

Michigan Navigability Report

Summary

Navigable streams and rivers are those capable of being used for commerce, including floating commercial logs, at seasonal high flows. The public has the right to use navigable streams. Use includes wading and fishing in navigable streams; however, the law is unclear as to whether such use also includes the right to recreationally boat on the water.

State Test of Navigability

Navigable streams are those with the “capacity for valuable floatage, irrespective of the fact of actual public use, or the extent of such use,” though a “stream which can only be made floatable by artificial means, can in no sense be deemed a public highway.”¹ The test is whether a stream inherently and by its own nature is capable of being used for commerce to float vessels, boats, rafts, or logs.² The navigability determination is made on a case-by-case basis and may be demonstrated where records indicate use for commercial log floating, by actually floating a number of large logs down the stream in question, or by surveying the body of water and comparing its dimensions (width, depth, rate of flow) to the reported dimensions of streams already found to be navigable.³ The stream need not have a capacity for commerce continually to be navigable, but only periodically.⁴

Michigan expressly chose not to adopt a recreational boating test as its state test of navigability, instead relying on whether the waters are capable of floating logs.⁵

Extent of Public Rights in Navigable and Non-Navigable Waters

In Michigan, a riparian (abutting a stream) or littoral (abutting a lake) owner owns to the center of the body of water, regardless of whether navigable.⁶

Private ownership over beds to navigable waters, however, is “subject to a servitude for commercial navigation of ships and logs, and, where the waters are so navigable, for fishing.”⁷ That is, “the public-trust doctrine applies only to *navigable* waters and not to all waters of the state [and] does not attach to lakes unconnected to other waterways or to lakes with only one

¹ Moore v. Sanborne, 2 Mich. 519, 523-24 (Mich. 1853).

² *Id.* at 526; *see also* Rushton *ex rel.* Hoffmaster v. Taggert, 11 N.W.2d 193, 196-97 (Mich. 1943).

³ Michigan Citizens for Water Conservation v. Nestle Waters N. Am. Inc., 709 N.W.2d 174, 219 (Mich. Ct. App. 2005), *aff'd in relevant part*, 737 N.W.2d 447 (Mich. 2007), *overruled on other grounds*, Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686 (Mich. 2010).

⁴ Taggert, 11 N.W.2d at 197; Moore, 2 Mich. at 526-27.

⁵ Bott v. Comm'r of Nat. Res., 327 N.W.2d 838, 841 (Mich. 1982).

⁶ *E.g., id.*

⁷ *Id.*; *see also* Taggert, 11 N.W.2d at 197.

inlet or outlet . . . not to be navigable.”⁸ The public trust applies up to the high-water mark.⁹ The “only recreational use . . . recognized by [the Supreme Court of Michigan] as an incident of the navigational servitude is fishing,”¹⁰ though one court implicitly recognized a right to wading when it permitted fishing in navigable waters that were not navigable to boats but could pass logs, and where fisherman accessed the river by wading.¹¹

Where there is no public access to an otherwise navigable lake, however, such as if a connecting stream is non-navigable, then only the littoral owners have a right to use the lakes.¹² If the lake is a dead-end and encompassed by a single owner, the lake is private even if it could be accessed through a navigable stream.¹³ And access to navigable waters over private property is trespass.¹⁴

Such public fishing and use of the water, however, is strictly limited to the water. Fishermen and boaters must be careful not to walk on the adjacent soil of the riparian owner, which would constitute trespass.¹⁵

The Michigan Supreme Court has not addressed whether recreational uses other than fishing, “a quiet sport” unlike potentially “intrusive and jarring” recreational boating, are “incidents of the navigational servitude and whether a distinction should be drawn in that regard between [publicly-owned beds, privately-owned beds underlying navigable-in-fact waters, privately-owned beds underlying waters capable of floating logs].”¹⁶ But hunting and fowling are not permitted.¹⁷ Cases before the Court of Appeals of Michigan, including one in 2017, have indicated greater acceptance of recreational use; “the public who gain access to a navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming, [and] anchor[ing] boats temporarily.”¹⁸ Because the public trust extends to the high-water mark,¹⁹ portage around obstacles and other contact with the bed would likely be permissible up to the high-water mark.

The public do not have rights to use non-navigable waters.²⁰

⁸ *Bott*, 327 N.W.2d at 846.

⁹ *Glass v. Goeckel*, 703 N.W.2d 58, 71-73 (Mich. 2005).

¹⁰ *Bott*, 327 N.W.2d at 841; *Taggert*, 11 N.W.2d at 197.

¹¹ *Taggert*, 11 N.W.2d at 194

¹² *Bott*, 327 N.W.2d at 841.

¹³ *Id.* at 841-42.

¹⁴ *Glass*, 703 N.W.2d at 75.

¹⁵ *Taggert*, 11 N.W.2d at 195; *see also Glass*, 703 N.W.2d at 75.

¹⁶ *Bott*, 327 N.W.2d at 843.

¹⁷ *Id.* at 842.

¹⁸ *Gunther v. Apap*, No. 333169, 2017 WL 4654975, at *3 (Mich. Ct. App. 2017) (quoting *Dyball v. Lennox*, 680 N.W.2d 522, 527-28 (Mich. Ct. App. 2004)); *accord Higgins Lake Prop. Owners Ass’n v. Gerrish Twp.*, 662 N.W.3d 387, 402 (Mich. Ct. App. 2003) (citing *Thies v. Howland*, 380 N.W.2d 463, 466 (1985)).

¹⁹ *Glass*, 703 N.W.2d at 71-73.

²⁰ *Bott*, 327 N.W.2d at 850; *Taggert*, 11 N.W.2d at 197.

Miscellaneous

Willful trespass on private land after receiving notice to depart is a misdemeanor with a fine of up to \$250 and jail sentence up to 30 days.²¹

For additional information on boating and fishing in Michigan, visit the state Department of Natural Resources website at <https://www.michigan.gov/dnr/> or the Michigan Economic Development Corporation website at <https://www.michigan.org/>.

²¹ Mich. Comp. Laws Ann § 750.552 (West 2021).