FLOW
FOR LOVE OF WATER

Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

May 13, 2019

Ms. Liesl Clark, Director Michigan Department of Environment, Great Lakes, and Energy Constitution Hall 525 West Allegan P.O. Box 30473 Lansing, Michigan 48909	Mr. Dan Eichinger, Director Michigan Department of Natural Resources Department of Natural Resources Executive Division P.O. Box 30028 Lansing, MI 48909
Ms. Terry Seidel, Chief Water Division Constitution Hall 525 West Allegan P.O. Box 30473 Lansing, Michigan 48909	

Re: State's Sovereign Title and Jurisdiction in the Bottomlands and Soils beneath the Waters of the Great Lakes under the Equal Footing and Public Trust Doctrines, Great Lakes Submerged Lands Act, MCL 324.32501 et seq., and Act 10 of 1953, MCL 324.2129; Submission by For Love of Water (FLOW)

Dear Director Clark, Chief Seidel, and Director Eichinger:

This letter and attached Legal Memorandum are submitted to you because of the serious questions raised by the former Governor Snyder Administration and Staff of the Michigan Department of Environment, Great Lakes, and Energy (EGLE) regarding the Great Lakes Submerged Lands Act (GLSLA), Act 10 of 1953, and the State's sovereign title and public trust interest in the bottomlands and soils beneath the navigable waters of Michigan. These questions have vast implications for the future of the State, citizens, and the Great Lakes, and their answers should not be driven by efforts to accommodate private purposes that jeopardize our waters, ecosystems, and communities protected by public trust law; this includes the efforts to accommodate the proposed tunnel in the soils and substrata under the Straits of Mackinac for a new Enbridge oil pipeline and the perils associated with the existing Line 5 located in the open waters of the Great Lakes.

FLOW understands there have been statements made by DEQ staff during the Snyder administration, more recently, by EGLE staff under the current administration that the State does not have jurisdiction under the Great Lakes Submerged Lands Act and/or the public trust doctrine over the Enbridge proposed pipeline tunnel in the soils beneath the Straits. We are aware that the former Snyder administration, DEQ, and Department of

Natural Resources (DNR) did not require the tunnel agreement, the "Second Agreement," "Third Agreement," the 2018 Easement and assignment, and the 99-year lease to Enbridge to be authorized by, or comply with, the GLSLA or the public trust doctrine. We are also aware that the 2018 Easement, related agreements, and 99-year lease were worded to confine the legal description of these documents to only those soils or subterranean lands beneath the surface of the lakebed of the Straits. This wording appears to have been an attempt designed to avoid the GLSLA and public trust law of Michigan.

The attempt to avoid the GLSLA and, it appears, public trust law is not only untenable, but it threatens the sovereign and public trust title of the State to the soils beneath the surface of the bottomlands of all of our Great Lakes and connecting waters. The legal implications of severing 38,192 square miles of Michigan's soils and strata beneath the bottomlands of the Great Lakes are staggering: slant or horizontal drilling for oil and gas would not be subject to the GLSLA (although the GLSLA actually prohibits any grants or other dispositions for oil and gas beneath the bottomlands); current, sand, gravel, and mineral leases or dispositions could be granted free of the GLSLA and public trust doctrine (although, presently leases for sand, gravel, and other materials are subject to the GLSLA); and the state's title and sovereignty would be compromised against foreign interests and claims, because this is an international water way, and because of the requirement for equal treatment under trade laws. It is time to pause, before an interpretation of law results in unfortunate adverse consequences.

Based on the attached Legal Memorandum (with the Appendix of citations and quotations), we submit that this attempt to avoid the GLSLA and public trust doctrine for the Enbridge oil pipeline tunnel is clearly contrary to the rule of law under the meaning of the GLSLA, the state's trust title under the equal footing doctrine, and the legal duty imposed by the public trust doctrine. Until such authorization is obtained consistent with the GLSLA, and/or the equal footing and public trust law, no past or new proposals, agreements, easements, leases, or other dispositions regarding any proposed oil pipeline tunnel or pipeline should be entered into, signed, or given any legal effect or validity. The GLSLA and/or public trust doctrine, including any easement under Act 10, prohibit any new or modified new Line 5 pipeline tunnel or other proposal unless an application is filed and determination made that it falls within the narrow exception standard under the GLSLA and public trust doctrine: (1) primarily a public, not private purpose, consistent with public trust interest; and (2) no interference or impairment of public trust waters or the soils beneath them; this includes no significant or unacceptable risk of impairment to the public trust and its protected uses.

The attached Legal Memorandum recommends specific determinations or actions that should be taken to assure the State and its citizens that the existing Line 5 and any proposed oil tunnel or pipeline comply with the rule of law required by the GLSLA and public trust doctrine.

Finally, we believe that the existing 1953 easement cannot be used to locate new structures or improvements, such as anchor supports, that constitute a substantial change in design

from the original location on the bottomland that failed to address the strong currents in the Straits. Any such change and continued use is new or far beyond the original easement design. An application that fully addresses risks of impairment and alternatives to Line 5 and the Straits should be required under the GLSLA. The anchor supports have been narrowly reviewed as "maintenance" or "repair" under a "dredging" activity permit, but the substantial change in pipeline design and its risks have never been reviewed or authorized under the GLSLA, including Sections 5202 and 5203 and the GLSLA rules.

Your leadership regarding these important questions and necessary actions for the State and its citizens is most appreciated. The potential danger to the public trust and sovereign title of Michigan to the soils and subterranean materials beneath the Great Lakes is far too great to risk to negotiate an agreement without compliance with the GLSLA and public trust doctrine for for the benefit of a private corporate oil pipeline in the Straits of Mackinac. Because of this, we request that you consult with Attorney General Nessel regarding the applicable rules of law that apply to the proposed tunnel pipeline and existing Line under the GLSLA and public trust doctrine. We further ask that any negotiations with Enbridge regarding such tunnel or existing Line 5 make clear that they are subject to and must be authorized under the GLSLA and public trust doctrine.

Should you have any questions regarding the above or the Legal Memorandum, please advise, as we'd be glad to meet with you to discuss these matters. If possible, we would very much appreciate a response to this letter before May 24, 2019. Thank you.

Sincerely yours,

Elizabeth R. Kirkwood
Executive Director
FLOW

James M. Olson
President and Legal Advisor
FLOW

cc: Hon. Gretchen Whitmer, Governor of Michigan
Hon. Dana Nessel, Attorney General of Michigan
Hon. Senator Gary Peters
Hon. Senator Debbie Stabenow

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To: **Director Liesl Clark, Michigan Department of Environment, Great Lakes and Energy; Chief Terresa Seidel, Water Division, Department of Environment, Great Lakes and Energy, Director Dan Eichinger, Michigan Department of Natural Resources**

From: **James Olson**[1]

Re: **LEGAL MEMORANDUM ON THE GREAT LAKES SUBMERGED LANDS ACT, ACT 10 OF 1953 (UTILITY EASEMENTS IN PUBLIC TRUST BOTTOMLANDS), THE STATE'S SOVEREIGN AND PUBLIC TRUST TITLE IN THE STATE'S NAVIGABLE WATERS AND THE SOILS BENEATH THEM: THE EXISTING ENBRIDGE DUAL OIL PIPELINE EASEMENT, AND THE PROPOSED TUNNEL AGREEMENT AND NEW OIL PIPELINE IN THE STRAITS OF MACKINAC**

