

Prepared for a panel discussion at the National
Wildlife Federation Convention, Milwaukee,
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cc: Education - Game
Institute for Fisheries
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INSTITUTE FOR FISHERIES RESEARCH
DIVISION OF FISHERIES
MICHIGAN DEPARTMENT OF CONSERVATION
COOPERATING WITH THE
UNIVERSITY OF MICHIGAN

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October 24, 1951

Report No. 1303

THE PROBLEM OF MAINTAINING PUBLIC FISHING PRIVILEGES ALONG NON-
NAVIGABLE STREAMS.

By

A. S. Hazzard

Abstract

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Starting with Connecticut in 1925 the various states have
been making increased efforts to guarantee access to public fishing
waters by lease, easement, purchase or gift.

The Pine River Case initiated in 1925 aroused Michigan to the
need for insuring access to trout streams. In 1936, when finally
settled in the United States Circuit Court of Appeals, the right of
the public to fish this stream was affirmed. Navigability---in this
case the floating of saw logs to the mill---was the test of the public
character of the water. The Taggart Case in 1943 further upheld the
rights of the public to fish "navigable" streams once legal access
had been gained and if no bank trespass were involved.

With the earmarking of forty cents from each resident fishing
license, by act of the Legislature in 1939, for several purposes,
among which was the acquisition of public fishing sites, Michigan
launched a sizeable program which by March of 1951 included 485 sites---
312 on lakes and 173 on streams. State, county, and township parks

provide additional public access, mostly on lakes. The annual budget for purchase has varied from \$25,000 to \$65,000; the cost per site has ranged from \$1.00 to \$15,000 with an average price of about \$1,300. Michigan is now spending more for development and maintenance of these sites than for purchase. The danger of excessive spending of license fees for these purposes in response to local public pressure is emphasized.

The development of trout ponds for public fishing on a restricted basis is described. Twenty-six ponds were in operation in 1950 providing fishing during the regular trout season. Regulations on most permitted two trout per day, flies only, no boats or rafts and fishing from one hour before sunrise to one hour after sunset. Such ponds, mostly in Southern Michigan, provide some fishing for trout in an area where trout waters are few and considered private in character since they were not used for floating logs.

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Law enforcement, environmental improvement and fish planting are of no value unless fishing rights are preserved. In thickly populated states posting, especially on the smaller non-navigable streams, has been a growing problem during the past twenty-five years. Perhaps it is significant that, in looking up the history of attempts to maintain public fishing, no reference to the subject could be found in the index to the Transactions of the American Fisheries Society covering the period 1872-1928. Well aware of the need to maintain public fishing areas, many states are making strenuous efforts to guarantee fishing privileges through expenditures of the sportsman's license fees.

Connecticut, starting in 1925 by lease, purchase and gift, has been acquiring frontage on streams, lakes and ponds. Protection of private property against vandalism through posting of warning signs, maintenance of stiles over fences and patrol was given to all lessors of property. In his biennial report to the State Board of Fisheries and Game for 1928, John W. Titcomb[✓] stated that as of that date the

[✓] Titcomb, John W., 1928, Seventeenth Biennial Report of the State Board of Fisheries and Game for 1928, pp. 1-165.

state had acquired by lease or purchase fishing rights on fifteen of the larger trout streams aggregating 160 miles. In 1938 Lyle M. Thorpe² summarized Connecticut's pond fish management program before the 3rd North American Wildlife Conference. At that time in addition to cooperative agreements on streams, sixty ponds and lakes were under management whereby grants of fishing rights, revokable by property owners at any time for good reasons, provide public fishing in exchange for management advice, supervision, stocking where needed, posting and patrol.

