



Watershed news & views

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FISHING INDUSTRY WORTH BILLIONS

Michigan's 1.8 million anglers spent an estimate \$1.5 billion on fishing trips and equipment in 1996, according to the American Sport Fishing Association. Those expenditures support nearly 36,000 full-time jobs, with a total annual payroll of \$772 million, according to an association study. Fishing contributed \$120 million in state taxes and nearly \$81 million in federal taxes. Michigan anglers spent 28.7 million days fishing in 1996. Sportfishing supported more than 1.2 million full-time jobs in the United States last year, the same study concludes, generating \$28.3 billion in wages and more than \$3 billion in federal income taxes and \$2.39 billion in state income taxes.

WHAT IS "NAVIGABILITY"?

By Clifford H. Bloom, Attorney at Law; Law, Weathers & Richardson, P.C.

Some lakes, rivers and streams in the state of Michigan are "navigable", while others are not. What does it mean to be "navigable"? Whether or not a body of water is navigable can have major implications for adjoining riparian property owners. Unfortunately, the concept of navigability in Michigan is widely misunderstood and is often misapplied, even by the courts. Generally, the public has no right to use non-navigable waterways, and such waterways can only be used by the adjoining riparian property owners. Conversely, if a body of water is navigable, the public has the right to use the waters for certain limited purposes.

Due to different legal issues and for simplicity's sake, I will not address navigability in this article as it relates to the Great Lakes (excluding Lake Champlain!) and major bays or waterways tied into the Great Lakes.

In the past, the concept of navigability was used almost exclusively for business and commerce. Throughout the 20th century, however, navigability has evolved to encompass the limited recreational activities of fishing and boating.

If a body of water is navigable, the property rights of adjoining riparian owners are subject to certain rights of the public to use the water. In essence, members of the public have an easement (technically, a "servitude") to use the waters for certain limited purposes such as boating and fishing. If a waterway is non-navigable, the public generally cannot use the water, and in some cases members of the public may not use the water even if the public has lawful access to the body of water. Navigability has not been governed by statutes passed by the Michigan Legislature, but rather by the Michigan common law. Michigan common law is comprised of all appellate court decisions over the years addressing a subject. In Michigan, there are generally two alternate tests for determining whether or not a body of water is navigable. First, if a body of water has been used in the past or is presently used by larger commercial vessels (such as tankers, fishing boats, tug boats, etc.), the body of water is navigable. Second, the "floating log" test has long been recognized by Michigan courts. Pursuant to this test, if a body of water (particularly a river, stream or creek) was used during the late 1800's for floating commercial grade logs, the body of water was deemed navigable. Even if a body of water was never actually used during the lumbering days for floating such logs, it can still be deemed navigable today if the flowing body of water is sufficiently wide and deep that commercial grade logs could be freely floated today.

In the 1982 case of *Bott v Natural Resources Commission*, 415 Mich 45 (1982), the Michigan Department of Natural Resources attempted by judicial action to expand the definition of navi-

gability for flowing bodies of water to make many theretofore private lakes, creeks and streams public by arguing that a recreational boating test should be substituted for the traditional log floating test. That attempt was decisively defeated by the Michigan Supreme Court, which held in *Bott* in part as follows:

One must question whether there is an overriding need justifying adoption of a new test of navigability.

The argument based on public need assumes that recreational value should be given paramount consideration and makes no attempt to consider competing public values. Recreational use has a cost. The inland waters aid the nesting of wild fowl and the propagation of aquatic life. An expansion of public use would also affect the communities where the waters are located.

The proposed changes in law would not have a purely theoretical effect. It is said that adoption of the recreational-boating test will respond to the asserted increase and public's need for access to recreational waters and yet not produce quantitatively different results from the log-flotation test. These two propositions are irreconcilable. If the new test is adopted to meet a need which the former test is not able to satisfy, there necessarily must be some quantitative difference when the two tests are actually applied or there is no need for a new test.

Recreational boats, such as kayaks and canoes, displace far less water than logs, are highly maneuverable, and can travel through waterways unfit for floating logs to market. Michigan is a state of numerous inland waters, characteristics similar to those of the creeks connecting the lakes in the instant cases. Adoption of a recreational boating test would subject many formerly private inland waters to what are in essence recreational easements.

Fishing is a quiet sport. General boating and water recreational can, however, be intrusive and jarring.

Public access to these previously non-navigable waters will diminish enjoyment of surrounding property. Many of those who own such property are vacationers who acquired the property for peaceful retreat. A rule which opens these waters to curious boaters and enterprising fishermen may render the property unfit as a refuge or retreat. Even if these interests are thought to be too intangible to warrant protection, 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 hereto-

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About The Cover

The pictures on the front cover were from slide photos taken by James H. Harding, Michigan State University Museum.

The descriptions of the turtles on this page are from the book, *Michigan Turtles and Lizards, A Field Guide and Pocket Reference*, by James H. Harding and J. Alan Holman, Michigan State University, Cooperative Extension Service. First Edition, 1990.

Painted Turtle (*Chrysemys picta*)

This is a common, small, dark-shelled turtle with a yellow-striped head and red and yellow stripes on the neck, legs, and tail. The smooth black or olive carapace has red markings along the edge, especially underneath the marginal scutes. The plastron is usually yellow, sometimes tinged with red, with a large, dark central blotch. In some specimens this blotch is nearly absent, while in the western subspecies (see Distribution and Status) the blotch is wider and more complicated and extends along the seams between the scutes. Males are smaller and have longer front claws than females. Adult carapace length: 4 to 7 inches (10 to 18 cm). Record length (western subspecies): 9.8 inches (25 cm).