Date: **May 13, 2019**

OVERVIEW

This legal memorandum addresses several significant questions related to the required authorizations and steps the State of Michigan should take to bring the existing Enbridge Line 5 and/or any agreements, easements, and leases regarding the proposed tunnel and pipeline under the rule of law. This memorandum further addresses the State's sovereign and public trust title in and to the waters and bottomlands and soils under the Great Lakes. The administration of former Governor Snyder executed extra-legal agreements between the executive, state agencies, and Enbridge, without authorization under the Great Lakes Submerged Lands Act ("GLSLA"),[2] Act 10 of 1953 ("Act 10"),[3] the equal footings doctrine,[4] and common law public trust doctrine.[5] Legislation enacted in the waning days of the Snyder Administration (Act 359) attempted to

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[2] MCL 324.32501 et seq., ("GLSLA" or "Act 247"), PA 1955, Act 247.
[3] Easement between Department of Conservation and Lakehead (Enbridge's predecessor in interest), granted pursuant to Act 10 of 1953, PA 1953 see FNS 11 and 12, *infra*.
[4] *Shively v Bowlby,* 152 U.S. 33, 14 S. Ct. 548 (1894); *Illinois Central R Rd v Illinois,* 146 U.S. 387 (1892); *PPL Montana, LLC v Montana*, 132 S Ct 1215 (2015). See Section B, 1, *infra*.
[5] *Illinois Central R Rd v Illinois, supra; Obrecht v National Gypsum*, 361 Mich 299 (1961).

facilitate the Governor's extra-legal actions, but Act 359, (hence the tunnel agreement, the attached easement and assignment, and 99-year lease) have been declared unconstitutional and void by Michigan Attorney General Dana Nessel.[6] The Opinion of the Attorney General ("OAG") ruling requires the state agencies, including the Michigan Department of Environment, Great Lakes, and Energy ("EGLE") and Department of Natural Resources ("DNR"), to adhere to the ruling; hence the state executive branch cannot give effect to Act 359 or the described agreements. However, serious questions remain that must be answered in order to require Enbridge, the existing Line 5, and any tunnel or related agreements to conform to the rule of law under the GLSLA and the equal footing and public trust doctrines.

It is submitted that EGLE and DNR[7] are each required to make the following determinations or take the following actions to require Enbridge to comply with the rule of law regarding the existing Line 5 and the new proposed tunnel and oil pipeline:

(1) Determine that the GLSLA, its regulations, and public trust law standards apply to: Enbridge's existing Line 5 and easement, the proposed Tunnel Agreement, the December 2018 Easement, the 99-year lease, the occupancy of Great Lakes bottomlands by structures and improvements, and use of or tunnel in the bottomlands and soils beneath the Straits of Mackinac;

(2) Require Enbridge to apply for authorizations for the existing 1953 easement; the substantial change in design from the originally authorized design; the recent December 2018 easement, lease, and other dispositions and agreements[8] in full compliance with the GLSLA, its rules, and the common law public trust doctrine;

(3) Determine that the equal footing doctrine and public trust doctrine inherent in the State's sovereign title to the waters and soils under the Great Lakes, including Straits, extends to and includes all of the soils or subterranean soils and strata beneath the waters of the Straits;

(4) Determine that Act 10 for utility easements under the bottomlands of the Straits of Mackinac extends to the soils and subterranean strata under the Great Lakes, and that Act 10 does not contain the standards for the determinations required by the public trust and equal footing doctrines, namely: (a) an improvement of the public trust purpose or interest; and (b) no substantial interference or non-impairment pursuant to *Illinois Central Railroad v Illinois*, *Obrecht v National Gypsum Co*, and other public trust cases in Michigan;

(5) Determine that Act 10 does not authorize a lease for a tunnel and oil pipeline under the Straits;

[6] OAG No. 7309, Mar. 28, 2019.
[7] The Michigan Department of Environmental Quality (DEQ) became the Michigan Department of Environment, Great Lakes, and Energy (DEGLE) on April 22, 2019.
[8] *E.g.* Second Agreement between Governor Snyder, DEQ, DNR, and Enbridge, Oct. 3, 2018.

(6) If Act 10 does not extend to the soils and subterranean soils beneath the Straits, determine that there is no express statutory authority to grant an easement for the proposed Enbridge tunnel and oil pipeline in the soils and strata beneath the Straits;

(7) If Enbridge decides that it wants to continue operating the existing Line 5 and/or build and operate a tunnel below the Straits, require that Enbridge apply for the appropriate and necessary authorizations for any leases, dispositions, and/or agreements for occupancy, use, structures, or alteration of bottomlands and soils beneath the waters of the Straits pursuant to the GLSLA and other applicable laws;

(8) If Enbridge decides that it will not apply for authorization and approvals described in paragraphs (1), (2), and (7) above, then declare continued operation of the existing Line 5 contrary to law, and order Enbridge to cease and desist using the existing Line 5, with a reasonable period of time to cease and desist and decommission the dual lines in a reasonably prompt fashion.

In reviewing the actions that the Michigan EGLE and/or DNR, or other state officials can or should take regarding the above-titled matter, there is a threshold question of law that cuts across the above-cited laws and must be answered and ruled upon:

> What is the scope and extent of the state's sovereign and public trust title in the lakebed, bottomlands, soils, and subterranean materials under the Straits of Mackinac and the Great Lakes under the equal footing doctrine for state title and trust, the public trust doctrine, the GLSLA and Act 10?

A. BRIEF HISTORY AND BACKGROUND

In 1952, Lakehead Pipe Line Company (now Enbridge) sought an easement to construct a pipeline for its crude oil dual pipelines in the Straits, because this route (Line 5) cost less to transport crude oil from Alberta, Canada to Sarnia, Canada than the other proposed route around Chicago and across Indiana and southern Michigan.[9] The State's attorney general's office advised that the proposal would be denied because there was no express statutory authority to grant an easement over or in the bottomlands of the Great Lakes. So, in 1953, the legislature enacted into law Act 10 of the Public Acts of 1953.[10] Act 10 authorized the Department of Conservation to grant easements for public utilities over or in state lands, including bottomlands of the Great Lakes "held in trust."[11] Lakehead applied for an easement under Act 10, and it was granted subject to its terms, including a reference to the rights and public trust interest in the bottomlands of the State.[12] The 1953 Easement contained covenants that the easement and the dual pipelines in the Straits were subject to compliance with all state and federal laws, and that all due care would be exercised at all times to prevent injury to public and private property and

[9] The other route (known as "Line 6b" aka "Line 78") across southern Michigan to Sarnia was approved by the state and constructed in 1969.

[10] Act 10 (now NREPA, MCL 324.2129) ("Easements for Public Utilities— "The department may grant easements… for pipelines… over, through, under, and upon … the unpatented… *lake bottomlands* belonging to *or held in trust* by this state.").

[11] *Id*.

[12] 1953 Easement, para. J.

safety.[13] The easement authorized and incorporated a specific legal description, location, design and engineering requirements, limitations, and conditions. On its face, while Act 10 states an easement is subject to bottomlands "held in trust" by the state, Act 10 did not contain standards the satisfaction of which would also satisfy the public trust doctrine under the common law. Therefore, in granting the 1953 easement, the Department of Conservation did not make or record any findings that the project met the public standards as required by the common law.

