed in the office of the c
thereafter. Immediately a
intendent of schools and
superintendent of schools
census forthwith, and, befc
superintendent of public in
and the affidavits of the s

This act is ordered to t
Approved March 20, 1

board, shall be eligible to election or appointment to any other county office or position, the election or appointment of which is within the jurisdiction of such board of supervisors.

This act is ordered to take immediate effect.
Approved May 28, 1968.

[No. 57.]

AN ACT to amend section 2 of Act No. 247 of the Public Acts of 1955, entitled as amended "An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it; to permit the private and public use of waters over submerged patented lands and the making of agreements limiting and regulating the use thereof; to provide for the disposition of revenue derived therefrom; and to provide penalties for violation of this act," as amended by Act No. 293 of the Public Acts of 1965, being section 322.702 of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Section amended.

Section 1. Section 2 of Act No. 247 of the Public Acts of 1955, as amended by Act No. 293 of the Public Acts of 1965, being section 322.702 of the Compiled Laws of 1948, is amended to read as follows:

322.702 Great Lakes submerged lands; construction of act; land defined. [M.S.A. 13.700(2)]

Sec. 2. The lands covered and affected by this act are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state or held in trust by it, including those lands which have heretofore been artificially filled in. The waters covered and affected by this act are all of the waters of the Great Lakes within the boundaries of the state. This act shall be construed so as to preserve and protect the interests of the general public in the aforesaid lands and waters and to provide for the sale, lease, exchange or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands and to permit the filling in of patented submerged lands whenever it is determined by the department of conservation that the private or public use of such lands and waters will not substantially affect the public use thereof for hunting, fishing, swimming, pleasure boating or navigation or that the public trust in the state will not be impaired by such agreements for use, sales, lease or other disposition. The word "land" or "lands" whenever used in this act shall refer to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors thereof lying below and lakeward of the natural ordinary high-water mark, but the act shall not be construed as affecting property rights secured by virtue of a swamp land grant or such rights as may be acquired by accretions occurring through natural means or reliction. For purposes of this act the ordinary high-water mark shall be deemed to be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

This act is ordered to take immediate effect.
Approved May 28, 1968.

[No. 58.]

AN ACT to repeal Act No. 128 of the Public Acts of 1962, entitled "An act to prohibit the sale, trade or exchange or the offering for sale, trade or exchange of certain tangible

APPENDIX 21:

Documents Evidencing Legal Position of MDEQ and MDNR

Public Rights on Michigan Waters

Related Co
• Shipwreck

MICHIGAN CONSTITUTION

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

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.
>
> *Mich. Constitution, Art IV, §52.*

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

INTRODUCTION

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

The following document is offered as a guide to how water rights came to be and the current state of the law. This information has been compiled for convenience in answering common questions regarding water law in the State of Michigan. This material highlights the

2. Great Lakes and Lake St. Clair

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

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

STATE OF MICHIGAN

JOHN ENGLER, Governor

DEPARTMENT OF ENVIRONMENTAL QUALITY

"Better Service for a Better Environment"

HOLLISTER BUILDING, PO BOX 30473, LANSING MI 48909-7973

INTERNET: www.deq.state.mi.us

RUSSELL J. HARDING, Director

REPLY TO:

LAND & WATER MANAGEMENT DIVISION
PO BOX 30458
LANSING MI 48909-7958

July 17, 2001

CERTIFIED MAIL

Mr. Philip Adair
Ms. Bernadette Adair
2865 Kawkawlin River Drive
Bay City, MI 48706

Form letter sent to hundreds of Saginaw Bay shoreline residents.

Dear Mr. Adair and Ms. Adair:

SUBJECT: Beachfront Maintenance – 715 Bay Road Parcel

It has come to the attention of the Michigan Department of Environmental Quality (MDEQ) that there has been recent unauthorized activity on State bottomlands adjacent to the above referenced parcel of property. You have been identified as the legal owner of this parcel of property. The purpose of this letter is to advise you that these activities are illegal and to seek your cooperation in complying with the law.

Lower water levels have exposed extensive bottomland areas along Saginaw Bay. Vegetation is regrowing in many of these areas. The shallow water and vegetation in these coastal areas provide substrate and habitat for a variety of invertebrates important in the diet of fish, birds, and other wildlife. Coastal vegetation provides food, shelter, and nesting and resting areas for waterfowl, songbirds, and other animals. Shoreline vegetation dissipates wave energy, buffers land from wave action, and protects the lake bottom from scour. Vegetation also helps maintain water quality by removing sediments and nutrients, and filtering materials from the water. These coastal areas are critical natural resources, worthy of special protection.

Bottomlands of the Great Lakes are owned by the State of Michigan and are generally those areas lakeward of the ordinary high water line, defined as areas below elevation 580.5 IGLD85 for Lake Huron. This elevation is approximately three feet above July 2001 levels. Several State statutes regulate these areas and adjacent wetlands.