Blanding's Turtle (*Emydoidea blandingii*)

Blanding's turtle is a medium-sized turtle with an elongated, dome-like carapace and a long neck. The smooth carapace is usually black with a variable number of yellowish spots and streaks. The head is also dark, with brown or yellow spots, but the chin and the underside of the neck are bright yellow. The yellowish plastron has a dark blotch at the outer edge of each scute, and there is usually a flexible hinge between the pectoral and abdominal scutes. A frightened turtle may use this hinge to lift the front and back of the plastron and close up its shell. Hinge flexibility varies greatly between individuals, and some specimens have little or no shell closing ability. Adult carapace length: 6 to 10.5 inches (15.2 to 26.7 cm).

Snapping Turtle (*Chelydra serpentina*)

This large aquatic turtle has a big head with a pointed nose and hooked upper jaw, and a long, thick tail with a row of large, triangular scales along the top. The carapace is black, brown, gray, or olive, with pointed marginal scutes along the rear edge. (The shell is often covered with algae or mud.) Young snappers have three lengthwise keels on the carapace, but large adults may have shells that are nearly smooth. The yellowish plastron is small and cross-shaped and leaves much of the turtle's underside uncovered. This lack of protection may partly explain the snapping turtle's well-known biting defense. This is Michigan's largest turtle, often reaching 10 to 35 pounds (4.5 to 16 kg); the record weight was 86 pounds (39 kg) for a captive specimen. Adult carapace length: 8 to 18.5 inches (20 to 47 cm).

Spiny Softshell Turtle (*Apalone spinifer*)

This medium to large turtle is unmistakable, with its flat, smooth shell and long, pig-like nose. The rounded tan, brown, or olive carapace is marked with black dots or circles in juveniles and males, and dark blotches in adult females. The plastron is white, with gray patches over the plastral bones. Both carapace and plastron lack scutes and are quite soft and flexible. The name "spiny" comes from the small spines at the front of the carapace. The neck is very long, and a yellowish, black-bordered stripe is usually visible on the sides of the head. Females are larger and darker and have shorter tails than males. Adult female carapace length: 7 to 19 inches (18 to 48 cm). Adult male carapace length: 5 to 9 inches (12.7 to 23 cm).

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fore private character of the waters adjacent to their property significantly adds to its market value.

(Bott at pages 61, 62, 66, 73, 74, 78 and 79.)

Recently, the Michigan United Conservation Clubs ("MUCC") has attempted to broaden the definition of navigability and to make many formerly private lakes, creeks and streams public by supporting Senate Bill 767 in the Michigan Legislature ("SB 767"). Although the proposed definition of navigability contained in SB 767 is being sold as an attempt to "clarify" navigability rights, it would in fact overturn 100 years of common law and would make virtually every creek, stream and trickle of water in the state of Michigan public. It would also make many previously private lakes with only one small inlet or outlet public.

What does it mean for a river, stream or creek to be navigable? Does that mean that such flowing bodies of water can only be used by a person floating on the water and that the person cannot set foot on the river bottom? No. Once a flowing body of water is deemed "navigable", members of the public can use the body of water extensively and need not use it only to the extent that it can be floated upon. For instance, a small navigable river or stream can be traversed by the public in canoes or kayaks, but fishermen can also wade on the bottomlands of the river and even go out of the water and onto the banks to avoid obstructions such as trees, holes and fences. In other words, fishermen can wade the stream and need not limit themselves on a navigable body of water to only floating without touching the bottom. While the public's rights regarding a small navigable river or stream are generally limited to fishing and wading, SB 767 would not only dramatically expand the definition of navigability, but also the public's rights incidental to navigation. If SB 767 passes, the rights of the public to use a navigable body of water would also include all recreational activities such as hunting, trapping and motor boating, as well as fishing and wading.

Why should riparian owners on lakes or ponds be concerned about navigability, since navigability issues seem to affect flowing bodies of water (such as rivers, streams and creeks) more? A revised definition of navigability would impact any private lake or pond which has an inlet or an outlet, no matter how small. Based on longstanding common law definitions of navigability, a lake or pond which is predominantly surrounded by private property is considered private unless it has both a navigable inlet and outlet which would make it part of a "commercial highway." If the definition of navigability were expanded as proposed by SB 767 from a "commercial" or "log floatation" test to a "recreational" test, any presently private lake or pond which has either a small inlet or outlet would be deemed navigable and hence, public. Please keep in mind that once an inlet or outlet to a lake or pond is deemed navigable, members of the public can wade through the inlet or outlet to reach the lake (including carrying a boat or canoe for ultimate use on the lake or pond) — members of the public would not be required to float in a watercraft the entire way. Under an expanded definition of navigability, once members of the public are able to reach a previously private lake or pond, they could use the body of water for many purposes such as boating, fishing, trapping, swimming, hunting and ice fishing. Under the laws that presently exist, most of those activities would not be permitted.

Although the long-standing common law definitions of navigability in Michigan are somewhat confusing, they have served us well for the better part of a century. In practice, the overwhelming majority of rivers as well as large streams are already in fact, navigable. To overturn a century of accepted law and countless property owners' reasonably held expectations regarding privacy and the status of their water-related property rights would be unwise, unfair, unnecessary and probably an unconstitutional taking of private property without due process and just compensation. To the extent that you are concerned about efforts to change the definition of navigability, you should contact your local Michigan legislator.