In 1935 New York State began securing easements for public fishing from landowners along the better trout streams of the state. The procedure has been outlined by A. S. Hopkins³ (1940) in the Journal of Forestry and consists of purchasing a permanent easement, generally for a strip of land 66 feet wide along either bank of the stream. These easements give the public access for fishing only and do not permit hunting or camping. At intervals of about one-half mile entrance right-of-way⁵ from the nearest highway were included. In the first five years of this program the cost averaged about \$500 per mile. John Greeley (1945)⁴ reporting on the progress of this program stated that in this ten year period New York had acquired public rights covering 575 miles on 33 streams. In a letter dated February 16, 1951, Dr. John R. Greeley, Chief Aquatic Biologist for the New York Conservation Department, reported that 1,559 proposals for easement had been

²Thorpe, Lyle M., 1938, Pond fish management in Connecticut. Trans. 3rd N. Am. Wildlife Conf., pp. 469-477.

³Hopkins, A. S., 1940, New York State public fishing program. Journ. of Forestry, Vol. XXXVIII, No. 6, June 1940, pp. 464-467.

⁴Greeley, John R., 1945, Half a thousand miles of public trout streams. Trans. 10th N. Am. Wildlife Conf., pp. 326-331.

made of which 126 (involving 111.125 miles) were still outstanding. Mileage acquired totaled 627.76 on 52 of the better streams of the state at a total cost of \$425,931.22. Excluding free dedication of 66.51 miles at \$727 (usually for a nominal sum of \$1.00) the average cost per mile would be \$633.47.

W. E. Owens^{5/} (1938) described Ohio's program of insuring public fishing on the streams of their state. Permanent easements were used and landowners were persuaded to sign them for one dollar and other considerations which included posting of stream banks showing the strip under easement and giving points of ingress and egress, the erection of stiles over all fences and the improvement of the stream for fishing. This improvement included building small dams and deflectors to create pools, and placement of fish cover, and protection of banks by planting of trees and shrubs, rip-rapping, etc. The program was well received by landowners. One of the biggest problems was to keep improvement work abreast of acquisition. In a letter dated February 24, 1951, Lee S. Roach, Assistant Chief, Division of Wildlife of the Ohio Department of Natural Resources, stated that their program was dropped shortly because of this very problem, but that Ohio considers this a worthy program and plans to acquire fishing access to streams and stream improvements using Dingell-Johnson funds.

Michigan was aroused to the need for acquiring public fishing rights by several historic court cases.^{6/} In May of 1925 Gideon Gerhardt, a resident of Osceola County, went trout fishing in the

^{5/} Owens, W. E., 1938, Program of stream improvement and public fishing easements by State of Ohio Division of Conservation. Trans. Am. Wildlife Conf., pp. 325-330.

^{6/} Westerman, F. A., 1936, Historical review of Paine River "no trespass" case Mich. Conservation, Vol. 6, No. 3, pp. 5,11.

Pine River. Coming to a wire fence crossing the stream where it entered the posted land of Frank Collins, Gerhardt disregarded the "no trespass" sign and the warnings of the patrolman who soon discovered him and ordered him to leave. A trespass complaint was filed in a local court and the defendant found not guilty. Collins appealed to the circuit court which reversed the decision and fined Gerhardt six cents. The Izaak Walton League of America sensed the importance of this decision and began to raise funds to appeal the case and was shortly joined in the appeal by the Conservation Department and the attorney general. In the State Supreme Court the primary question raised was navigability and the test was whether or not the river had been used to float logs in the early lumbering days. There were plenty of witnesses to such use including local woodsmen who had actually taken part in log drives down the Pine River. It having been determined to the satisfaction of the court that the river was navigable in this sense the next question was whether or not fishing was a right incidental to navigation. Following are the historic words of the Supreme Court. ✓

"Pine River is navigable. In its waters people have the common right of fishing. The plaintiff, though owner of the soil, has no greater fishing rights than any other citizen So long as water flows and fish swim in Pine River, the people may fish at their pleasure in any part of the stream, subject only to the restraints and regulations imposed by the State. In this right they are protected by a high, solemn and perpetual trust, which it is the duty of the State to forever maintain."