In light of the varied interests in these coastal areas, the MDEQ is proposing revised rules that will allow for certain beach management activities. Until these rule revisions are promulgated, the following activities, subject to additional conditions, will be allowed:

Mowing of Vegetation. Lakefront property owners may mow vegetation to maintain temporary access on exposed bottomlands from the upland ownership directly to the existing still water shoreline, subject to the following limitations:

1. No plowing, disking, or other soil disturbance may take place.
2. No wood chips, paving, or other materials may be placed on the bottomlands.
3. The activity must be a single and complete project. If other activities that require a permit are submitted to the MDEQ for approval, these activities must be reviewed as part of the larger overall project.

P 0100e
v. 1/99)

Grooming Beaches. Lakefront property owners may mechanically groom the beach area on bottomlands to remove natural and manmade debris if all of the following conditions are met:

1. Grooming is accomplished by raking or dragging non-vegetated areas parallel to the still water shoreline and up to 30 feet landward of the shoreline.
2. Grooming is limited to the top four inches of the beach surface.
3. All collected debris is properly disposed of off of State-owned bottomlands and outside of any wetlands.
4. The beach area is comprised predominately of sand and pebbles.

It is imperative that any mowing and grooming activities strictly adhere to these regulations. Staff of the MDEQ and the Michigan Department of Natural Resources (MDNR) will be monitoring beachfront areas and taking enforcement action when future activities violate State regulations. Minor offenses are a misdemeanor punishable by a fine of up to $500. Penalties for unauthorized filling, dredging, or grading are more severe.

Individual permits are required from the MDEQ for work that goes beyond the above activities. A permit can generally be approved to construct a filled walkway up to 6 feet wide by 200 feet long through a swale with standing water conditions. An application for a permit may be obtained at the MDEQ's Land and Water Management Division (LWMD) home page, at www.deq.state.mi.us/lwm, or by calling the LWMD's Saginaw Bay District Office, at 989-686-8025.

Be advised that the United States Army Corps of Engineers (USACE) exercises Federal jurisdiction over Great Lakes bottomlands to an elevation of 581.5 IGLD85 and requires permits for all beach maintenance activities except mowing of vegetation. Beachfront owners should contact the USACE's Saginaw Field Office, at 989-894-4951, prior to initiation of any other beach maintenance activity.

We anticipate and would appreciate your full cooperation in this matter. If you have any questions, please contact Mr. Daniel Morgan, Supervisor, Saginaw Bay District Office, LWMD, at 989-686-8025, extension 8360.

Sincerely,

Richard A. Powers, Chief
Land and Water Management Division
517-373-1170

cc: U.S. Army Corps of Engineers
Mr. George Burgoyne, Jr., Resource Management Deputy, MDNR
Mr. Arthur R. Nash Jr., Deputy Director, MDEQ
Mr. Daniel Morgan, MDEQ
Permit Consolidation Unit, MDEQ

17

BRIEFING REPORT
Destruction of Coastal Marshes

Issue

A number of Saginaw Bay riparian property owners are mowing emergent marsh vegetation and tilling Great Lakes bottomlands. This practice destroys valuable coastal wetland habitat.

Background

Great Lakes water level fluctuations are normal and have occurred for decades in response to precipitation and evaporation. Average or above average lake levels have been experienced for the last 30 years, with the last period of below average water levels in 1963-65. High Lake Huron water levels inhibit emergent vegetative growth and erode the lake bottom to the detriment of coastal wetland resources, especially along Saginaw Bay. However, high water conditions also provide many riparian owners with sand beach and a clear view of Saginaw Bay. Normal to low water levels experienced in late 1998 and 1999 have exposed large areas of bottomlands and promoted the natural resurgence of Saginaw Bay coastal marsh habitat. This marsh habitat provides valuable breeding, rearing, feeding, and resting habitat for a diverse group of wildlife species, especially waterfowl. Marshes with standing water also provide valuable fish spawning and rearing habitat. Destruction of this habitat disrupts the natural life cycle of the native plants and animals of Saginaw Bay.

Property owners in Huron, Arenac, and Bay counties have begun mowing vegetation up to 300 feet lakeward of the ordinary high water mark to maintain a view of the water. Many are also tilling the Great Lakes bottomland to retard vegetation growth. Mowing and tilling of coastal wetland vegetation is an escalating practice along the Saginaw Bay coastline.

Conclusion

We believe that we have the authority and responsibility to protect coastal marshes on the bottomlands of the Great Lakes because Great Lakes bottomlands are owned by the state. Ownership alone should allow us to regulate the removal of bottomland vegetation. Existing regulatory authorities, principally Part 5, General Powers and Duties; Part 303, Wetland Protection; Part 323, Shorelands Protection and Management; and Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, could address this issue. We believe that authorization to remove vegetation by a riparian owner should be granted for the exercise of their riparian rights, but the authorization should be limited to a six-foot wide path, as opposed to total clearing.

