

Where is the Water's

By R. Craig Hupp

IN A CASE OF INTEREST TO EVERY MICHIGAN RESIDENT and our many annual visitors, the Supreme Court in *Glass v Goeckel*¹ answered “yes” to the question whether the public has the right to walk along the shores of the Great Lakes where a private landowner holds title to or beyond the water’s edge. This question is of substantial interest because Michigan’s shoreline is approximately 70 percent privately owned.² In reaching their respective answers to this question, the majority and dissenting opinions reaffirm our public heritage in the Great Lakes, recite a fascinating history of riparian law since Roman times, and illuminate the unusual mixture of overlapping public and private rights in the Great Lakes’ foreshores (the area between high water and low water marks).

While all justices agreed that the public has a right to access to the shores of the Great Lakes for limited purposes, the majority opinion, which determined that the right to access in most locations includes dry land adjacent to the water’s edge, prompted a vigorous dissent over what or where the water’s edge is. The majority has adopted a definition of the water’s edge that may well be difficult to define in many locations.

In 2001, Joan Glass sued the Goeckels, who own waterfront property on Lake Huron. Glass claimed that the Goeckels had interfered with her right to walk across the beach in front of their cottage between the ordinary high water mark and the water's edge. Her right to walk in the water was undisputed. Testimony revealed that in prior years both Glass and the Goeckels (like most other beach walkers enjoying the Great Lakes) had freely ranged up and down the beach in front of other properties.³

The trial court found that Glass was entitled to walk along the shoreline of Lake Huron "lakewards of the natural ordinary high water mark" as defined by § 2 of the Great Lakes Submerged Lands Act.⁴

The Court of Appeals reversed.⁵ It rejected the Submerged Lands Act as a basis for deciding right of access. It instead applied the "public trust doctrine," which preserves the public's title and right to use the waters and submerged lands of the Great Lakes up to the waters edge. The court held that the water's edge was literally that—the point where the waters of the Great Lakes ended and dry land began. On the landward side of that line, the littoral property owner had title and exclusive right to possession and use. The court held that title to submerged lands was exclusively in the state of Michigan. Because the water's edge changes with fluctuating lake levels, the court described a littoral owner's property as a moveable freehold.

Edge?

The Supreme Court reversed the Court of Appeals. The Court began its analysis with The Institutes of Justinian (535 CE), in which it is declared that "no one is barred access to the seashore . . ." This principal was adopted in the law of the sea as developed in the English common law. The Court cited the U.S. Supreme Court that lands within the tidal reach and below the high water mark by "their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects."⁶

This public right of use of these waters has become known as the public trust doctrine.⁷ The common law of the sea applies as well to the Great Lakes. From this it follows that "the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public. The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure."⁸ The Court noted that Great Lakes' bottom lands remain subject to a federal navigational servitude, although other than that interest,

"title to the shore and submerged shore is in the various States and the individual owners under them."⁹ The Court affirmed that "[t]he State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government."¹⁰ Although the State may transfer title to submerged lands, they remain subject to those public rights.

The Court then invoked the common law principles that apply to property burdened with certain rights—*jus privatum* and *jus publicum*. *Jus publicum* refers to the public right in navigable waters and the land they cover; *jus privatum* refers to private property rights that are held subject to the public trust. The Supreme Court concluded that the boundary of private property on the lake side need not be and was not coincident with the landward boundary of property burdened with the public trust. In most places along the shore, there is an area where *jus privatum* and *jus publicum* overlap.

The Court next turned to the question of where the public trust doctrine applies. The Court began by noting that although the Submerged Lands Act recognizes that submerged lands are subject to the public trust, it does not purport to establish the boundaries of the land subject to the public trust. At most, the Act establishes a mechanism for landowners to certify the boundary of their private property.

The Court concluded that the lake bottom up to the "ordinary high water mark" was subject to the public trust. The meaning of the term "ordinary high water mark" in this context evolved with regard to lands affected by the daily movement of the tides. There are no measurable tides on the Great Lakes. The majority's review of Michigan cases led to their conclusion that there is no clear Michigan precedent as to the definition or location of the ordinary high water mark, and they turned to the law of other states, particularly other Great Lakes states. The Court defined the ordinary high water mark as that point where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic."¹¹ The line will be relatively constant with time and should not change appreciably as lake levels change.

The Court then turned to the question whether walking along a beach was among the rights protected by the public trust doctrine. It concluded that walking along the lakeshore is inherent in the exercise of traditionally protected public rights of navigation, hunting, and fishing for commerce or pleasure. But the Court acknowledged some unspecified limitation in the rights protected by the public trust. Presumably protected uses are those, like walking on a beach, that are inherent in navigation, fishing, and hunting. The public trust doctrine does not permit every use of the lands. The doctrine cannot justify trespass of private property. Further, the property rights of the littoral property owner are superior to the rights of those within the *jus publicum* except as to the limited rights protected by the public trust doctrine.