In 1955 the GLSLA (aka "Act 247") was enacted.[14] The GLSLA was enacted to satisfy the standards under the public trust doctrine that applies to waters and the bottomlands and soils under the Great Lakes. Public trust law, as described more fully below, requires a statute to provide express authority for deeds, leases, other dispositions, such as easements, or agreements for occupancy and use of waters and bottomlands and soils under the Great Lakes. The GLSLA incorporated those standards (improvement of public trust, public purpose, and no interference or impairment) into law. The GLSLA did not exempt Act 10, nor would it have done so, because it added the standards necessary for dispositions such as easements to comply with public trust law.

Beginning in 2001 and continuing to present day, Enbridge became concerned about scouring from strong currents around the dual lines under the Straits. In 2001 Enbridge stopped stabilizing the lines with grout bags and fill as it had in the past, and installed 16 saddle supports anchored in the bottomland under the dual lines as an "emergency" measure. Since 2001, Enbridge has installed over 200 saddle supports, all of which were permitted by DEQ under the GLSLA as "dredging" based on "repair" or "maintenance" activity. In each instance DEQ's review of the permit applications was narrowly confined to considering impacts around the footprint of each anchor. Today, approximately 3 miles of the lines are elevated 2 to 4 feet above the bottomland. However, Enbridge has never applied for or obtained authorization under the GLSLA to change the design and structure of the dual pipelines. Despite the near total change in design and increased risks causing the change, there has been no determination regarding the potential massive impairment and impacts, and no consideration and determination regarding the existence of other alternatives under the GLSLA, the public trust, and laws of Michigan.

In summary, **First,** the existing Enbridge Line 5 easement for occupancy and use of bottomlands in the Straits of Mackinac has never been authorized under the GLSLA, Part 325, NREPA, MCL 324.32501 et seq. **Second,** Line 5 has never been authorized based on required written determinations because the easement, granted under Act 10, never complied with the requirement for determinations based on public trust standards and law. **Third**, the Snyder-DEQ-DNR-Enbridge tunnel agreement, and attached assigned easement and 99-year lease, were not authorized under the GLSLA, and were not properly authorized under Act 10 because they were not based on the determinations required by the public trust doctrine. **Fourth**, the so-called "Second Agreement" providing for leases to Enbridge of Great Lakes bottomlands has not been approved under the GLSLA, nor have determinations based on the standards under public trust law been made. **Fifth**, the 200 anchor supports (constituting 3 miles of elevated pipelines in the water column) have been permitted under the GLSLA for "dredging" into the soils of the Straits, but the supports are part of a *de facto* total or substantial change in design necessitated by the

[13] 1953 Easement, para A.
[14] 1955 PA 247; now NREPA, MCL 324.32501 et seq.

failure of the original design to account for the magnitude of the strong currents. That changed design has not been authorized under the GLSLA.

However, in order to determine the scope and extent of the public trust doctrine, the GLSLA, and Act 10, it is necessary to understand that the nature of the state title and public trust in the Great Lakes extends to the waters and the soils beneath them. As will be seen, this title and public trust cannot be divested or alienated, and when conveyances or agreements are made, they must satisfy public trust standards, or they are rendered void.

B. THE LEGAL FRAMEWORK AND PRINCIPLES

1. Equal Footing Doctrine and State's Trust Title in the Soils under Navigable Waters

When Michigan joined the United States in 1837, the State of Michigan took title, absolutely, as sovereign for its citizens under the "equal footing" doctrine to all of the navigable waters in its territory, including the Great Lakes, and "all of the soils under them" below the natural ordinary high mark.[15]

> The people of each State, based on principles of sovereignty, "hold the absolute right to all their navigable *waters and the soils under them*," subject only to rights surrendered and powers granted by the Constitution to the Federal Government.[16]
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> [T]he federal government could not withhold from the state the title to the submerged land, as it could and did the title to the other land of the territory. The states did not take an unqualified title to these lands. They were taken by them in trust for a public use for the people of the states, and subject to the rights of navigation by people of the entire country, and regulation by congress. By this ordinance it was provided that the navigable waters leading to the Mississippi and St. Lawrence, etc., 'shall be common highways, and forever free as well to the inhabitants of the said territory as to citizens of the United States and those of any other states that may be admitted into the confederacy.'[17]
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> The law seems to be well settled in the different states that the title to and dominion over lands covered by tide waters within the boundaries of the several states belong to each state wherein they are located. The state holds the fee in trust for the public. The doctrine established in regard to

[15] *Shively v Bowlby,* 152 U.S. 33, 14 S. Ct. 548 (1894); *Illinois Central R Rd v Illinois,* 146 U.S. 387 (1892); *State v Venice of America Land Company*, 160 Mich 680 (1910); *Glass v Gackle,* 473 Mich 667 (2005).
[16] *Martin v. Lessee of Waddell,* 16 Pet. 367, 410; 10 L. Ed. 997 (1842); *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469; 108 S. Ct. 791 (1988).
[17] *State v Lake St. Clair Fishing & Shooting Club*, 127 Mich 580, 593, 87 NW 117 (1901).

> lands covered by tide waters has also been held applicable to lands bounded by fresh water on our large lakes.[18]

The title to these navigable waters and the lakebed, bottomlands, or soils beneath them are held by the state as sovereign and protected by a public trust; the public trust is not a mere easement or limited to the surface of the lakebed, but rather inheres and applies to the entire bottomlands land and soils owned and held in trust by the State.[19]

> It is true that originally the title to the submerged lands of the navigable waters of the country was in the United States, but it is also true that such title was burdened with a trust for the use and benefit of the people for commerce and navigation. It is true that upon the admission of a state to the Union of states it took such title, but it took it burdened with such trust.[20]

> The states did not take an unqualified title to these lands. They were taken by them *in trust for a public use* for the people of the states, and subject to the rights of navigation by people of the entire country, and regulation by congress.[21]
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> * * *
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> It will be noted in cases involving this question that the expression 'easement of navigation' is frequently used. This term should not be confused. When applied to the unorganized public, *the individual member of the public, it unquestionably correctly describes his right. He has the right of passage, an easement*. *But when considering the organized public as represented by the government, it does not measure or correctly describe its rights*. The government has something more than an easement, a right of passage. *It has the paramount dominant right,* superior to that of the riparian owner, and in the enforcement of that right it may take, control and regulate in the interest of navigation the navigable waters of the nation and the submerged lands over which they flow.[22]

2. The Public Trust Doctrine Requirements and Standards

The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country.[23] Today, those rights and protected public trust uses include

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[18] *Id*. at 593-594.
[19] *Id*.; *Illinois Central Rail Road v Illinois*, 146 U.S. 387; 13 S Ct 110, 36 L Ed 1018 (1892); see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).
[20] *McMorran Milling Co v C.H. Little*, 201 Mich 301, 313 (1918).
[21] *State v Lake St. Clair Fishing & Shooting Club*, *supra*.
[22] *McMorran Milling Co*, 201 Mich at 315.
[23] *Illinois Central R. Co. supra,* 146 U.S. at 458; *National Audubon Soc. v. Superior Court of Alpine Cty.,* 33 Cal.3d 419, 433–441, 189 Cal. Rptr. 346, 658 P.2d 709, 718–724 (1983); *Arnold v. Mundy,* 6 N.J.L. 1, 9–10 (1821). These cases were cited with approval by U.S. Supreme Court in *Montana PPL v Montana*, 132 S Ct 1215 (2015).

fishing, navigation, swimming, boating, bathing, beach walking below the ordinary, natural high water mark, and sustenance.[24]

