

board of regents. The legislature may impose funding controls through appropriation legislation but it cannot assume administrative controls with respect to highway commission programs that provide for an exercise of executive powers of government by the legislature which would be in violation of the Const 1963, art 3, § 2.

FRANK J. KELLEY,  
*Attorney General.*

750522-3

**GREAT LAKES: Title to Submerged Lands.**

**WATERS AND WATERCOURSES: United States Navigational Servitude.**

The navigable waters of the State are subject to the navigational servitude of the United States.

The consent of the State by gift, grant or sale is required if the United States is to acquire any proprietary right to the submerged lands of the Great Lakes, although the United States can exercise power of eminent domain in acquiring a proprietary interest in such lands.

Opinion No. 4871

May 22, 1975.

Commander  
Ninth Coast Guard District  
1240 East 9th Street  
Cleveland, Ohio 44199

Attention: F. R. Grundman  
District Legal Office

You have indicated the continuing objection of the United States Coast Guard to assertions by the Department of Natural Resources that the USCG must, prior to undertaking work in aid of navigation upon bottomlands of the Great Lakes, obtain permits issued by the Department under provisions of Michigan's Submerged Lands Act (1955, PA 247; MCLA 322.701 *et seq*; MSA 13.700(1) *et seq*). In particular, you have stated:

"[A] state does not have the power to require the Coast Guard to obtain a state permit when it is constructing facilities on the navigable waters of the United States which will reasonably promote the safety and welfare of navigation. . . ."

Discussions between my office and representatives of the Michigan Department of Natural Resources, however, has disclosed a related problem involving the title to submerged lands upon which Federal improvements in aid of navigation are made.

At the outset, I do recognize that navigable waters of this State are subject to the navigational servitude of the United States and that in exercising its rights reserved by that servitude, the United States is not subject to control, nor need it obtain the prior permission of the State of Michigan.

That is not to say, however, that in exercising its reserved rights, the United States acquires any proprietary rights to the submerged lands of the Great Lakes nor to any fill placed therein. The State continues steadfast in its claim that it is vested with fee simple title to all submerged lands which had not, prior to the State's admission to the federal union, been granted to or confirmed in private persons by the general government or, since, had been patented or granted by the State.

In that regard, it is clear that the United States cannot convey good and sufficient title to any unpatented bottomlands or made (filled) lands forming a part of previously submerged lands of the Great Lakes unless the Federal government first obtains title from the State of Michigan by gift, grant, purchase or condemnation.

The State of Michigan was admitted to the Federal Union on an equal footing with the original states. 5 Stat 49; Approved 15 June 1836.

As a quasi-sovereign state, Michigan is in its sovereign capacity vested with fee title to all unpatented submerged and overflowed lands lying beneath the waters of the Great Lakes within its political boundaries, impressed, however, with the public trust. *Hilt v Weber*, 252 Mich 98; 233 NW 159 (1930); *Illinois Central R. Co. v Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892).

The nature of State title was early recognized by the Federal Government. In an opinion issued by the United States Attorney General on 30 July 1879 (1879 Att'y. Gen. Ann. Rep. 369) and directed to the Secretary of the Treasury, it is stated:

"[The Supreme] Court has laid down the doctrine that the shores of navigable waters, and the soils under them, are not granted by the Constitution to the United States, but are reserved to the States respectively (*Pollard's Lessee v Hagen*, 3 How, 202) and that the proprietorship of such shores and soils belongs absolutely to the States, subject only to the rights surrendered by the Constitution to the General Government (*Martin v Waddell* 16 Pet., 367); . . ." 1879 Att'y. Gen. Ann. Rep., supra, 371.

The State of Michigan's title to submerged lands was again confirmed by Congressional action in 1953. Act of Congress May 22, 1953 c. 65 Title I; 67 Stat 29 *et seq*, 43 USC 1301; hereinafter the "Submerged Lands Act."

Section 3(a) provides:

"It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed established, and vested in and assigned to the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

\* \* \*

The *title* of the State of Michigan to Great Lakes submerged land is, we agree, subject to Federal appropriation, use, development, improvement and control.

As stated in Section 3(d) of the Submerged Lands Act; 67 Stat 30; 43 USC 1311(d):

"Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power."

It is the position of the State of Michigan, therefore, that if, in addition to constructing facilities on navigable waters to promote the safety and welfare of navigation, the Federal Government seeks to permanently appropriate submerged lands belonging to the State of Michigan, the Federal Government is obligated to pay just compensation for the lands appropriated.

Section 6 of the Submerged Lands Act; 67 Stat 32, 43 USC 1314 provides:

"(a) *The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which we specifically recognized, confirmed, established, and vested and assigned to the respective States and others by section L3LL of this title.*"

"(b) *In the time of war or when necessary for national defense, and the Congress or President shall so prescribe the United States shall have the right . . . to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.*"

From the above, it is clear that it is the intent of Congress that the respective States shall be compensated for the taking and expropriation of fee title to lands. (See also 1879 Att'y. Gen. Ann. Rep., *supra*.)

