January 22, 2007

To: Boardman River Dams Committee  
c/o Jennifer Jay  
Re: Michigan Riparian Rights Law

Ladies and Gentlemen:

1. Issue Presented

The Light and Power Board of the City of Traverse City has determined that it is no longer economical to operate four dams on the Boardman River for electric generating purposes. The Light and Power Board operates the dams under an easement conveyance from Grand Traverse County made in 1980. Upon the termination of the dams' electric generating use, title to the dams and the associated real property interests will revert to Grand Traverse County. That decertification process is underway. The County has stated that it may remove the dams from the Boardman River as the cost of renovating and upgrading the dams may be more expensive than any public purpose that the County may have for maintaining the dams. If the dams are removed the impoundment of the Boardman River created by the dams will retreat to restore the river to a course which will approximate its original route. The potential for that action has raised the questions of who will have title to the exposed bottomlands that were previously under the impoundment and who will have riparian rights on the Boardman River. We have reviewed title abstracts for Boardman Pond to give opinions on the record title to the properties bordering on the Pond, and have abstracts under order for Sabin Pond. This letter reviews our understanding of Michigan Riparian Rights law which will be the basis upon which we give our opinions of title.

2. Interpreting Conveyance Documents

As a general rule a conveyance document is interpreted from the language of the text of the document. The document is accepted at face value unless there is an ambiguity in the document which cannot be resolved from reading the document itself. If there is an ambiguity in the document then other facts may be reviewed to try and determine what the parties to the document meant. In reviewing title we are reviewing what is shown in the recorded documents at the register of deeds office.
3. **Ownership of Real Property**

   (a) The "ownership" of real property may have many different facets. It is often misleading to state who "owns" a parcel of real property. Our legal concepts of ownership of real property come from English Common Law. A party that owns the land, that is the dirt, owns "fee title." The fee is simply a reference to the dirt itself. That was the most important facet of title under English Common Law. A party that owns a parcel of real property today is still referred to as having fee title. That title may be subjected to a number of encumbrances or other rights. For example, a party may grant someone else a mortgage or an easement across the parcel of property. Easements such as a utility easement or road right-of-way are common on many parcels of property. It is also common to see driveway easements and mineral interests conveyed to other parties thereby encumbering fee title. Where a parcel of property has other aspects of title that accompany the fee, and pass with title to the fee, they are "appurtenances" to fee title.

   (b) An appurtenance of real property bordering on a natural waterway is riparian rights. Those are the rights of access and use of that waterway which accompany the title to a parcel of property bordering the natural watercourse. When a party acquires fee title to a parcel of property it acquires all of the appurtenances which pertain to the parcel of real property. Appurtenances do not need to be referenced individually or specifically to be transferred with the title to real property, although they commonly are. They pass with the title to the real property as a matter of law.

4. **Adverse Possession/Prescriptive Easements**

   (a) In general, title to a piece of property is determined by reviewing record title to see who the County Register of Deeds office shows is holding title. In addition to what is shown of record title, there is another aspect of title embodied in the Common Law. The Common Law is that law which was inherited from England at the time of the Declaration of Independence, thereafter continued as United States Common Law, and subsequently, within the State of Michigan, as Michigan Common Law. Our Common Law still provides for a concept which grew out of English Common Law of the Middle Ages called adverse possession. The concept arose because of the desire of the monarch to keep properties in use so that they would be available to tax and promote the wealth of the realm. The basic concept is that if a party takes and holds someone else's piece of property and uses it as its own, for a period of 15 years or longer, that adverse party then may claim title to the property.

   (b) A correlative concept is a prescriptive easement that allows a party to use the property in a limited fashion, without trying to claim the full fee for 15 years or longer, in which case a prescriptive easement arises, allowing the party to continue that limited use thereafter as a matter of right. An example of this might be a prescriptive driveway easement where a party has driven over someone else's piece of property for over 15 years, using it only for driveway purposes. That party, if the prerequisites of open and adverse use are met, may claim that
driveway easement right over the property. Questions of adverse possession and prescriptive easements are fact specific. They are usually not shown by record title and, hence, cannot be resolved by reviewing an abstract.

5. **Michigan Riparian Rights Law**

   (a) Riparian rights refer to the water rights of parcels of real property that border upon natural waterways. A more proper distinction is that "littoral rights" reference the water rights of parcels which border upon a lake, and "riparian rights" references the rights of parties that border upon other watercourses such as rivers and streams. Under Michigan law, there is no particular distinction between the two except with regard to those that border on the Great Lakes. Because Michigan riparian law does not distinguish between littoral rights and riparian rights, they are often both referred to as riparian rights. Michigan riparian rights law is essentially the same as that of the other states east of the Mississippi. It is based upon English Common Law. West of the Mississippi water rights are based upon a different set of concepts.

   (b) Riparian rights are real estate rights which automatically attach to land that borders upon a natural waterway. *Thompson v Enz*, 379 Mich 677 (1967). If a party borders upon a natural watercourse it automatically is riparian, and the riparian rights apply to that parcel of real property. Riparian rights cannot be severed from that real property. The rights go with the real property, not the party that owns the real property. Riparian rights do not apply to land bordering upon artificial bodies of water.

   (c) Riparian rights include: (i) the right to use the watercourse for uses such as swimming, bathing, fishing and hunting, so long as that riparian user does not unreasonably interfere with the use by other riparian owners; (ii) the ownership of the bottomlands of the waterway from the edge of the waterway to the center of the waterway (the property owner on each side owns to the center where the common boundary of the bottomlands meet); (iii) the right to wharf out to enhance the use of the waterway through watercraft; and (iv) the right to accretion of sediment along the shoreline waterway. A number of these uses are regulated under state law such as building a wharf or pier out into a waterway, and hunting and fishing. Nevertheless they are still riparian rights associated with the parcel of property, and the owner of that property is entitled to that use, subject to the state regulation.