> [T]he public trust doctrine remains a matter of state law, see *Coeur d'Alene, supra,* at 285, 117 S. Ct. 2028 (*Illinois Central,* a Supreme Court public trust case, was 'necessarily a statement of Illinois law'"); *Appleby v. City of New York,* 271 U.S. 364, 395, 46 S Ct. 569, 70 L. Ed. 992 (1926) (same), subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters *and their beds in trust for the public*, see *Shively,* 152 U.S., at 49, 15–17, 24, 46, 14 S. Ct. 548, the contours of that public trust do not depend upon the Constitution.[25]

The quintessential public trust case, particularly for the Great Lakes, is the U.S. Supreme Court's decision in *Illinois Central R. Rd. v Illinois* in 1892.[26] The question before the Court was whether the state of Illinois had the authority to convey by legislative grant a square mile of Lake Michigan and its soils beneath these navigable waters to a private railroad company for expansion of its industrial operations. Despite the economic and job benefits, the Court ruled that the conveyance was beyond the authority of the state legislature. This was because the title to all of the waters and soils beneath them vested in the States on admission to statehood, and that these waters and bottomlands were held in trust for navigation, fishing, and other public uses and purposes. The Court reasoned that under the state's title in these public trust bottomlands or soils could not be alienated to or controlled by private parties for primarily private purposes or where the use, occupancy, or alteration of these public trust waters and soils would be impaired.[27]

The public trust doctrine means that the state holds these waters and soils beneath them in trust for the public for the protection of preferred or dedicated public trust uses of navigation, fishing, boating, swimming, bathing, drinking water, and other recreation.[28] As a general rule, there can be no disposition, transfer, conveyance, occupancy or use of any kind of these public trust waters and the soils beneath them; the state can never divest itself of the trust title in the waters and soils beneath them.[29] Subject to the rule against divestiture of the trust interest, the state can only authorize the use, occupancy, or a disposition of public trust bottomlands and soils if there is a statute that expressly authorizes such action and the statute contains the following standards that are determined to be met in particular circumstances:[30]

> (1) The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest (such as navigation, fishing, etc.), not a private one; and

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[24] MCL 324.32502; *Glass v Goeckle*, 473 Mich 673, 703 NW 2d 58 (2005*); Obrecht v National Gypsum Co.,* 360 Mich 399 (1961); *Collins v Gerhardt*, 237 Mich 38, 211 NW 115 (1926); *Nedtweg v Wallace*, 237 Mich 14, 208 NW 51 (1926).
[25] *PPL Montana, LLC v Montana*, *supra*.
[26] *Illinois Central R Rd*, *supra*, 146 U.S. at 436-437, 459.
[27] *Id*., 146 U.S. at 436-437.
[28] *Id.; Glass v, Goeckle, supra.*
[29] *Id*.
[30] *Obrecht v National Gypsum*; *Illinois Central*, *supra.*

(2) The proposed disposition, occupancy, or action will not interfere with or impair the public trust waters, soils, habitat, wildlife like fish and waterfowl, or one or more of the public-trust uses.[31]

3. Act 10 of 1953

Act 10 authorizes the state to grant public utility easements over state lands, including "over, through, under, and upon" lake bottomlands "belonging to or held in trust by the state." It does not authorize any lease, deed, or other disposition or form of conveyance.

> Sec. 2129. The department may grant easements, upon terms and conditions the department determines just and reasonable, for state and county roads and for the purpose of constructing, erecting, laying, maintaining, and operating pipelines . . . over, through, under, and upon any and all lands belonging to the state which are under the jurisdiction of the department and over, through, under, and upon any and all of the unpatented overflowed lands, made lands, and lake bottomlands belonging to or held in trust by this state.[32]

Act 10 does not contain any public trust standards as required by *Illinois Central R Rd., Obrecht v National Gypsum*, and public trust law. *Obrecht* requires authorizations for public trust lands and waters to comply with *Ill Central* standard.[33] *Illinois Central* and *Obrecht* provide only narrow exception for grants, dispositions such as easements, leases, and agreements for occupancy and use of trust bottomlands and soils under the Great Lakes: these are: (1) primarily public purpose or improvement of public trust interest; and (2) no substantial or material impairment or interference with bottomlands, waters, or protected public trust uses.[34] It is up to the State to make due recorded determinations whether a proposed use complies with these exceptions based on the application and the proofs of factual circumstances. Because approval is in the nature of a grant, the State cannot be compelled to grant authority to occupy and use its bottomlands and waters (with the exception of those who are riparians and engaged in lawful riparian uses or activities).

In the case of Enbridge, the 1953 Easement states that it covers Great Lakes waters and the bottomlands beneath these waters, but there are no findings made or requirements in Act 10 based on the necessary standards to comply with public trust law; an easement based on a statute like Act 10 that does not contain public trust standards and/or is not based on findings or determinations that these standards have been considered and met, is contrary to law and void or voidable. Similarly, the 2018 Easement to the Mackinac Straits Corridor Authority, assigned to Enbridge, is based on a statute that does not contain the standards required by public trust law; moreover, no findings or determinations were made before the signing of the easement based on public trust law standards.

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[31] *Id*.
[32] 1953 PA 10, MCL 324.2129.
[33] *Illinois Central R Rd v Illinois*, *supra; Obrecht* at 412-413.
[34] *Id*.

Finally, the 99-year lease to Enbridge was not authorized under the GLSLA, nor was it authorized under Act 10. As a result, there is no authority for the lease, unless Enbridge applies for and obtains authorization under the GLSLA.

4. The Great Lakes Submerged Land Act ("GLSLA"), NREPA Part 325, MCL 324.32501 et seq.

The GLSLA implements the state's duty to comply with the public trust in the Great Lakes and the soils beneath the lakes up to the "ordinary high-water mark." As noted above, Act 10 is limited to "easements" for public utilities. While the Act clearly authorizes easements in or over public trust bottomlands and waters, Act 10 does not contain any public trust standards for the DEQ or DNR, (depending on the latest realignment of agency authority by the then current governor's Executive Order) to determine whether a utility easement can be properly authorized.[35] The GLSLA, on the other hand, expressly authorizes deeds, leases, or any other use or occupancy agreements or conveyances, such as easements, of these public bottomlands, and contains public trust standards pursuant to *Illinois Central R Rd v Illinois*.[36] But in addition to the necessary statutory authority, in the absence of public trust standards in the statute or in application of the statute to the approval of a conveyance or use, in due recorded form, such easement, deed, lease or other use or occupancy is also prohibited.

> Sec. 32502. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, *or other disposition* of unpatented lands and the private or public use of lands *whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state* or that the public trust in the state will not be impaired by those agreements for use, sales, lease or other disposition… The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark.

[35] *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892).

[36] See *Obrecht v National Gypsum Co*, 361 Mich 399 (1960), approving public trust standards in the GLSLA as consistent with the standards required for dispositions and uses of the bottomlands of the Great Lakes under *Illinois Central R Rd*, supra. "[I]t will be found authoritatively that no part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation such as the swamp land acts and the St. Clair Flats leasing acts (see *State v. Lake St. Clair Fishing & Shooting Club and Nedtweg v. Wallace*, *supra*), can be alienated or otherwise devoted to private use in the absence of due finding of one of two exceptional reasons for such alienation or devotion to non-public use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed 'in the improvement of the interest thus held' (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made 'without detriment to the public interest in the lands and waters remaining.'" *Obrecht v. Nat'l Gypsum Co.,* 361 Mich. 399, 412, 413; 105 N.W.2d 143, 149 (1960).

