

Proposed Michigan Legislation Regarding the Public Trust Doctrine
(House Bill 5319)

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Law Weathers

Michigan has a limited common law water-related tradition sometimes referred to as the “public trust doctrine.” Although the phrase “public trust” is used in the context of water rights and navigability, the Michigan courts have also used the phrase in many other areas of the law totally unrelated to bodies of water. In addition, the Michigan courts have also shown a lack of precision when discussing the “public trust” even as to bodies of water. In the past, the courts have vaguely asserted that certain waters and aquatic uses are held “in trust” for the benefit of the public. Thus, private riparian rights in some situations are subject to certain usage rights by the general public. However, the actual reach of the public trust doctrine regarding waters and navigability is somewhat uncertain.

Where a river or lake is “navigable,” the courts have indicated that the water (and potentially the lake or river bed) is impressed with or subject to the public trust doctrine. The public trust doctrine seems to stand for the proposition that waters located within the Great Lakes, as well as navigable rivers and even navigable inland lakes, are owned (or co-owned) by the state which “holds” those waters in trust for the public and certain public uses. The public trust doctrine preserves public rights to waters separate from a riparian landowner’s title. Although various groups have urged the Michigan appellate courts to extend the public trust doctrine to nonnavigable inland lakes, streams, creeks, and even groundwater, the Michigan appellate courts have refused to do so. For some of the Michigan cases that discuss the public trust doctrine, please review *Bott v Comm’n of Natural Resources*, 415 Mich 45 (1982); *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25 (2005), and *Glass v Goeckel*, 473 Mich 667 (2005).

Another Michigan common law doctrine is that of “riparian rights,” which is also sometimes referred to as the “reasonable use doctrine.” Any riparian property owner in Michigan has such rights, whether the riparian owns land with frontage on one of the Great Lakes, an inland lake, or a river, stream, or creek. The reasonable use doctrine allows a riparian to utilize the riparian property (and related water) for a variety of different uses. However, the public trust doctrine, which preserves public rights to waters, operates as somewhat of a restriction on private riparian rights with regard to any body of water subject to the public trust doctrine.

A number of thoughtful riparians and groups throughout Michigan are concerned about the diversion of water from the state, whether it be pursuant to municipal water systems outside the relevant watersheds, bottled water extractions, or other diversions. Many believe that the existing state laws, federal laws, and multi-jurisdictional compacts are not sufficient to protect Michigan’s water resources from unreasonable exploitation. Hence, some believe that the public trust doctrine should be expressly extended to all waters within Michigan, both on the earth’s surface and underground.

Last September, seven Democratic members of the Michigan House of Representatives introduced House Bill No. 5319, which would legislatively extend the public trust doctrine to all waters within Michigan, including nonnavigable lakes and streams and even groundwater. The proposed legislation states as follows:

HOUSE BILL No. 5319

September 9, 2009, Introduced by Reps. Scripps, Roberts, Valentine, Geiss, Warren, Smith and Bledsoe and referred to the Committee on Great Lakes and Environment.

A bill to amend 1994 PA 451, entitled "Natural resources and environmental protection act," (MCL 324.101 to 324.90106) by adding part 4.

The People of the State of Michigan Enact:

Part 4. Public Trust Resources

Sec. 401. (1) The conservation and development of the natural resources of the state are of paramount public concern in the interest of the health, safety, and general welfare of the people, and the air, water, and other natural resources of the state shall be protected from pollution, impairment, and destruction.

(2) The waters of the state, including groundwater, are held in trust by the state. The state shall protect these waters and other natural resources that are subject to the public trust for the benefit of present and future generations.

(3) The attorney general, on behalf of the state, or any other person may maintain an action in the circuit court having jurisdiction to enforce the public trust in the state's natural resources, either alone or in conjunction with other provisions of this act or other legal remedies that are appropriate. The circuit court may apportion costs, including attorney fees, if the interests of justice require.

At the time that this article was authored, passage of House Bill No. 5319 was uncertain. The proponents of the legislation argue that it is necessary to protect Michigan's water resources from unreasonable exploitation and diversion. They believe that current common law and legislative protections are not sufficient. Finally, they assert that the passage of the bill will not detract from riparian ownership rights.

Some of the opponents of House Bill No. 5319 view it as a "power grab" by the government. They fear that it will constitute a "taking" of private property rights, including riparian rights. They claim that riparians will not be able to exercise their riparian rights without extensive government regulation and interference.

Although anyone who knows this author is aware that I have very definite opinions regarding riparian issues, I have not yet been able to decide for myself whether this proposed piece of legislation is meritorious or not. If anything, passage of the legislation would lead

riparian law into uncharted waters (sorry, I could not resist!). House Bill No. 5319 would achieve what the Michigan appellate courts have refused to do—extend the public trust doctrine to nonnavigable bodies of water such as certain inland lakes, streams, ponds, wetlands, and creeks, as well as groundwater. It is also not clear how the Michigan courts would interpret House Bill No. 5319 if enacted. It is also not clear how the proposed legislation would “mesh” with existing riparian rights case law. The enactment of House Bill No. 5319 (or a similar bill) would be an open invitation to the Michigan courts to create new case law with very little legislative or prior common law guidance. It is unclear whether the proposed legislation would be responsibly interpreted by the courts to prevent unreasonable water diversions or turn it into an opened Pandora’s Box that decimates private property rights.

If you wish to express an opinion about House Bill No. 5319, please email the editor of this magazine at fmogdis@mi-riparian.org or mail your letter to *The Michigan Riparian* magazine at 304 East Main Street, Stanton, Michigan 48888. *The Michigan Riparian* may, in a future issue, print some of your comments or post them on the magazine’s website.