Although this decision was handed down in 1926, the Pine River was not actually opened to the public for ten more years because of other complications involved in ownership and management of the stream.

Downstream from the Collins property were the considerable holdings of the Ne-Bo-Shone Association which was incorporated in the State of Ohio. This club had encouraged the development of natural log jams across the river and had felled trees into and across the stream making it difficult and dangerous for fishermen to wade or boat the river without trespass on the banks. Feeling that the opinion of the court in the Collins-Gerhardt case had been frustrated by the action of the club, the state was about to bring action to force removal of the obstructions when the association moved first and asked for an injunction in the U. S. Circuit Court at Grand Rapids to restrain the Conservation Commission from removing these jams. The same issue of navigability and the right of the public were again raised and witnesses once more testified as to the use which had been made of the river in the floating of logs. Judge Raymond's decision⁸ went further than that of the state court. He questioned that the public right of fishing was properly considered incidental to navigation. He considered that the right to fish came from the fact that the waters were public in character and that both navigation and fishing were proper public uses of such waters and were co-existent and not dependent.

The Ne-Bo-Shone Association carried the case to the United States Court of Appeals of Cincinnati which reviewed the findings of the lower courts and refused to reopen the case. A final appeal could still be made to the United States Supreme Court but the deadline of June 1936 came with no further court action and the Association reported shortly thereafter that the river had been freed of obstructions and that there would be no interference with fishermen using the stream so long as they did not trespass on the banks.

⁸Ne-Bo-Shone Association, Inc. vs. Hogarth, et al., 81 Federal Reporter, 2nd Series, page 70.

The right of the public to fish another stream in Michigan, the Little South Branch of the Pere Marquette River was challenged by the owner of streamside property who fenced to the margin and dredged a deep channel to prevent wading upstream or down. The "Taggart Case"⁹ of 1943 which resulted, further broadened the decision rendered in the other two cases and it was stated that "the public character of water was held to be determined by reference to the public necessity for its use." However, in the Taggart case the court specified that its decisions would not necessarily affect all bodies of water. The following is quoted from page 443:

"The instant case does not in any way affect very small trout streams or private property which have not been used by the public for logging or boating: Burrows vs. Whitwam, 59 Mich. 279; nor does it cover private lakes and ponds owned by abutting property owners. As to such bodies of water, the riparian owner has complete control."

Another milestone in Michigan's efforts to assure the public right to fish came in 1939 when the Legislature passed an act¹⁰ providing for a general resident fishing license of one dollar, of which forty cents was earmarked for acquiring land for public access, to undertake stream and lake improvement and for fisheries research. Although this and most other earmarking of funds of the Conservation Department were abandoned in the legislative session of 1949, the law had served its purpose and the activities specified have become permanent and sizeable items in the annual budget of the Fish Division. Mr. Floyd Fanselow, civil engineer for the Division is in charge of this program and has reported as follows on acquisition and development.

⁹ Attorney General vs. Taggart, 306 Mich. 432.

¹⁰ Act No. 337, P. A. 1939.

Of 485 public fishing sites, 312 sites have been acquired to date on lakes, 173 on streams (mostly on trout streams); of the total 333 were purchased; 127 came to the state through tax reversions, 13 were acquired by exchange; 8 are under lease and 4 represent outright gifts. Development has been accomplished on 146 sites; another 151 were usable as acquired; 188 are not yet improved. State, county and township parks (mostly on lakes) provide further public access to fishing water in Michigan.

The budget for purchase of these public fishing sites (acquisition is by land buyers of the Lands Division of the Conservation Department) has varied from \$25,000 to about \$65,000 per year. The cost has ranged from the nominal \$1.00 to \$15,000 for an 8 acre site on a popular lake to which public access had been very limited. The average purchase price has been about \$1,300.