> Sec. 32503. (1) Except as otherwise provided in this section, the department, *after finding that the public trust in the waters will not be impaired or substantially affected*, may enter into *agreements* pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands, *after approval of the state administrative board*. Quitclaim deeds, leases, or agreements covering unpatented lands… shall contain such terms, conditions, and requirements as the department determines to be just and equitable and in conformance with the public trust. The department shall reserve to the state all mineral rights, including, but not limited to, coal, oil, gas, sand, gravel, stone, and other materials or products located or found in those lands, except where lands are occupied or to be occupied for residential purposes at the time of conveyance…[37] (2) The department shall not enter into a deed or lease that allows drilling… *beneath the unpatented lands* for the exploration or production of oil or gas.

It should also be noted that the GLSLA rules prohibit authorizations and permits to use or occupy the public trust bottomlands and waters of the Great Lakes unless the applicant demonstrates (1) through an environmental impact statement that there will be no impairment or adverse impacts to the public trust, and (2) that there exist no other feasible and prudent alternatives to the proposed use or activity. R 322.1015. The GLSLA and its rules provide for public hearings on request by aggrieved or affected persons or parties. R 322.1017.

CONCLUSIONS

Based on the foregoing and the attached Appendix containing legal citations and text-quotations regarding the equal footings and public trust doctrines, Act 10 and the GLSLA, the State, through its appropriate agencies, must make the determinations and take the actions outlined in paragraphs (1) through (8), above.

First, the answer to the threshold question at the top of page 3 above is: On admission to the union, the State of Michigan took title as sovereign, absolutely, in the navigable waters and bottomlands and soils under those waters, including the Great Lakes, subject only to a federal navigational servitude. The state took sovereign title in trust—a public trust—for the benefit of its citizens, present and future generations. The state can never authorize a conveyance, lease, easement or other disposition or agreement to occupy these waters or the bottomlands and soils unless there is express statutory authority to do so; the statute requires, and the state determines, that the proposed conveyance or use falls within the a narrow exception that the use is primarily public and in improvement of the public trust interest (fishing, navigation, boating, swimming, sustenance, such as drinking water). Even where there is a valid exception consistent with the public trust, the state cannot divest, alienate, or repeal the public trust in the state's sovereign title of these waters, lands, and soils under these waters.

Second, the Great Lakes Submerged Lands Act by its plain meaning and intent applies to the waters of the Great Lakes and all of the lands, soils, and subterranean land ownership under the

[37] MCL 324.32503.

waters of the Great Lakes to the ordinary or natural high-water mark.

Third, independent of the GLSLA, the public trust applies to and extends to the waters of the Great Lakes and all of the lands, soils, and subterranean land ownership under them.

Fourth, Act 10 and a utility easement in or under the Great Lakes pursuant to Act 10 are subject to the public trust doctrine; Act 10 is not valid because it does not comply with the narrow exceptions and required findings or determinations required by the public trust doctrine. In any event, the 1953 easement to Lakehead (Enbridge) was granted without the required determinations imposed by the public trust doctrine; and the tunnel, tunnel agreement, any agreement related to it, and the easement and 99-year lease for the tunnel and oil pipeline are void or not in compliance with the determinations demanded by the public trust doctrine.

Fifth, the state should notify, demand, and require Enbridge to demonstrate compliance with public trust standards and the standards under the GLSLA and rules through an application; only if Enbridge can establish a basis for determining that it has complied with the GLSA and public trust standards can it continue operating the existing Line 5 and/or obtain necessary easement, leases, and other approvals or permits for a tunnel. If the company decides not to apply for and comply with these required authorizations, its continued use and operation of Line 5 on bottomlands, or its proposed tunnel and pipeline are contrary to law, must cease; or, if the company fails to comply with the standard under GLSLA and public trust law, then the existing easement or such continued use and operation cannot be authorized, and should be shut down and decommissioned in a reasonably ordered fashion, including conditions to reduce or minimize risk and endangerment until such time as decommissioning is completed.

Sixth, in addition to adhering to Attorney General Nessel's OAG 7309, it is submitted that the State must determine and rule that the tunnel agreement, the DNR 2018 tunnel easement to the Mackinac Straits Corridor Authority, the assignment of the easement to Enbridge, and the 99-year lease are void or contrary to law, because they are not in compliance with the GLSLA, and/or equal footing and public trust law. The Michigan DNR and DEQ, and the former Snyder administration attempted to avoid the GLSLA and public trust law by inserting language in the 2018 easement language stating that the easement was limited to bedrock below the lakebed surface. This was done based on an erroneous interpretation that the State's title held in public trust is limited to the lakebed. Based on the foregoing and legal citations and references in the attached Appendix, this is untrue. The State's title and public trust under equal footing and public trust law applies to the navigable waters and soils, bottomlands, and lands under these waters. Moreover, the GLSLA expressly requires authorization for any lease, disposition, agreement for occupancy, use or structures based on due recorded determinations that the public trust standards in the GLSLA have been met. This was not done, and until Enbridge applies and obtains such authorizations, it is prohibited from proceeding, or the tunnel agreement, easement, and lease are otherwise void.

Seventh, there have been questions about the nature of the 1953 easement or any disposition under the public trust doctrine, specifically whether an easement granted in the waters or bottomlands of navigable waters is revocable. Under *Illinois Central R. Rd,* the U.S. Supreme Court ruled that a grant or disposition of lands under navigable waters was always subject to the public trust and revocable. (See Appendix, paragraph 5. *National Audubon v Superior Court*.)

The doctrine is irrepealable; the state cannot divest itself of its duty to protect the public trust. As a result, an easement is in the nature of a license and is revocable.

# # #

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APPENDIX

TO

LEGAL MEMORANDUM ON THE GREAT LAKES SUBMERGED LANDS ACT, ACT 10 OF 1953 (UTILITY EASEMENTS IN PUBLIC TRUST BOTTOMLANDS), THE STATE'S SOVEREIGN TITLE AND PUBLIC TRUST IN THE STATE'S NAVIGABLE WATERS AND THE SOILS BENEATH THEM: THE EXISTING ENBRIDGE DUAL OIL PIPELINES AND PROPOSED TUNNEL AND NEW OIL PIPELINE IN THE STRAITS OF MACKINAC

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1. ***State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 580, 593-596, 87 N.W. 117 (1901).**

It has been often decided that the title taken by the federal government under such cession was limited by the provisions of its grant, and that the states subsequently carved from the Northwest Territory took the title to the submerged land under the cession and the ordinance of 1787, and that the federal government could not withhold from the state the title to the submerged land, as it could and did the title to the other land of the territory. The states did not take an unqualified title to these lands. They were taken by them in trust for a public use for the people of the states, and subject to the rights of navigation by people **123 of the entire country, and regulation by congress. By this ordinance it was provided that the navigable waters leading to the Mississippi and St. Lawrence, etc., 'shall be common highways, and forever free as well to the inhabitants of the said territory as to citizens of the United States and those of any other states that may be admitted into the confederacy.' See Shively v. Bowlby, 152 U. S. 33, 14 Sup. Ct. 548, 38 L. Ed. 331. In the case of People v. Kirk, 162 Ill. 146, 45 N. E. 830.

