

## **ATTORNEY WRITES**

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### **“Artificial or Real?”**

While many areas of water law in Michigan are well established by the courts, the property rights of lakefront owners on an artificial lake are uncertain due to two recent decisions of the Michigan Court of Appeals. Within the last five years, the Court of Appeals held that artificial lakes in Michigan do not have riparian rights in *Persell v. Wertz*, 287 Mich App 576 (2010) and *Holton v. Ward*, 303 Mich App 718 (2014). Please see my earlier articles on these cases in the Summer 2010 and Spring 2014 issues of the *Michigan Riparian Magazine*.

These two Court of Appeals cases potentially present a huge problem for lakefront owners on artificial lakes. Why? With a natural lake, lakefront property owners have over 175 years of Michigan common law that spells out in significant detail what specific rights riparian property owners have. For example, the courts have long held that riparian owners have exclusive rights of dockage, seasonal boat moorage, water drawing privileges and similar rights on and over their lakeshore and lake bottomlands. Riparian owners also have the right to fish, swim, hunt water fowl and engage in a variety of different recreational uses and activities with regards to their water frontage.

However, by declaring that artificial bodies of water do not have riparian rights in *Persell v. Wertz* and *Holton v. Ward*, the Court of Appeals has created a vacuum regarding the rights of waterfront property owners on an artificial body of water. Can they install and utilize docks, boat hoists and swim rafts? Do they own or control any of the bottomlands adjacent to their waterfront lots? Can waterfront property owners on artificial lakes permanently and seasonally

moor, anchor or dock boats along their water frontage? Can they use the entire surface of the artificial body of water for fishing, water skiing and sailing? Unfortunately, the Michigan appellate courts have not really addressed any of these issues with regard to artificial bodies of water.

Over a year ago, one of the waterfront property owners in *Holton v. Ward* attempted to appeal the decision by the Michigan Court of Appeals to the Michigan Supreme Court. The Michigan Lake & Stream Associations, Inc. (“MLSA”) filed an amicus brief with the Michigan Supreme Court in favor of the appealing party. MLSA requested the Supreme Court to not only hear the appeal but to also hold that over time artificial bodies of water could effectively become conventional lakes with riparian rights. Interestingly, the Illinois courts have adopted that view. Although the appellate courts in Illinois have held (like Michigan) that artificial bodies of water do not have riparian rights, the Illinois courts also recognize the “artificial becomes natural” rule. That is, if an artificial body of water has been utilized similarly to a natural lake over a period of time, it will be deemed to be a lake with riparian rights. MLSA asked the Michigan Supreme Court to adopt the same view. In *Holton v. Ward*, the Michigan Court of Appeals appeared to reject the Illinois rule that an artificial lake could become a riparian lake. See *Holton v. Ward* at footnote 12. The Illinois approach is discussed in more detail below.

Regrettably, on March 31, 2015, the Michigan Supreme Court decided not to hear the appeal in *Holton v. Ward*. As a result, the Court will not substantively consider the position advocated by MLSA (at least not at this time). Typically, the Michigan Supreme Court tends to accept less than five percent of the cases that are submitted to it for appeal.

The main justification for treating artificial lakes differently (and not according them riparian rights) appears to be the notion that because the original owner or developer of the entire

lake maintains “control” over the lake, there is no need (or it would be unfair) to apply the riparian rights doctrine to an artificial lake. However, in most real world situations in Michigan, that justification is illusory or even false. For the overwhelming majority of artificial lakes in Michigan (whereby lots or parcels have been purchased by third parties), there are no deed restrictions, restrictive covenants or similar recorded documents that indicate how lot owners can use the artificial lake (let alone specifying whether individual lot owners own the bottomlands adjacent to their lot, can utilize docks, boat hoists and similar items, can use the entire surface of the lake for general recreation, etc.). Even where one common owner, developer or platter has imposed deed restrictions, restrictive covenants or the equivalent on an artificial lake or individual lake front lots or parcels before selling them to third parties, rarely do such restrictions indicate whether or not the lake is to be treated as a natural or artificial lake, and such restrictions almost never indicate whether lot owners can use the entire surface of the lake for general recreation, install and use docks or engage in similar lake usage. In fact, it has been the experience of MLSA that purchasers of lots or parcels on most artificial lakes believe that their rights of usage to the lake itself are the same as a natural riparian lake.

To the extent that the Court of Appeals has now held that lot owners on artificial lakes do not have riparian rights, there is no current legal guidance on the nature and scope of the rights of lot owners on artificial lakes. For example, do the decisions in *Persell v. Wertz* and *Holton v. Ward* mean that lot owners on artificial lakes:

- Do not own or control the bottomlands adjacent to their lots?
- Cannot install or use a dock, boat hoist or swim raft?
- Cannot permanently or seasonally moor, anchor or store boats or watercraft?
- Cannot use the entire surface of the artificial lake?

- Cannot fish or hunt water fowl on the lake?
- Cannot go on the ice in the winter?
- Cannot draw water from the lake for consumptive uses?
- Cannot engage in general boating on the lake's surface?
- Cannot swim or recreate in general on or in the lake?

If artificial lakes in Michigan do not (and cannot) have riparian rights, then presumably individual lot owners around such lakes must treat them as ponds or wetlands and can engage in the following disruptive uses and activities:

- Install a fence across their respective portions of the lake.
- Keep others from using the water/lake above the bottomlands that they own.
- Keep others from using the ice above the bottomlands that they own.