Development of sites varies depending upon the amount of use and the number and location of cottages on the lake. All such parcels of land are surveyed and the boundaries marked as soon as possible after acquisition. Some sites, especially in the less populated north, merely have access roads-- usually simple sand trails; others, generally in southern Michigan, are provided with toilets, trash cans, pumps, and boat ramps if needed. Camping is permitted on the larger sites, especially in the north. Although other recreational uses such as swimming and picnicking are not forbidden (except at a few extremely crowded places) no encouragement in the form of tables and stoves is given such activities. Especially on trout streams in the north the aim is to provide a place where the public can reach and use the waters for fishing with the bare minimum of development. It is imperative that developments remain simple and inexpensive and that maintenance be minimal, otherwise as the program grows the cost of keeping these sites presentable will be excessive. Michigan is now spending more for development and maintenance than for acquisition. For the biennium 1949-50 ¹¹the budget

for purchase of sites was \$60,000 each year; for development and maintenance the funds allotted were \$90,000 and \$85,000 respectively. In order to maintain sites which have been developed a special crew of men and equipment has been provided for each of the three regions into which the state is divided and further expansion of this program is envisioned. The dangers in a program of this type are obvious from Michigan's experience. The public generally fails to distinguish between a park and an access site and expects roads to be maintained, grass and weeds to be cut, trash to be picked up (fishermen can be just as careless and thoughtless as campers) and toilets to be kept clean. To what extent the sportsman's license money should be spent for such activities which contribute nothing to fishing is an important question to be considered by any state embarking on a program of public fishing site acquisition.

Michigan's program on streams in the southern zone has not been large to date; the emphasis here has been mostly on lakes. Trout streams in this part of the state are few and small. There seems to be little problem of access to the larger rivers for the generally limited amount of fishing for bass, pike and other warm-water species. Impoundments on these streams are rather common and they are more heavily fished than the stream proper. The numerous lakes^{12/} (Oakland County, close to Detroit, alone has 446 natural lakes of which 21 are over 200 acres in size) in nearly all parts of Michigan probably divert anglers from streams except for trout fishing. Our purchase program reflects the interests and opportunities of the fishermen.

The smaller streams in southern Michigan were obviously never used for navigation including the floating of logs since extensive native pine forests were not found here. It is therefore expected that any

^{12/}Brown, C. J. D., 1943, How many lakes in Michigan. Mich. Cons., Vol. XII, No. 5, pp. 6,7.

case involving such waters would give riparian owners exclusive rights to the fishing as has been held in other states and as was suggested in the Taggart decision previously referred to. As stated earlier, trout streams are few and small here, the larger streams are readily accessible, and the only value of most of the smaller, warm-water streams--- unless impounded---is for bait minnow production. Michigan's purchase program on streams in the south has therefore been limited to acquiring a few sites in the lower reaches of the larger rivers and to the purchase of trout pond sites. Where small spring-fed streams are available and the terrain is suitable, ponds can be developed which seem to meet a real need of trout fishermen in populous lower Michigan.^{13/} Twenty-six of these ponds have been acquired or constructed and placed under special regulations which are believed necessary for maintenance of the fishing. Except for five ponds in the upper part of the lower peninsula where the daily limit is five trout, anglers are restricted to two trout per day. Fishing with artificial flies only is lawful from one hour before sunrise to one hour after sunset and no boats or rafts are permitted on these small ponds for obvious reasons. Registration and complete catch records are maintained on the ponds of the Hillsdale Fish Management and Experimental Area (formerly the Hillsdale Rearing Ponds) and there further experiments are being conducted to determine the best methods for stocking and regulating the use of such special trout ponds.

The need for insuring anglers a place to fish is self evident and will increase with the growth of population. Michigan's experience has shown that an acquisition program is popular and practicable but that

^{13/}Hazzard, Albert S. and K. G. Fukano, 1948, Special regulation trout ponds. Mich. Cons., Vol. XVII, No. 5, pp. 6, 7, 14.

there are dangers in yielding to public pressure for sites where they are not really essential and for spending too much money on development and maintenance.

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