Recommendation

There are two options available to address this issue. The first option is to utilize the existing authority of Parts 5, 303, and 325. The second option is to utilize Part 323 to designate these bottomlands as "Environmental Areas."

Part 323 regulates any alteration of vegetation in Environmental Areas; those areas necessary for the preservation of fish and wildlife. Part 323 specifically authorizes regulation of "those lands between the ordinary high-water mark and the water's edge." The DEQ could designate these areas as Environmental Areas in about 30 days, pursuant to the existing administrative rules. This approach would require us to document the value of the habitat.

Consultations with the Department of Attorney General and the Department of Natural Resources leads us to conclude that the mowing and tilling of these coastal marshes is a regulated activity. We recommend taking action through the following steps: 1) advise legislators and local units of government of the DEQ's position and proposed action; 2) issue press releases; 3) notify riparian owners currently practicing coastal wetland mowing and tilling that this practice is in violation of state statute and should not be continued; and 4) take enforcement actions, as necessary, to curtail the mowing of coastal wetlands and the tilling of state-owned bottomlands.

A press release and letters to property owners regarding Parts 5, 303, and 325 authority have been prepared.

Prepared by: Douglas F. Morse, Senior Biologist
Land and Water Management Division
Saginaw Bay District Office
Department of Environmental Quality
December 17, 1999
Revised May 22, 2000

APPENDIX 22:

Economic Value of Beaches

The Economic Value of Beaches - A 2002 Update

By James R. Houston

U.S. Army Engineer Research and Development Center
3909 Halls Ferry Road, Vicksburg MS 39180

ABSTRACT

Travel and tourism is America's largest industry, employer, and earner of foreign exchange, and beaches are the largest factor in travel and tourism. Beaches receive more tourist visits than combined visits to all Federal and state parks, recreational areas, and public lands. The Federal Government receives the lion's share of taxes from beach tourist spending, and these taxes are far greater than Federal expenditures on beach infrastructure such as beach nourishment. The Miami Beach nourishment project is an example of the national economic return of beach nourishment. The project completely rejuvenated Miami Beach and led to large increases in tourist visits. Today, foreign tourists at Miami Beach only pay more in Federal taxes than the Federal Government spends nationally on beach nourishment. Foreign competitors for international tourism spend far more than the United States in advertising, protecting, and restoring beaches. However, despite the clear importance of travel and tourism to the national economy, the United States has not acted to counter this competition, and its dominant lead in international tourism declined in the 1990's. Its lead is projected to fall significantly more over the next decade.
Additional Keywords: Beach nourishment, economy, tourism

INTRODUCTION

Houston (1995a, 1996) described the economic value of America's beaches. He noted that the travel and tourism industry is becoming increasingly dominant in economies of developed countries. However, few realize that travel and tourism is already America's largest industry, employer, and earner of foreign exchange; and beaches are the largest factor in travel and tourism. The World Travel and Tourism Council (1998) notes that tourism is a key driver of 21st century economic activity and is the largest creator of jobs, wealth, and investment in the world. Although high-technology industries grab the news, travel and tourism is providing the economic growth, jobs, and foreign exchange that make the United States competitive in a world economy. This paper updates and supports the conclusions of Houston (1995a, 1996) on the economic importance of beaches to the national economy.

TRAVEL AND TOURISM IS LARGEST INDUSTRY

Travel and tourism is the world's largest industry with the broad measure of economic activity, Travel and Tourism Economy (TTE), contributing $3.5 trillion in 2001 to the world's Gross Domestic Product (GDP) and exceeding the GDP of all countries other than the United States and Japan (World Travel and Tourism Council 2001a). Travel and tourism also is the world's largest growth industry with an average growth of 9% per year since 1985 (World Tourism Organization

2001). Similarly, TTE contributes $1.2 trillion to America's GDP (World Travel and Tourism Council 2001b). This is 11.6% of U.S. output and makes TTE the largest contributor to GDP just ahead of retail trade that contributes 8.9% to GDP (World Travel and Tourism Council 2001c). TTE also produces $223.9 billion in annual tax revenue for all levels of government in the United States (Miller 2001). Travel and tourism is both the world's and America's largest employer, with TTE employing 207 million people throughout the world and 16.9 million people (one person out of every 8.1 in the United States) (World Travel and Tourism Council 2001a,b). In contrast, all U.S. manufacturing industries combined from IBM to General Motors to Intel employ only 18.8 million people (Research and Analysis Bureau 2001). In addition, service industries such as travel and tourism are projected to produce almost 95% of all new U.S. jobs over the next 10 years with TTE employment increasing to 18.6 million and manufacturing employment declining to 18.7 million by 2011 (World Travel and Tourism Council 2001b, Research and Analysis Bureau 2001). The increase in travel and tourism jobs and decline in manufacturing jobs is largely unrecognized by local and state governments that still compete for a shrinking pie by trying to attract manufacturing. Their efforts often target high-technology industries that are reducing employment as rapidly as other manufacturing industries. Houston (1995a) notes that even Florida, with remarkable competitive advantages in travel and tourism, concentrates on attracting high-technology industries. Part of this benign neglect of travel and tourism may be due to perceptions that this industry has low-wage jobs. However, U.S. per-capita wages for travel and tourism jobs average 13% higher than average U.S. per-capita wages (Holecek 1995). Switzerland provides a good example of high wages in tourism, because it depends on tourism more than any developed country yet has one of the world's highest per-capita incomes.