One example of the potential chaos created by *Persell v. Wertz* and *Holton v. Ward* involves the allocation of bottomlands ownership. In Michigan, it is rare for a survey or legal description for a lakefront or waterfront lot or parcel on a natural lake to include a legal description of the lake bottomlands attributable to that lot or parcel. In other words, legal descriptions rarely extend under the water into or along the bottomlands of an inland lake. Instead, the Michigan appellate case law has long held that where a legal description utilizes language such as “extends to the water’s edge”, “to the lake”, “along the shore” or similar wording, the parcel or lot is deemed to be waterfront by operation of law and the bottomlands attributable to that lot or parcel extend to the center of the lake. See *Hilt v. Weber*, 252 Mich 198; 233 NW 159 (1930); *Mumaugh v. McCarley*, 219 Mich App 641; 558 NW2d 433 (1996) and *Bauman v. Barendregt*, 251 Mich 67; 231 NW 70 (1930). At what angle the riparian boundary lines for a particular lot or parcel on an inland lake radiate or extend to the center of the lake is a question of fact, which can be determined by circuit courts. See *Heeringa v. Petroelje*, 279 Mich

App 444; 760 NW2d 538 (2008). For some artificial lakes in Michigan, the legal description for a particular waterfront lot or parcel does extend out and into (or under) the artificial body of water involved. However, it has been the experience of MLSA that for the overwhelming majority of artificial lakes in Michigan, the legal descriptions for waterfront parcels or lots generally extend only to the water's edge (and not into the lake or bottomlands), just as is true with almost all lots or parcels on natural lakes. Therefore, if artificial lakes do not have riparian rights and the deeds or legal descriptions for lots or parcels on a particular artificial lake end at the water's edge, how would the bottomlands be allocated? Could the owners of such waterfront lots or parcels even utilize the bottomlands adjacent to their lots or parcels for docks, boat moorage, etc.? Implementation of a broad general rule that artificial lakes do not have (and cannot have) riparian rights creates a severe problem with regard to lake bottomlands allocation, usage and ownership on artificial lakes.

In addition, neither *Persell v. Wertz* nor *Holton v. Ward* define what constitutes an artificial lake versus a natural lake for purposes of having riparian rights. In some situations, it would be easy to define what constitutes an artificial lake. For example, large lakes created out of former gravel pits or quarries are almost certainly artificial lakes. However, in other cases, it is difficult to ascertain whether a lake is "artificial" for legal purposes. As another example, what about the situation where a natural lake existed, but its lake level or area has been increased significantly (and artificially) due to non-natural augmentation such as a new dam, augmentation well or massive dredging? Are such enhanced lakes "natural" or "artificial"? What about the case where a creek, stream or river existed (with riparian rights), but a new dam created an artificial lake? Is the resulting artificial lake riparian because the earlier flowing bodies of water

were riparian? What about a lake created by the manipulation or damming up of underground springs? The Court of Appeals has not addressed these definitional issues.

Many artificial lakes throughout Michigan resemble natural lakes. That is, likely dozens (if not hundreds) of artificial lakes around Michigan have been used for half a century or more as if they were natural lakes. Many artificial lakes are quite large. Lakefront property owners on many artificial lakes have installed and utilized docks, boat hoists, swim rafts, seawalls and similar structures for decades. They have permanently or seasonally moored, anchored, stored or kept boats and watercraft along their lakefront as well as moored to their docks, piers, boat cradles and similar structures. They have boated, water skied and recreated over the surface of the entire lake on numerous occasions. They have drawn water from the lake to water their lawns, as well as used the frozen surface of the lake during the winter for ice fishing. In other words, the lakefront lot owners on many artificial lakes have treated their lake for many years as if it were “natural”. Why should that type of artificial lake be treated any different from a natural lake for purposes of recognizing and exercising riparian rights?

Rather than have the courts attempt to craft non-riparian-type rights for artificial lakes pursuant to a future decades-long case by case approach, MLSA has urged a practical current solution. If an artificial lake has been used and treated as a natural lake for some period of time, then riparian rights should attach to that artificial body of water. For example, if an artificial lake has been used by the lot owners around the lake for a number of years for dockage, boat moorage, fishing, swimming, general recreation, etc., then the artificial lake should become or be deemed to be a “riparian” lake.

Michigan courts can look to the neighboring state of Illinois for that type of practical solution to the problem that artificial lakes may not have riparian rights (at least not when such

lakes are initially created). In general, the Illinois common law, like Michigan law, holds that riparian rights do not typically extend to artificial bodies of water when they are created. *Nottolini v. LaSalle National Bank*, 335 Ill. App. 3d 1015; 270 Ill. Dec 423; 782 NE 2d 980 (2003). However, the Illinois courts have recognized that:

“[I]t is apparent that man-made bodies of water can come to be treated as natural bodies of water and that private riparian rights can be acquired on man-made bodies of water as well”. *Alderson v. Fatlan*, 231 Ill. 2d 311, 322; 898 NE2d 595 (2008).

In *Alderson v. Fatlan*, the Illinois Supreme Court recognized and adopted the “artificial-becomes-natural” rule. The Illinois Supreme Court recognized the difficulties that can arise in trying to distinguish an artificial lake from a natural lake, particularly with the passage of significant periods of time. The Court also noted:

More fundamentally, ...the artificial-becomes-natural rule is justified by principles of fairness and equity. Simply put, in some cases, where the usage of the artificial body of water has long been subtle, it may be appropriate to treat the artificial body as a legal equivalent as a natural one. *Alderson* at p. 322.

What would the appropriate period of time be in Michigan for treating an artificial lake as a riparian lake based on overall lake usage? Michigan courts could use the general residuary statute of limitations in Michigan of six years (MCL 600.5813). Or, Michigan courts could use the longest statute of limitations for real property in Michigan of 15 years (MCL 600.5801).

Until the Michigan appellate courts begin to address these issues, the rights of property owners on artificial lakes in Michigan will remain in a legal limbo.