Justices Young and Markman each filed concurring and dissenting opinions. In general, they concurred that Great Lakes' submerged lands were protected by the public trust doctrine. However, the dissenters reached a very different reading of prior Michigan

cases and those of other states as to the boundary for the application of that doctrine. They concluded that the public trust extends only to lands that are submerged. Both dissenters would draw the boundary of the land affected by the public trust, in Justice Young's words, at "the wet portion of the shore over which the lake is presently ebbing and flowing."¹² This demarcation line will move in and out as lake levels rise and fall. The dissenters also disagreed that the public trust concept includes a right to walk as distinct from navigation, fishing, or hunting.

Both dissenters argued that the definition of ordinary high water mark adopted by the majority would be difficult to determine in practice and would lead to more litigation. To illustrate this point, Justice Young's dissent includes a photograph of the foreshore and questioned where the majority would define the ordinary high water mark in it. His point is well taken: beyond the area of obviously wet sand where the waves are lapping, there is no apparent bright line in the photo that would conform to the majority's definition. The determination of the point at which the action of the water is no longer evident will in some circumstances require a fact-intensive enquiry.



Photograph of the foreshore from Justice Young's dissenting opinion

The implication of the significant changes in Great Lakes' levels are not fully addressed by any opinion. The majority acknowledged that Great Lakes' levels change, but did not confront the magnitude of that change. Recognizing that the fluctuation of lake levels may result in "temporary exposure," the Court held that, "This land, although not immediately and presently submerged, falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point."¹³ This temporarily exposed lake bottom may be very extensive at some locations. Between 1964 (the modern low) and 1986 (the modern high), levels in Lakes Huron and Michigan rose about 5.9 feet, and between 1986 and 2003, they dropped back nearly the same amount, 5.3 feet.¹⁴ In this 40-year period, in areas

When one considers the extensive use that our foreshores receive each year, it is surprising that the question of the public's right to walk on the beaches of the Great Lakes did not arise until nearly 170 years after statehood.

where the lake bottom is shallow and relatively flat, the literal water's edge moved a significant distance landwards (perhaps 100 feet or more) as the water rose, and then moved back out a similar distance as water levels dropped. The Court's opinion appears to mean that this entire expanse of beach at periods of low water levels is available for limited public use.

When one considers the extensive use that our foreshores receive each year, it is surprising that the question of the public's right to walk on the beaches of the Great Lakes did not arise until nearly 170 years after statehood. Although Justices Young and Markman were concerned that the definition of the water's edge as adopted in *Glass* will spawn fences and litigation, the author is optimistic that the civility and common sense that has permitted a sharing of the foreshores since statehood will continue in the future. ♦

Craig Hupp is a partner in the environmental practice group of Bodman LLP's Detroit office. His areas of practice include hazardous waste remediation, water law issues, and environmental litigation. He often serves as lender's counsel regarding environmental issues arising in loan transactions. Mr. Hupp is a 1983 graduate of Wayne State University Law School, and holds degrees in engineering and dispute resolution. He is a member of the State Bar of Michigan's Alternative Dispute Resolution Section.

Footnotes

1. 473 Mich 667; 703 NW2d 1 (2005).
2. Dave Eggert, "Michigan Supreme Court Considers Beach Rights," *The Detroit News*, Mar. 10, 2005, available at <http://www.detroitnews.com/2005/metro/0503/10/C07-112832.htm>.
3. Brief for Appellant at 3, *Glass v Goeckel*, Mi S Ct (Docket No 126409).
4. MCL 324.32501 et seq.
5. 262 Mich App 29; 683 NW 2d 719 (2004).
6. 473 Mich 667 at 677-78, quoting *Shively v Boulby*, 152 US 1, 11; 14 S Ct 548; 38 L Ed 331 (1894).
7. Note that the competing interests between the public and riparian owners along inland lakes and streams are balanced differently. See, e.g., *Bott v Commission of Natural Resources*, 405 Mich 45; 327 NW 2d 838 (1982), *Sterling v Jackson*, 69 Mich 488, 37 NW 845 (1888).
8. 473 Mich 667 at 678.
9. 473 Mich 667 at 678, n 7, quoting *Gibson v United States*, 166 US 269, 271-272; 17 S Ct 578; 41 L Ed 996 (1897).
10. 473 Mich 667 at 679, quoting the holding of *Nedtweg v Wallace*, 237 Mich 14, 17; 208 NW 51 (1926).
11. 473 Mich 667 at 691, citing *Diana Shooting Club v Husting*, 156 Wis 261, 272; 145 NW 816 (1914).
12. 473 Mich 667 at 706.
13. 473 Mich 667 at 691.
14. U.S. Army Corps of Engineers, Detroit District, Historic Great Lakes Levels, <http://www/lre/usace.army.mil/greatlakes/hh/greatlakeswaterlevelshistoricdata/greatlakeshydrographs>.