TRAVEL AND TOURISM KEY TO INTERNATIONAL COMPETITIVENESS

The United States is a major player in the international travel and tourism industry. "There is probably no country in the world that has a greater comparative advantage in tourism than the United States" (U.S. Travel and Tourism Administration 1993). In fact, travel and tourism is one of a handful of developed-world industries that the United States dominates. The United States receives more than 45% of the developed world's travel-and-tourism revenues and 60% of its profits (Wall Street Journal 1994). International tourism is the world's largest export earner, with foreign currency receipts from international tourism outstripping exports of petroleum products, motor vehicles, telecommunications equipment, textiles, or any other product or service (World Tourism Organization 2001). Travel and tourism contributed 16.5% of U.S. exports worth $196.3 billion in 2001 (World Travel and Tourism Council 2001b). This is larger than the combined export value of U.S. agricultural commodities, aircraft, computers, and telecommunications equipment (U.S. Department of Commerce 2001). This spending by foreign tourists supports about 2.7 million American jobs or as many jobs as are in the U.S. computer industry (Bureau of Labor Statistics 2001). The United States runs massive annual trade deficits of hundreds of billions of dollars, but travel and tourism is one of the few bright spots with a trade surplus in 1999 of $13.9 billion (International Trade Administration and Bureau of Economic Analysis 2000). This surplus is greater than the $13.8 billion U.S. trade surplus for

agricultural exports (U.S. Department of Commerce 2000). Americans take pride in U.S. high-technology industries, but the United States ran a trade deficit in high-technology goods of $34.6 billion in 2000 (U.S. Department of Commerce 2001). Foreign tourism produces annual tax revenues of about $7.5 billion (U.S. Travel and Tourism Administration 1995). The majority of these tax revenues (about 53% or $4 billion) go to the Federal Government. Local governments that provide most tourist-support infrastructure receive only 14.3 percent of the tax revenue from foreign tourists (U.S. Travel and Tourism Administration 1994). The greatest tax revenues from foreign tourists are collected in Florida, with annual revenues of $1.43 billion. The Federal Government receives about $754 million of these revenues with local governments receiving only $98 million (U.S. Travel and Tourism Administration 1994).

BEACHES KEY TO U.S. TRAVEL AND TOURISM

Beaches are the key element of U.S. travel and tourism, because they are the leading tourist destination (USA Today 1993, Carlson Wagonlit Travel Agent Poll 1998, Washingtonpost.com Poll 2001, Chivas Poll 2001). Seventy-five percent of summer travelers plan to visit beaches (Morgan 2000). Coastal states receive about 85% of tourist-related revenues in the United States largely because beaches are tremendously popular (World Almanac 2001). Although there are many interior attractions from Yellowstone to the Grand Canyon and from Las Vegas to Branson, Missouri, the popularity of beaches dominates tourism. For example, a single beach location, Miami Beach, reported more tourist visits (21 million) than were made to any National Park Service property (the Blue Ridge Parkway with 19 million visitors was the National Park Service property with the most visitors) (Wiegel 1992, National Park Service 2001). Miami Beach has almost twice as many tourist visits as the combined number of tourist visits to Yellowstone (3.4 million), the Grand Canyon (4.5 million), and Yosemite (3.4 million) (National Park Service 2001). California beaches alone have more tourist visits (567 million) than combined tourist visits (286 million) to all 346 National Park Service properties (including national seashores and monuments such as the Lincoln Memorial and Washington Monument) and visits (106 million) to all Bureau of Land Management properties that cover 287 million acres, about one-eighth of the land of the United States (King 1999; National Park Service 2001; Bureau of Land Management 2001). It is estimated that each year approximately 180 million Americans make 2 billion visits to ocean, gulf, and inland beaches (Clean Beaches Council 2001). This is almost twice as many visits as the combined 1.16 billion visits made to properties of the National Park Service (286 million), Bureau of Land Management (106 million), and all state parks and recreation areas (767 million) (National Association of State Park Directors 2000). Moreover, many of these visits to state parks and recreation areas were visits to beaches. State beaches in California, for example, occupy only 2.7% of California state park holdings, but account for 72% of visits (King 1999). Beaches make a large contribution to America's economy. The U.S. Travel and Tourism Administration estimated that in 1992 beaches contributed about $170 billion annually to the economy (U.S. Travel and Tourism Administration 1993). King (1999) shows that California beach tourism makes a total direct and indirect contribution of $73 billion to the national economy, more than five times the $14.2 billion