The law seems to be well settled in the different states that the title to and dominion over lands covered by tide waters within the boundaries of the several states belong to each state wherein they are located. The state holds the fee in trust for the public. The doctrine established in regard to lands covered by tide waters has also been held applicable to lands bounded by fresh water on our large lakes. The rights of navigation and of fishery remain substantially in the public as before. If these rights were taken away or materially infringed upon by the act or action of the commissioners under the *594 act, the action of the commissioners could not be sustained, as the legislature has no power to dispose of the waters of Lake Michigan, or the lands under the waters, contrary to the trust under which they are held for the people.' In Illinois Cent. R. Co. v. City of Chicago, 173 Ill. 485, 50 N. E. 1104, the same distinguished jurist said: 'It is true that the state holds the title to lands covered by the waters of Lake Michigan, lying within its boundaries; but it holds the title in trust for the people, for the purposes of navigation and fishery. The state has no power to barter and sell the land as the United States sells its public lands, but the state holds the title in trust, in its sovereign capacity, for the people of the entire state, as held in People v. Kirk, 162 Ill. 138, 45 N. E. 830.' In Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, it was said: 'The interest of the people in the navigation of the waters, and in commerce over them, may be improved, in many instances, by the erection of wharves, docks, and piers therein. For this purpose the state may grant parcels of the submerged lands, and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interests in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has *595 an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such

parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and water remaining. * * * A grant of all lands under the navigable waters of a state has never been adjudged to be within the legislative power, and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mantioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.' See, also, the recent case of Illinois Cent. R. Co. v. City of Chicago (No. 114, Oct. term, 1889) 20 Sup. Ct. 509, 44 L. Ed. 622, where Mr. Justice Brown said: 'Under the law of the state of Illinois, as laid down by the supreme court, not only in the case under consideration, but in the prior case of People v. Kirk, 162 Ill. 146, 45 N. E. 830, 'the state holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery. The state has no power to barter and sell the lands as the United States sells its public lands, but the state holds title in trust in its sovereign capacity for the people of the entire state.' Such was also the ruling of this court in a case between the same parties. Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, affirming Illinois v. Illinois Cent. R. Co. (C. C.) 33 Fed. 730. This, too, is a question of local law, with regard to which the decisions of the state courts are conclusive.' In Prewe v. Improvement Co., 93 Wis. 550, 67 N. W. 918, 33 L. R. A. 645, it is said: *596 "It is plain that no grant from the state, for purely private purposes, of such lands, could operate to impair or defeat the previously acquired rights of the riparian owner; for the state has no right to make such a grant. The right which the state holds in these lands **124 is in virtue of its sovereignty, and in trust for the public purposes of navigation and fishing. The state has no proprietary interest in them, and cannot abdicate its trust in relation to them, and, while it may make a grant of them for public purposes, it may not make an irrepealable one; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. These views are maintained with clearness and vigor in the very able and elaborate opinion of the court in the case last cited.' McLennan v. Prentice, 85 Wis. 444, 55 N. W. 764. Certainly, if the state had power, by the act in question, to convey and relinquish to 'James Reynolds, his heirs and assigns, forever,' and hence to the defendant,-a private corporation,-all its right, title, and interest in and to all lands lying within the limits of Muskego Lake, then it may, in a similar manner, convey and relinquish to private persons or corporations all such right, title, and interest, in and to every one of the 1,240 lakes in Wisconsin. Such conveyance and relinquishment is claimed to be a legitimate exercise of the police power of the state; and it is contended that, because the act asserts that such system of drainage is required for the preservation of the public health, the same is conclusive upon all courts. While the question of the necessity, expediency, or propriety of taking private property for public use is for the legislative department of the government, yet the question whether a particular use is public or private is for the judicial department. Water Co. v. Winans, 85 Wis. 39, 40, 54 N. W. 1003, 20 L. R. A. 662, and authorities there cited.' See, also, Steel Co. v. Bilot (Wis.) 84 N. W. 855. In Shively v. Bowlby, 152 U. S. 43, 14 Sup. Ct. 548, 38 L. Ed. 331, it was said of the title to beds and shores of navigable waters: 'It properly belongs to the states, by their inherent sovereignty, and the United States has wisely abstained from extending, if it could extend, its survey and grants beyond the limits of high water.'

The extent to which the legislatures may control and dispose of the bed of the lakes is a question about which the courts are not in harmony. As has been seen from the cases discussed, some of them hold that there is a limitation on the power of the state to cut off the rights of navigation or fishing by its inhabitants. Others say that they cannot grant the fee of the submerged land, and that whatever privileges are given are more in the nature of licenses, and are always revocable. It is not necessary to decide this question. It is safe to say, however, that all agree that there is a trust reposed in the state, which takes the title to submerged land for public uses, and not for purposes of profit by sale; and whether we hold that the legislative management must be conclusively assumed to be for the best interests of the public, or is open to question in the courts, the fact remains that the land is taken in trust for public uses, and we may properly conclude that, in passing a statute of limitations applicable to dry land, the legislature had no intention of subjecting the public fisheries and navigable waters to the right of private and exclusive title to be acquired by occupancy.

In McLennan v. Prentice, 85 Wis. 428, 55 N. W. 764, it was held that 'lands lying under the shoal waters of the Great Lakes, and between the bank and navigable waters, are held by the state in trust for the public purposes of navigation and fishing, and no grant thereof for purely private purposes can operate to impair or defeat the previously acquired rights of the riparian owner.' It was further said: 'The state has no proprietary interest in them, and cannot abdicate its trust in relation to them, and, while it may grant them for public purposes, it may not make an irrepealable one; and any attempted grant of the kind would be held, if not absolutely void upon its face, as subject to revocation. These views are maintained with clearness and vigor in the very able and elaborate opinion of the court in the case of Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, and are supported by numerous adjudicated cases.' In Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, the court said: 'The incalculable mischiefs that would follow, if a riparian owner is to be cut off from access to the water, and another owner sandwiched in between him and it, * * * are self-evident, and have been frequently animadverted on by the courts. * * * If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive **125 the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practical injustice to the owner of the original riparian estate, that would follow, would, of themselves, be a sufficient reason for refusing to adopt any such a doctrine.' If this language is appropriate to a claim that the state may own and sell land within any accretions or relictions, *599 how much more pertinent is it to the claim that the state may cut off all public and riparian rights, by surveying and selling the submerged lands off shore, or that the legislature intended to permit the same result to be attained through a statute of limitations! It is a rule of construction that statutes providing for the granting of land will require an express provision to authorize a grant beyond the shore line. See Gould, Waters, § 36.

To briefly recapitulate: St. Clair Flats are a part of the bed of one of the Great Lakes. The federal government had only a title in trust for future states, with certain *601 powers in relation to navigation. On the admission of Michigan, all of said submerged land covered by this lake, to high-water mark, passed to the state in its sovereign right,-not as private proprietor, and subject to sale, but in trust for the public, according to the original cession from Virginia and the ordinance of 1787.

Id. at 593-596, 598–99, 600–01.

2. State v Venice of Am Land Co

The condition of this territory when the state was admitted into the Union is *702 the condition which must control. That the state of Michigan holds these lands in trust for the use and benefit of its people—if we are correct in our conclusion—cannot be doubted. The state holds the title in trust for the people, for the purposes of navigation, **779 fishing, etc. It holds the title in its sovereign capacity. People v. Silberwood, 110 Mich. 103, 67 N. W. 1087, 32 L. R. A. 694; State v. Fishing & Shooting Club, 127 Mich. 580, 87 N. W. 117.