The Federal Government may acquire fee title to unpatented, submerged lands lying beneath the waters of the Great Lakes within this State's political boundaries, either by condemnation, or under 1874 PA 4; MCLA 3.301; MSA 4.31, or 1955 PA 247; MCLA 322.701 *et seq*; MSA 13.700(1) *et seq*.

1874 PA 4, *supra*, provides:

"Sec. 1. That whenever the United States of America desire to acquire title to land belonging to the state of Michigan including land which is now or has in the past been covered by the navigable waters of the United States of America, for sites or for any improvement or addition to any government area, reservation, or other station including

but not limited to military or naval reservations or stations, light-houses, beacons, or other aids to navigation and/or aeronautics or for the building of sea walls, breakwaters, ramps, and piers, and application is made by a duly authorized agent of the United States, describing the site required for one of the purposes aforesaid, then the governor of the state is authorized and empowered to convey the title to the United States, and to cede to the United States jurisdiction over the same: Provided, The state shall retain concurrent jurisdiction so far that all process, civil or criminal, issuing under the authority of the state, may be executed by the proper officers thereof upon any person or persons amenable to the same within the limits of land so ceded, in like manner and to like effect as if this act had never been passed."

1955 PA 247, supra, provides in part:

"Sec. 3(1). The department of conservation, hereinafter referred to as the 'department', after finding that the public trust in the waters will not be impaired or substantially affected, is hereby authorized to enter into agreements pertaining to waters over and the filling in or submerged patented lands, or to lease or deed unpatented lands, after approval of the state administrative board. Quitclaim deeds, leases or agreements may be issued or entered into by the department with any person, firm, or corporation, public or private, or the United States of America covering unpatented lands, and shall contain such terms and conditions and requirements which shall be deemed just and equitable and in conformity with the public trust as determined by the department. The department shall reserve to the state of Michigan all mineral rights, including but not limited to coal, oil, gas, sand, gravel, stone and other materials or products located or found in said lands, except where lands are occupied or to be occupied for residential purposes at the time of conveyance." (MCLA 322.703(1))

"Sec. 5(a). The department may permit, by lease or agreement, the filling in of patented and unpatented submerged lands and permit permanent improvements and structures after finding that the public trust will not be impaired or substantially injured.

"The department may issue deeds or may enter into leases if the unpatented lands applied for have been artificially filled in or are proposed to be changed from the condition that exists on the effective date of this act by filing, sheet piling, shoring, or by any other means, and such lands are used or to be used or occupied in whole or in part for uses other than existing, lawful riparian or littoral purposes. The consideration to be paid to the state for the conveyance or lease of unpatented lands by such applicant shall be not less than the fair, cash market value of the lands determined as of the date of the filing of such application, minus any improvements placed thereon but in no case shall the sale price be less than 30% of the value of the lands. In determining the fair, cash market value of the lands applied for, the department may give due consideration to the fact that such lands are connected with the riparian or littoral property belonging to the applicant, if such is the case, and to the uses, including residential and commercial, being made or which can be made of said lands."

"Sec. 6. The fair, cash market value of lands approved for sale under the provisions of this act shall be determined by the department. In no instance shall the consideration paid to the state be less than \$50.00. If the applicant is not satisfied with the value determined by the department, within 30 days after the receipt of such determination he may submit a petition in writing to the circuit court of the county in which such lands are located and the court shall appoint an appraiser or appraisers as the court shall determine for an appraisal of said lands. Decision of the court shall be final." (MCLA 322.706)

The Department of Natural Resources has therefore properly insisted that the Federal Government compensate the State of Michigan for submerged lands which the Federal Government has indicated it intends to expropriate and lands which, in the process of utilizing, the Federal Government intends to fill creating unsurveyed fast land no longer subject to submergence and accompanying use by the general public for navigation, boating, fishing, or hunting.

FRANK J. KELLEY,  
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750522.4

**INSURANCE: Retaliatory Tax.**

When applying the retaliatory tax provisions of the insurance code, the amount of tax imposed by a sub-entity of a foreign state upon a Michigan insurance company doing business in that state is included in the tax to be imposed on foreign insurance companies from that state doing business in Michigan. The computation of the retaliatory tax also include deductions, variances, and rates allowed by the foreign state to Michigan insurance companies.

Opinion No. 4874

May 22, 1975.

Daniel J. Demlow, Commissioner  
Insurance Bureau  
Michigan Department of Commerce  
111 North Hosmer Street  
Lansing, Michigan

You have requested my opinion on the following questions:

1. Does Section 476 of the Insurance Code of 1956, 1956 PA 218, § 476; MCLA 500.476; MSA 24.1476 apply when a sub-entity of a foreign state collects or imposes taxes on Michigan Insurance Corporations?
2. Should the Insurance Bureau take into consideration the deductions allowed by a foreign state to Michigan Insurance Corporations when applying Section 476, *supra*, to insurers incorporated in that state?
3. If the Insurance Bureau does consider the variance in deductions and rates between foreign states and Michigan, how should Section 476, *supra*, be applied?