contribution of the National Park Service system (International Ecotourism Society 2001). Similarly, beach tourism in Florida makes a $33.7 billion contribution to the national economy (Tait 2001). Multiplying the ratio of visitors to national beaches (2 billion) and visitors to California beaches (567 million) by the contribution of California beach visitors to the national economy ($73 billion) yields an estimate that in 1999 U.S. beaches contributed approximately $257 billion to the national economy. As was noted to be the case for foreign tourists, most taxes paid by beach tourists also flow primarily to the Federal Government. For example, a study of tourism at Huntington Beach, California, showed that the Federal Government is the main beneficiary of beach tourism, with tourism at Huntington Beach generating $135 million in Federal revenues, $25 million in state sales tax revenues, and $4.8 million in local revenue sales tax and parking fees (King 1999).

ECONOMIC RETURN OF BEACH NOURISHMENT

Beach erosion is the number one concern that Americans who visit beaches have about beaches (Hall and Staimer 1995). With 33,000 kilometers of eroding shoreline and 4,300 kilometers of critically eroding shoreline, beach erosion is a serious threat to the Nation's beach tourism and, therefore, a threat to the national economy (U.S. Army Corps of Engineers 1994). Restoring beaches through beach nourishment can greatly increase their attractiveness to tourists. For example, in 1989, 74% of those polled in New Jersey said the New Jersey shore was "going downhill." By 1998, only 27% thought the New Jersey shore was in decline with 86% saying that the shore was one of New Jersey's best features (Zukin 1998). The difference between 1989 and 1998 was construction of the beach nourishment project from Sandy Hook to Barnegat Inlet, NJ, which is the largest beach nourishment project (in terms of volume) in the world (U.S. Army Corps of Engineers 2001). Houston (1996) cites beach nourishment at Miami Beach as a good example of the economic benefits of beach restoration. Miami Beach had virtually no beach by the mid-1970's. As a result, facilities were run down; and Miami Beach was not the place to visit. Beach nourishment in the late 1970's rejuvenated Miami Beach and opened its beaches to the public. Beach attendance, based on lifeguard counts and aerial surveys, increased from 8 million in 1978 to 21 million in 1983 (Wiegel 1992). The number of foreign tourists visiting Miami increased from 2.3 to 5.6 million from 1980 to 2000 (Lang 2001). Four million overnight visitors stay in Miami Beach annually, and 7 of the 10 million tourists visiting Miami visit its South Beach. These visitors spend $4.4 billion annually in Miami Beach including expenditures of $2.4 billion by foreign tourists (City of Miami Beach 2001). The annual foreign revenue from tourists at Miami Beach of $2.4 billion is about 50 times the $52-million cost of the Miami Beach beach-nourishment project that has lasted over 20 years (Houston 1996). The capitalized annual cost of the project over its current 20-year life is about $2.5 million. Stronge (2000) reports that half of Florida tourists are beach tourists. Assuming half of the foreign tourists at Miami Beach are beach tourists, foreign beach tourists spend $1.2 billion annually at Miami Beach. Using the capitalized annual cost of the Miami Beach project of $2.5 million, this means that for every $1 that has been invested annually to nourish the beaches at Miami Beach, Miami Beach has received almost $500 annually in foreign exchange. This figure compares

with a return of less than $0.50 in agricultural-trade surplus ($13.8 billion in 2000) for each $1 of crop subsidy ($32.2 billion in U.S. producer support in 2000) (Bureau of Labor Statistics 2001, Alcorn 2001). It is an extreme example, but if the Miami Beach experience of receiving $500 from foreign beach tourists for every $1 invested in beach renourishment were successfully repeated in a national beach restoration program, an investment of 1% of the annual U.S. crop subsidy would wipe out the average annual U.S. trade deficit of the past decade (U.S. Department of Commerce 2001). It is instructive to compare the Federal investment in beach infrastructure (beach nourishment) versus Federal tax revenues from tourists. From 1950-1993, the Federal Government and its cost-sharing partners spent an average of $34 million (1993 dollars) annually on beach nourishment (U.S. Army Corps of Engineers 1994). The Federal investment has increased since the mid-1990's and is approximately $100 million a year (Marlowe 1999). Travel and tourism produces $223.9 billion in tax revenues and 53% or about $119 billion of these tax revenues go to the Federal Government (World Travel and Tourism Council 2001c, U.S. Travel and Tourism Administration 1994). Assuming from the Florida experience, half of these tourists are beach tourists (Stronge 2000), beach tourists produce Federal taxes of about $60 billion a year. This number is consistent with annual Federal taxes of $14 billion from California beach tourists (King 1999) and about one quarter of national beach visits occurring in California. Federal taxes of $4 billion come annually from foreign tourists with about $2 billion from foreign beach tourists (U.S. Travel and Tourism Administration 1994). Therefore, for every dollar in annual Federal expenditures for beach nourishment, the Federal Government is receiving tax revenues of approximately $600 from beach tourists including $20 from foreign beach tourists. Miami Beach is an example of the return on investment of beach nourishment. With a $2.5 million annual capitalized cost of the Miami Beach nourishment project and annual Federal tax revenues just from foreign tourists at Miami Beach of over $130 million (U.S. Travel and Tourism Administration 1994), the Federal Government is receiving over 50 times as much tax revenue from foreign-tourist spending at Miami Beach than it spends on beach nourishment at Miami Beach. It receives about seven times as much tax revenue annually from foreign-tourist spending at Miami Beach than it spends to restore all Florida beaches and more tax revenue annually than it spends to restore all of the Nation's beaches. Similarly, California received just about $2 million annually in Federal beach nourishment funds from 1995 to 1999 (King 1999), and the Federal Government receives $14 billion in tax revenues annually from California beach tourists. This yields the Federal Government receiving 7,000 times as much in tax revenues from California beach tourists as it spends on beach nourishment in California. Houston (1996) noted that the Federal Government is receiving a huge return on its beach-nourishment investment just from foreign-tourist taxes and not including taxes from domestic tourists nor reduction of storm damage and resulting emergency-relief spending.