An exhaustive discussion of the nature of the state's title to the land beneath the waters of the Great Lakes, and of the question whether any part of such territory can be acquired, as against the state, by adverse possession, will be found in the minority opinion of Justice Hooker in the last above case. It there clearly appears from an abundance of authority that title to submerged lands in the Great Lakes held by the state cannot be devested [sic] by adverse possession; it being held in trust for the public, according to the original cession from Virginia and the ordinance of 1787. The late case of Illinois Steel Co. v. Bilot, 109 Wis. 418, 87 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905, supports this view. Olds v. Com'r of State Land Office, 150 Mich. 134, 122 N. W. 952; Ainsworth v. Munoskong Hunting & Fishing Club, 123 N. W. 802.

State v. Venice of Am. Land Co., 160 Mich. 680, 701-702, 125 N.W. 770, 779 (1910)

3. Obrecht v. Nat'l Gypsum Co.,

This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of five Great Lakes. Long ago we committed ourselves (see State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580, 594, 595, 87 N.W. 117; State v. Venice of America Land Co., 160 Mich. 680, 702, 125 N.W. 770; Nedtweg v. Wallace, 237 Mich. 14, 21, 24, 34, 208 N.W. 51, 211 N.W. 647) to the universally accepted rules of such trusteeship as announced by the Supreme Court in Illinois Central Railroad Co. v. State of Illinois, 146 U.S. 387, 13 S.Ct. 110, 119, 36 L.Ed. 1018. That exhaustively reasoned decision may be read with profit as Michigan approaches, again as in white pine days, the impending construction and utilization, as instruments of maritime commerce, of more deep water docks and piers along her lakebound shores. Turning to pages 453 through 460 of the report, and reading those pages in conjunction with our quoted act of 1955 as amended in 1958, it will be found authoritatively that no part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation such as the swamp land acts and the St. Clair Flats leasing acts (see State v. Lake St. Clair Fishing & Shooting Club and Nedtweg v. Wallace, supra), can be alienated or otherwise devoted to private use in the absence of due finding of one of two exceptional *413 reasons for such alienation or devotion to non-public use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed 'in the improvement of the interest thus held' (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made 'without detriment to the public interest in the lands and waters remaining.' Instances where the legislature has

directly and specially pursued its exceptional and conceded authority in such regard may be found on examination of P.A.1954, No. 41 (authorizing conveyance to Detroit Edison Company of a marshy and rocky area opposite Harbor Beach); P.A.1955, first extra session, No. 8 (authorizng conveyance of the Abitibi Corporation of an area of filled lake bottom opposite Alpena); P.A.1959, No. 11 (authorizing conveyance to Consumers Power Company of an easement for specified purposes in and over certain submerged portions of Lake Michigan); P.A.1959, No. 31 (authorizing conveyance to Detroit Edison Company of a shallow and polluted portion of the bed of Lake Erie in Monroe county), and P.A.1959, No. 84 (authorizing conveyance, to the Mackinac county board of road commissioners, of an easement for construction of a bridge leading from one island to another in the Les Cheneaux group).
2 We agree with the attorney general that the public title and right is supreme as against National Gypsum's asserted right of wharfage, and hold that the latter may **150 be exercised by the Company only in accordance with the regulatory assent of the State.[6] *414 No such assent has been given and, for that reason alone, the chancellor erred in decreeing that National Gypsum might proceed with what in law has become, since entry of such decrees, an entry upon and unlawful detention of State property.

The same issue-of conflict of riparian rights with public rights-came to unanimous determination in Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529, 52 LEd. 828. There the defendant riparian proprietor (Hudson Water Co.) sought to draw water from the Passaic River, in New Jersey, for transportation by pipe line to Staten Island in the state of New York. New Jersey objected, assigning as superior the public right. New Jersey was upheld. The court, speaking through Mr. Justice Holmes, reasoned to its decree of affirmance as follows (209 U.S. at page 356, 28 S.Ct. at page 531):

'This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. * * * The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.' The Supreme Court held further in this case that a state has constitutional power to insist that its *415 natural advantages shall remain unimpaired, and that when that state 'finds itself in possession of what all admit to be a great public good,' it may as against such asserted claim of a riparian retain what it has 'and give no one a reason for its will.' This is good law for the cases before us, ***and we adopt it.***

The Supreme Court held, in the Illinois Central case (146 U.S. at pages 445, 446, 13 S.Ct. at page 115), and we now hold, that:
'The riparian proprietor is entitled, among other rights, as held in Yates v. Milwaukee, 10 Wall. 497, 504, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public.'

The reason for this rule appears later in the report, 146 U.S. starting on page 453 and carrying on to page 454, 13 S.Ct. at page 118. The reason:

'The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period **151 be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, *416 or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state.'

Id. at 412–16, 105 N.W.2d 143, 150–51 (1960).

4. Glass v Goeckle

The History of the Public Trust Doctrine

Throughout the history of American law as descended from English common law, our courts have recognized that the sovereign must preserve and protect navigable waters for its people. This obligation traces back to the Roman Emperor Justinian,**64 whose Institutes provided, "Now the things which are, by natural law, common to all are these: the air, running water, the sea, and therefore the seashores. Thus, no one is barred access to the seashore ...." Justinian, Institutes, book II, title I, § 1, as translated in Thomas, The Institutes of Justinian, Text, Translation and Commentary (Amsterdam: North–Holland Publishing Company, 1975), p. 65; see also 9 Powell, Real Property, § 65.03(2), p. 65–39 n. 2, quoting a different translation. The law of the sea, as developed through English common law, incorporated the understanding that both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and 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. Therefore the title, jus privatum, in such lands ... belongs to the King as the sovereign; and the dominion thereof, jus publicum, is vested in him as the representative of the *678 nation and for the public benefit. [Shively v. Bowlby, 152 U.S. 1, 11, 14 S.Ct. 548, 38 L.Ed. 331 (1894).]

This rule-that the sovereign must sedulously guard the public's interest in the seas for navigation and fishing-passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan. See Nedtweg, supra at 17, 208 N.W. 51; accord Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473–474, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), quoting

Shively, supra at 57, 14 S.Ct. 548. Michigan's courts recognized that the principles that guaranteed public rights in the seas apply with equal force to the Great Lakes. Thus, we have held that the common law of the sea applies to the Great Lakes. See Hilt v. Weber, 252 Mich. 198, 213, 217, 233 N.W. 159 (1930); People v. Silberwood, 110 Mich. 103, 108, 67 N.W. 1087 (1896). In particular, we have held that the public trust doctrine from the common law of the sea applies to the Great Lakes.6 See Nedtweg, supra at 16–23, 208 N.W. 51; Silberwood, supra at 108, 67 N.W. 1087; State v. Venice of America Land Co., 160 Mich. 680, 702, 125 N.W. 770 (1910); accord Illinois Central I, supra at 437, 13 S.Ct. 110. Accordingly, under longstanding principles of Michigan's common law, 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.7 *679 The state serves, in **65 effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. See Nedtweg, supra at 16, 208 N.W. 51; Venice of America Land Co., supra at 702, 125 N.W. 770; State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580, 586, 87 N.W. 117 (1901); Lincoln v. Davis, 53 Mich. 375, 388, 19 N.W. 103 (1884).78 The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources.

Id. at 473 Mich. 667, 679-680 (2005).