   (d) As stated previously, riparian rights may not be removed from the riparian parcel of real property to which they apply. They cannot be conveyed away by the owner of a riparian parcel. The owner of a riparian parcel may allow another party to access the waterway over the riparian property for a limited use which does not exceed that which the riparian owner may be allowed to perform. Hence, if a riparian owner allows another party an easement across the property to access the waterway, that will be permitted so long as the additional use does not unreasonably interfere with other riparian owners' use of the waterway.
(e) At the time that the first dam was constructed on the Boardman River, all of the land which touched upon the Boardman River's natural watercourse was riparian. That property held riparian rights. Adjacent inland property had no riparian rights.

(f) A riparian owner may build a dam on a river, subject to governmental regulations, so long as it only creates an impoundment upon its own real property. To the extent the dam is going to create an impoundment upon other upstream property, the builder of the dam must either acquire that real property or acquire a "flowage right" over the upstream property. A flowage right is a right to flow water over the property of another. It is in the nature of an easement. If granted, it allows the downstream owner of the dam to create an impoundment that will cover the part of the upstream parcel over which flowage is allowed. That flowage right will terminate when the owner of the dam either: (i) conveys the flowage right back to the upstream property owner upon the removal of the impoundment; (ii) abandons the impoundment by reducing it, showing an intent to abandon it; or (iii) fails to use it for a period of 15 years, in which case that flowage right should be lost to the upstream property owner.

(g) The rights to establish impoundments behind the dam creating the Boardman Pond appear to have been acquired by the electric companies either by: (i) accruing the fee title to the property; (ii) acquiring flowage rights; or (iii) by a prescriptive use of flowage over the upstream property for a period of 15 years or longer. Such a claim to flowage rights through prescriptive use by the electric companies is shown in the title records for the Boardman Pond and appears to predate 1925.

(h) In 1930 certain conveyances between the Michigan Public Service Company and the Emerson's divided the title to the upland property and the bottomland property in the southwest 1/4 of the northeast 1/4 of Section 34. A similar conveyance of the uplands was made for the north 1/2 of the southeast 1/4 of Section 34. If Boardman Pond was a natural watercourse, such a division between the upland and bottomland could not occur as riparian rights (the bottomland) cannot be separated from riparian property. However, the bottomland in question was originally upland to a natural watercourse and, hence, is subject to division and conveyance. The bottomlands themselves are the riparian property that bordered on the Boardman River. Therefore, it appears that all of the riparian rights for the natural watercourse of the Boardman River belong to Grand Traverse County, as the current owner of the fee title interest of the impoundment bottomlands previously assembled by the successive electric companies on the Boardman River.

(i) Some parties may wish to question the County's right to abandon the dams and reduce the impoundment thereby removing the use of the pond which they have come to expect after a number of years of use. However, Michigan has recognized the right of the owner of a dam to terminate its use. Goodrich v McNillan, 217 Mich 630 (1922). This position has been subsequently upheld. Further, the county is a public entity and is subject to different duties and obligations than those of private individuals. It must operate for the general welfare of its citizens. It is doubtful that there are grounds to insist that the County either retain the dam or the property which has been impounded, for a County use.
The documents which made conveyances to the various power companies over the years did not reference riparian rights. They reference title to the bottomlands, which were riparian property, and occasionally flowage rights. That is what the parties were interested in and therefore they apparently saw no need to make reference to other matters. Further, once riparian properties were conveyed, an appurtenant interest of each of those parcels is the riparian rights that accompany the riparian property. Those rights are automatically transferred, with a conveyance of fee title. A specific statement of riparian conveyance is not needed. Hence, it is hard to give any interpretation to the intent of those documents regarding riparian rights other than the riparian rights were conveyed with the property.

None of the documents in the title history of Boardman Pond reference a conveyance of or claim to riparian rights, until the more recent conveyances after the recording of the plat of Keystone Subdivision in 1968. At the time of the recording of the Subdivision Plat, riparian rights are specifically referenced as belonging to the lots in the Subdivision. Interestingly, the second plat, Keystone Subdivision No. 2, does not reference riparian rights. It does reference that the waterfront lots and the common park go to the water's edge. Thereafter, other documents sometimes reference the property line extending to the water, or title being subject to other parties' riparian uses. However, the references to riparian rights are not consistent and, hence, there is no pattern by which to interpret the intent of the conveyances.

The initial platting of Keystone Subdivision claims riparian rights. The Plat notes the lots go to the water's edge. By going to the water's edge the property is riparian, if it is a natural waterway. It is not. Thus, the Plat documents and subsequent conveyances show an intent which is contrary to the existing title.

The lot owners in the two Keystone Plats may claim that the language of those Plats means that the platters understood the history of the property to be that the parties who originally conveyed the bottomlands and/or the flowage rights to successive electric companies understood that they were conveying the right to flow water, but retained a right to access the Boardman River. If that can be substantiated, then the uplands, to the extent that the impoundment is reduced to the watercourse of the River, will have a right to access the river. Because any such lot will no longer touch the waterfront, this claim will have to include some type of limited access route over the bottomlands owned by the County to get to the River and allow access to the water and use of the water. In essence, we believe such a claim will be seeking some type of water rights and the right to access the water, not riparian rights.

The title opinions we have provided with regard to the respective properties show our belief as to what is the record title shown in the abstracts for the referenced parcels. This letter is an attempt to add a further explanation of Michigan law in the event that it is helpful in understanding what we stated in the other letters.
To the extent you have any questions, please feel free to contact me.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETTLLP

Nyal D. Deems

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