WORLDWIDE COMPETITION FACING THE U.S.

Houston (1996) noted that travel and tourism's importance to world economies, employment, and international competitiveness has not been lost on America's economic competitors. Germany and Japan have outspent the United States in infrastructure investment for decades, including

spending freely to maintain their beaches as infrastructure investments. For example, Germany has spent about $3.3 billion over 40 years on shore protection (Kelletat 1992). This amount is about five times the corresponding U.S. expenditures over the same period and about 25 to 50 times a greater share of GDP (Houston 1995b). These expenditures were made to protect a coastline less than 5% the length of the U.S. coast. Japan's budget for shore protection and restoration has topped $1.5 billion in a single year (Marine Facilities Panel 1991). This is more spent in a single year than the United States has spent in over 40 years from about 1950 to 1990 (U.S. Army Corps of Engineers 1994). Spain with its extensive beaches is a major competitor for tourists. It conducted a 5-year program to both restore existing beaches and build new ones and spent more than the United States has spent for beach restoration over 40 years (Ministerio de Obras Publicas y Transportes 1993). Of course, tourism is the dominant and critical industry in Spain. Even so, Spain's tourist revenues are only about 7% those of the United States (World Almanac 2001).

U.S. BEGINNING TO LOSE LEAD

Houston (1996) noted that abundant natural attractions, including the world's most extensive beaches, make the United States attractive to tourists. However, there is a world economy in tourism that gives consumers ample choices and produces stiff worldwide competition for tourists. If Florida beaches become run down, German tourists can choose Spanish beaches. If Hawaiian beaches decline, Japanese tourists can choose Australia's Gold Coast. This worldwide competition is well recognized outside the United States. For example, Houston (1996) noted that in the mid-1990's the United States spent only $16.3 million in advertising to its international tourist markets, and this was compared to Spain's $170 million in advertising (Washington Post 1995). The United States ranked 31st in tourism advertisement behind countries such as Malaysia and Tunisia (Brooks 1995). Ireland spent 180 times more per capita on tourism advertisement than the United States (National Oceanic and Atmospheric Administration 1998). However, even this minimal U.S. spending of $16.3 million on advertisement to international tourist markets was eliminated when Congress abolished the U.S. Travel and Tourism Administration in 1996. "The United States is (the) only country in the developed world without a government-funded National Tourism Office and (it) bodes badly for the country's future tourism growth" (National Oceanic and Atmospheric Administration 1998). The United States currently has no nationally-funded tourism advertising whereas countries such as Australia, Canada, France, Greece, Singapore, and Spain each spend about $100 million on international marketing (Brooks 1995, Hotel-online 1998, Balzer 1998). As world tourism grew dramatically in the 1990's, the number of foreign tourists visiting the United States actually declined slightly from 1992 to 1999. Although foreign tourist numbers declined, spending by foreign tourists in the United States increased 70% from 1990 to 1997. However, this trend also has stalled, with spending by foreign tourists in the United States declining from 1997 to 1999 (Cable News Network (CNN) 2000). The United States has slipped behind France and Spain as the leading tourist destination, and the U.S. share of the international tourism market has declined in the 1990's. The trade surplus that the United States enjoys in travel and tourism has dropped almost in half from $26.3 billion in 1996 to $13.9 billion in 1999

(International Trade Administration and Bureau of Economic Analysis 2000). Moreover, with no action by the United States, the downward trend in the U.S. share of the world market will continue. The World Travel and Tourism Council (2001d) estimates that the United States will rank a disappointing 122nd in the world in international tourism growth from 2001 to 2011 and lag the growth in countries such as Burkina Faso, Mauritius, Mali, Laos, Botswana, and Poland (countries that are hardly known as tourist destinations).