The Great Lakes Submerged Lands Act

Plaintiff argues that the Legislature defined the scope of the public trust doctrine and established the outer limits of the doctrine in the GLSLA, thus supplanting our case law. This act, according to plaintiff, manifests a legislative intent to claim all land lakeward of the ordinary high water mark. Thus, plaintiff claims that the public trust extends to all land below the ordinary high water mark as defined in the act, which states that "the ordinary high-water mark shall be at the following elevations above sea level, international *682 Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet." MCL 324.32501.

We find plaintiff's reliance on the GLSLA to be misplaced. First, the act does not show a legislative intent to take title to all land lakeward of the ordinary high water mark. MCL 324.32502 provides:

The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by, it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect **67 the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be

impaired by those agreements for use, sales, lease, or other disposition. The word “land” or “lands” as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

*683 The first sentence of this section states that the act applies only to “unpatented lake bottomlands” and “unpatented made lands.” The fourth sentence, however, defines “land” or “lands” in the act as including not only the bottomlands and made lands described in the first sentence, but also “patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark ....”11 Thus, the act covers both publicly owned land (the lake bottomlands and made lands described in the first sentence) and privately owned land that was once owned by the state (patented land below the ordinary high water mark). In other words, the act reiterates the state's authority as trustee of the inalienable jus publicum, which extends over both publicly and privately owned lands. The act makes no claims to alter the delineation of the jus privatum of individual landowners.

Moreover, the act never purports to establish the boundaries of the public trust. Rather, the GLSLA establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine. Indeed, most sections of the act merely regulate the use of land below the ordinary high water mark.12 *684 The only section of the act that purports to deal with property rights is § 32511, MCL 324.32511:

**68 A riparian owner may apply to the department for a certificate suitable for recording indicating the location of his or her lakeward boundary or indicating that the land involved has accreted to his or her property as a result of natural accretions or placement of a lawful, permanent structure. The application shall be accompanied by a fee of $200.00 and proof of upland ownership.

As shown previously, a vital distinction in public trust law exists between private title (jus privatum) and those public rights that limit that title (jus publicum). Section 32511 only establishes a mechanism for landowners to certify the boundary of their private property (jus privatum). The boundary of the public trust (jus publicum)-distinct from a boundary on private littoral title-remains a separate question, a question that the act does not answer.

Finally, plaintiff also relies on the following language in § 32502 to argue that the GLSLA establishes the scope of the public trust doctrine:

This part [the GLSLA] shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over *685 patented and unpatented lands, and to permit the filling in of patented submerged lands

whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.13

Again, plaintiff's reliance on this section is misplaced. This sentence states that the act will be construed to protect the public interest. But that rule of construction begs the question and cannot resolve whether the public has an interest in a littoral property in the first place. It provides no reason to expand the public trust beyond the limits established at common law. Thus, we must look elsewhere to determine the precise scope of the public trust to which § 32502 refers.14

Id. at 685-686.

Michigan's courts have adopted the ordinary high water mark as the landward boundary of the public trust. For example, in an eminent domain case concerning property on a bay of Lake Michigan, we held that public rights end at the ordinary high water mark. Peterman v. Dep't of Natural Resources, 446 Mich. 177, 198–199, 521 N.W.2d 499 (1994).15 Thus, we awarded damages for destruction of the plaintiff's property above the ordinary high water mark that resulted from construction by the state (which occurred undisputedly in the water and within the public trust). Id. Similarly, in an earlier case where the state asserted its control under the public trust doctrine over a portion of littoral property, the Court also employed the high water mark as the boundary of the public trust. Venice of America Land Co., supra at 701–702, 125 N.W. 770.
https://1.next.westlaw.com/Document/I3750cab6007b11da8ac8f235252e36df/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default) - co_anchor_F132007059301
Our Court has previously suggested that Michigan law leaves some ambiguity regarding whether the high or low water mark serves as the boundary of the public trust. See Broedell, supra at 205–206, 112 N.W.2d 517. But the established distinction in public trust jurisprudence between public rights (jus publicum) and private title (jus privatum) resolves this apparent ambiguity. Cases that seem to suggest, at first blush, that the public trust ends at the low water mark actually considered the boundary of the littoral owner's private property (jus privatum) rather than the boundary of the public trust **70 (jus publicum).16 Because the public trust doctrine *688 preserves public rights separate from a landowner's fee title, the boundary of the public trust need not equate with the boundary of a landowner's littoral title. Rather, a landowner's littoral title might extend past the boundary of the public trust.17 Our case law nowhere *689 suggests that private title necessarily ends where public rights begin. To the contrary, the distinction we have drawn between private title and public rights demonstrates that the jus privatum and the jus publicum may overlap.

Nor does this recognition of the potential for overlap represent a novel invention. While not binding on Michigan, other courts have similarly accommodated the same practical challenge of fixing boundaries on shifting waters: they acknowledged the possibility of public rights coextensive with private title. See, e.g., State v. Korrer, 127 Minn. 60, 76, 148 N.W. 617 (1914) (Even if a riparian owner holds title to the ordinary low water mark, his title is absolute only to the ordinary high water mark and the intervening shore space between high and low water mark remains subject to the rights of the public.); see also North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 301 (N.D., 1995) (stating that neither the state nor the riparian owner held absolute interests

between high and low water mark); Shaffer v. Baylor's Lake Ass'n, Inc., 392 Pa. 493, 496, 141 A.2d 583 (1958) (subjecting private title held to low water mark to public rights up to high water mark);**71 Flisrand v. Madson, 35 S.D. 457, 470–472, 152 N.W. 796 (1915) (same as Korrer, supra); Bess v. Humboldt Co., 3 Cal.App.4th 1544, 1549, 5 Cal.Rptr.2d 399 (1992) (noting that it is "well established" that riparian title to the low water mark remained subject to the public trust between high and low water marks).

The Hilt Court concluded by stating how the public trust doctrine affected a riparian owner's private title: While the upland owner, in a general way, has full and exclusive use of the relicted land, his enjoyment of its use, especially his freedom to develop and sell it, is clouded by the lack of fee title, the necessity of resorting to equity or to action for damages instead of ejectment to expel a squatter, and the overhanging threat of the State's claim of right to occupy it for State purposes. The State, except for the paramount trust purposes, could make no use of the land.... [Id. at 227, 233 N.W. 159.]

Id. at 687-689.

5. National Audubon v Superior Ct of Los Angeles

(c) *Duties and powers of the state as trustee.*
In the following review of the authority and obligations of the state as administrator of the public trust, the dominant theme is the state's sovereign power and duty to exercise continued supervision over the trust. One consequence, of importance to this and many other cases, is that *parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.*

As we noted recently in *City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, 162 Cal.Rptr. 327, 606 P.2d 362, the decision of the United States Supreme Court in *Illinois Central Railroad Company v. Illinois, supra,* 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018, "remains the primary authority even today, almost nine decades after it was decided." (26 Cal.3d 521, 162 Cal.Rptr. 327, 606 P.2d 362.) The Illinois Legislature in 1886 had granted the railroad in fee simple 1,000 acres of submerged lands, virtually the entire Chicago waterfront. *Four years later it sought to revoke that grant. The Supreme Court upheld the revocatory legislation*

Turning to the *Illinois Central* grant, the court stated that: *"Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time*. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible.... The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned **722 of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

In summary, the foregoing cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust (see *City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, 162 Cal.Rptr. 327, 606 P.2d 362). Except for those rare instances in which a grantee may acquire a right to use former trust property free of trust restrictions, the grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes

Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.

Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 437-438, 440, 447, 658 P.2d 709, 728 (1983).