CONCLUSION

Travel and tourism is America's leading industry, employer, and earner of foreign exchange; and beaches are the leading factor in travel and tourism. Few in America realize that beaches are a key driver of America's economy and its competition in a world economy. Perhaps Americans do not appreciate the importance of tourism to the national economy because 98% of the 1.4-million tourism-related businesses in the United States are classified as small businesses, and this makes the industry extremely fragmented (U.S. Travel and Tourism Administration 1995). Lacking national advertising from either this fragmented industry or a national travel office, the importance of travel and tourism to the national economy has not been communicated to the American people. The conclusion one draws today is the same as that noted by Houston (1995b), "Without a paradigm shift in attitudes toward the economic significance of travel and tourism and necessary infrastructure investment to maintain and restore beaches, the U.S. will relinquish a dominant worldwide lead in its most important industry."

ACKNOWLEDGEMENTS

Permission was granted by Headquarters, U.S. Army Corps of Engineers, to publish this information.

REFERENCES

Alcorn, G. 2001. Congress helps out down on the farm, World News, 3 September 2001, http://www.theage.com.au/news/world/2001/09/03/FFXBIU5Q3RC.html>.

Balzer, S. 1998. Congress weighs $100M dowry for U.S. tourism, The Business Journal, <http://phoenix.bcentral.com/phoenix/stories/1998/08/17/story7.html>.

Brooks, Browning. 1995. Interview with Professor Robert Bryer, Florida State School of Business, Florida State Times, <http://www.fsu.edu/~fstime/FSTimes/Volume2/Issue1/qanda.html>.

Bureau of Labor Statistics. 2001. Occupational Employment and Wages in 1999 Based on the New Standard Occupational Classification System Summary, <http://www.bls.gov/ news.release/ ocwage.nr0.htm>.

Bureau of Land Management. 2001. Technical Appendix 3: Comparison of RMIS with other Recreational Data Sources, <http://www.blm.gov:80/nhp/efoia/wo/fy01/im2001-131, attach 4.pdf>.

Cable News Network (CNN). 2000. Luring international tourists to the United States, <http://www10.cnn.com/2000/TRAVEL/NEWS/05/11/visiting.america/>,.

Carlson Wagonlit Travel Agent Poll. 1998. BEACH BLANKET BINGO, <http://www.carlsontravel.com/About_Us/News_Release/9801/980625.htm>.

Chivas Poll. 2001. The best place to vacation is the beach, <http://www.chivas.com/polls/vacation_results.html>.

City of Miami Beach. 2001. Tourism Overview, <http://ci.miami-beach.fl.us/newcity/depts/econdev/visitors%20Profile.htm>.

Clean Beaches Council. 2001. The Blue Wave Campaign, Protecting a Precious Resource at Risk, <http://www.cleanbeaches.org/bluewave/default.cfm>.

Hall, C., and Staimer, M. 1995. Concerns about the coast, USA Today, page 1A, 9 August 1995.

Holecek, Donald F. 1995. Tourism, Special Report 76, Michigan Agricultural Experiment Station, Michigan State University, <http://www.msue.msu.edu/msue/imp/modsr/04089576.html>.

Hotel-online. 1998. Increased Pressure on National Promotional Budgets, <http://www.hotel online.com/Neo/News/PressReleases1998_4th/Nov98_PATA.html>

Houston, J.R. 1995a. The Economic Value of Beaches, The CERCular, Coastal Engineering Research Center, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS, Vol. CERC-95-4, December 1995, 1-4.

Houston, J.R. 1995b. Coastal Forum I: Beach Nourishment, Shore and Beach 63(1), January, 21-24.

Houston, J.R. 1996. International Tourism & U.S. Beaches, Shore and Beach 64(2), April, 3-4.

International Ecotourism Society. 2001. Ecotourism Statistical Fact Sheet, <http://www.ecotourism.org/textfiles/statsfaq.pdf>.

International Trade Administration and Bureau of Economic Analysis. 2000. U.S. International Travel and Tourism Balance of Trade (Receipts/Exports and Payments/Imports) 1990-1999pr, <http://tinet.ita.doc.gov/view/f-1999-03-001/>.

Kelletat, D. 1992. Coastal Erosion and Protection Measures at the German North Sea Coast, Journal of Coastal Research 8 (3), 699-711.

King, P. 1999. The Fiscal Impact of Beaches in California, Public Research Institute, University of San Francisco, <http://online.sfsu.edu/~pgking/handouts/thefiscalimpactofbeaches.pdf>.

Lang, Jones. 2001. Overview of the Miami Lodging Market, 23 August 2001, <http://www.hospitalitynet.org/ihra/news/4008918.htm>.

Marine Facilities Panel. 1991. U.S. Japan Wind and Seismic Effects Panel, 17th Meeting of the Marine Facilities Panel of the United States-Japan Cooperative Program in Natural Resources (UJNR), J-(4), 1-9, Tokyo, Japan. U.S. Dept. of Commerce, National Oceanic and Atmospheric Administration, 533 pp.

Marlowe, H. 1999. Assessing the Economic Benefits of America's Coastal Regions, <http://www.coastalcoalition.org/facts/coastalregions.html>.

Miller, R.R. 2001. Economics of Travel and Tourism, New York University's 7th Annual Stephen W. Brener Distinguished Lecture Series, World Travel and Tourism Council, <http://www.scps.nyu.edu/images2/WTTCNYU.pdf>.

Ministerio de Obras Publicas y Transportes. 1993. Recuperando La Costa, Serie Monografias, Centro de Publicaciones, Madrid, Spain.

Morgan, D. 2000. Catch the Blue Wave, Environmental Group Releases List of Cleanest U.S. Beaches, ABC News. <http://abcnews.go.com/sections/travel/DailyNews/CleanBEaches000519.html>.

National Association of State Park Directors. 2000. State Park Statistics, <http://www.indiana.edu/~naspd/statistics.html>.

National Oceanic and Atmospheric Administration. 1998. Promotion of International Tourism to the United States, <http://www.yoto98.noaa.gov/yoto/meeting/tour_rec_316.html>

National Park Service. 2001. Visitation Statistics; 2000 Visitation, <http://www2.nature.nps.gov/stats/>.

Research and Analysis Bureau. 2001. Job Projections for U.S. Industries, 1998 - 2008, <http://rad.dli.state.mt.us/project/Project8/projUS8.htm>.

Stronge, W. B. 2000. The Economic Benefits of Florida's Beaches: Local, State and National Impacts, <http://www.coastalcoalition.org/ACCarticles/stronge.htm>.

Tait, S. 2001. Thanks, Kirby Green for a job well done, Shoreline, May 2001, <http://www.fsbpa.com/shorelinemay01>.

U.S. Army Corps of Engineers. 1994. Shoreline Protection and Beach Erosion Control Study, Phase I: Cost Comparison of Shoreline Protection

Projects of the U.S. Army Corps of Engineers, Water Resources Support Center, Washington, DC.

U.S. Army Corps of Engineers. 2001. Sandy Hook to Barnegat Inlet, New Jersey Beach Erosion Control Project, <http://www.nan.usace.army.mil/business/prjlinks/coastal/seabrite/index.htm>

U.S. Department of Commerce. 2000. The Exports and Trade Balance Picture for the United States for 1998 & 1999 With a Focus on International Travel Exports, <http://tinet.ita.doc.gov/analysis/export99.html>.

U.S. Department of Commerce. 2001. U.S. Foreign Trade Highlights, <http://www.ita.doc.gov/td/industry/otea/usfth/tabcon.html>.

U.S. Travel and Tourism Administration. 1993. World Tourism at the Millennium, U.S. Department of Commerce, April 1993, 97 pp.

U.S. Travel and Tourism Administration. 1994. Impact of International Visitor Spending on State Economies, U.S. Department of Commerce, December 1994.

U.S. Travel and Tourism Administration. 1995. Travel Outlook Forum, Forging New Strategies in Tourism Research, U.S. Department of Commerce, 17 October 1995.

USA Today. 1993. More plan vacations this year, Page D1, 17 March 1993.

Wall Street Journal. 1994. The Other American Dream Team, 15 February 1994.

Washington Post. 1995. Chefs Bemoan a Reduction in Their Favorite Deduction, Page D4, 11 April 1995.

Washingtonpost.com: Poll. 2001. Where do you like to spend your spring vacation, www.washingtonpost.com/wp-dyn/education/kidspost/poll/ <http://www.washingtonpost.com/wp-dyn/education/kidspost/poll/>.

Wiegel, R.L. 1992. Dade County, Florida, Beach Nourishment and Hurricane Surge Study, Shore and Beach 60(4), 2-26.

World Almanac. 2001. Funk & Wagnalis Corp., Mahwah, NJ.

World Tourism Organization. 2001. Leading the World's Largest Industry, <http://www.world-tourism.org/aboutwto/aboutwto.html>.

World Travel and Tourism Council. 1998. World Travel Tourism Development, A Global Opportunity, <http://gocalif.ca.gov/research/intrnl.html>.

World Travel and Tourism Council. 2001a. Year 2001, World, TSA Research Summary and Highlights, <http://www.wttc.org/ecres/pdfs/WLD.pdf>.

World Travel and Tourism Council. 2001b. Year 2001, United States, TSA Research Summary and Highlights, <http://www.wttc.org/ecres/pdfs/all1.pdf>.

World Travel and Tourism Council. 2001c. Year 2001, TSA Research, Overview, and Definitions, <http://www.wttc.org/ecres/pdfs/overview.pdf>.

World Travel and Tourism Council. 2001d. Year 2001 TSA Research, Country League Tables, <http://www.wttc.org/ecres/pdfs/cnty_rk.pdf>

Zukin, C. 1998. The Shore - Looking up (Save the Beach Passes), The Star-Ledger/Eagleton-Rutgers Poll, <http://slerp.rutgers.edu/releases/119_3.htm>.