



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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December 2, 2010

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**Re: Request for Opinion /Possible Lake Shady Dam Removal**

Dear Mr. Canan:

Thank you for your correspondence dated October 13, 2010, requesting an opinion of the Attorney General's Office with respect to the possible Lake Shady dam removal.

You indicate that Lake Shady is a small lake that is located within the City of Oronoco in Olmsted County. The Middle Fork of the Zumbro River and the South Branch of the Middle Fork of the Zumbro River come together at Lake Shady. Lake Shady has existed for many years and was created by a dam across the Middle Fork of the Zumbro River near the outlet of the lake. Lake Shady has become filled with a large amount of silt in recent years that has severely impaired its recreational usage. Local residents have been unable to secure funds to dredge the lake and restore the dam. On September 23 and 24, 2010, the Oronoco area received a large amount of rainfall that caused serious flood damage around the dam and washed out the approach area for the north end of the CSAH 12 bridge that crosses the river just east of the dam. You expect that large sums of money will be required to complete the needed repairs, causing the community to consider removal of the dam as part of the restoration process.

1. *If the dam is removed and the new low water mark of the Middle Fork of the Zumbro River and the South Branch of the Middle Fork of the Zumbro River can be firmly established, you ask who would own the newly exposed former lake bed that becomes dry land through the process of accretion?*

Since this Office cannot investigate and evaluate questions of fact, Op. Atty. Gen. 629-a (May 9, 1975), we cannot render opinions which are based on factual determinations. I nevertheless can provide the following analysis, which I hope will be of assistance to you.

First, the State of Minnesota became the owner of the beds of navigable waters located within its exterior boundaries upon its admission to the Union. *State v. Longyear Holding Co. et al*, 224 Minn. 451, 463, 29 N.W.2d 657, 665 (1947). The legislature has also expressed that the State owns the beds of navigable rivers in Minnesota:

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The ownership of the bed and the land under the waters of all rivers in the state that are navigable for commercial purposes are in the state in fee simple, subject only to the regulations made by the United States with regard to the public navigation and commerce and the lawful use by the public while on the waters.

Minn. Stat. § 103G.711 (2010). The facts presented here indicate that Lake Shady has existed for many years and was created by a dam constructed across the Middle Fork of the Zumbro River near the outlet of Lake Shady. Based on these facts, it does not appear that Lake Shady was a navigable water when the State of Minnesota was admitted to the Union on May 11, 1858.<sup>1</sup> For non-navigable lakes, the Minnesota Supreme Court has held that the riparian owners adjacent to the lake generally hold title to the bed of the lake in severalty, with the boundary lines of each abutting tract being fixed by extending the lines for each tract to the center of the lake. *State v. Adams*, 251 Minn. 521, 561, 89 N.W.2d 661, 687 (1957).

You also indicate that some of the bed of Lake Shady also forms the bed of the Middle Fork of the Zumbro River and the South Branch of the Middle Fork of the Zumbro River (hereinafter collectively "Zumbro River"). The question of whether the Zumbro River was navigable at the time of statehood such that the State of Minnesota owns the bed is a question of fact. *See State, by Burnquist v. Bollenbach*, 241 Minn. 103, 63 N.W.2d 278 (1954).

Second, under Minnesota law, a riparian owner holds title to shore land in absolute fee to the ordinary high water mark of a navigable water and fee to the land between the ordinary high-water mark and the natural low-water mark of a navigable water subject to the right of the public to use or reclaim it for public purposes. *State v. Korrer*, 127 Minn. 60, 148 N.W. 617, 623 (1914). Although the State owns fee title to the bed of a navigable water below the natural low water mark as of statehood, a riparian owner has certain rights:

But while the shore owner owns the fee only to low-water mark, he has certain well-defined rights in the water and the soil under it below low-water mark. These rights are designated riparian rights. Riparian rights are incident to the ownership, not of the bed of the water, but of the shore land. The riparian owner has the right to the use of the water and has the right of access to it for that purpose. To that end, he may follow it as it recedes. He has the title to the reliction caused by the gradual recession of the water and to the accretion caused by the washing of sand, dirt, and gravel ashore.

*Id.* at 60, 148 N.W. at 621-22. While a riparian owner has the right to access the water, title to that property lying below the natural low water mark does not transfer to the riparian owner except in cases of accretion or reliction. *Id.*

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<sup>1</sup> Although you indicate that Lake Shady was created by the construction of a dam, it is of course possible that a navigable lake existed in this location at the time of statehood.

Third, under the doctrine of accretions and relictions, a riparian owner generally gains a vested right to property added to the riparian lands as a result of accretions and relictions. *State v. Longyear Holding Co. et al*, 224 Minn. 451, 467, 29 N.W.2d 657, 667 (1947). Accretion is the natural accumulation of soil washed to the shore or deposited by the water over a long period of time. *Id.* Reliction is the gain of land by the gradual, permanent, and natural recession of the body of water. *Id.* at 467-68, 29 N.W.2d at 667. Reliction applies when there is a very gradual, almost imperceptible, recession of the waters. *Id.* When the drainage is sudden and artificial, however, courts have held that it is not a true reliction and the newly exposed bed belongs to the State. *Id.* at 467, 29 N.W.2d at 667. The Minnesota Supreme Court has defined such a reliction as an avulsion and agreed that, "as a general rule, riparian land made by avulsion does not change the underlying ownership." *Reads Landing Campers Association, Inc. v. Township of Pepin*, 546 N.W.2d 10, 13 (1996). The *Longyear* Court also stated that the reliction must be permanent in order for the riparian owner to gain title to that land. *Id.* at 468, 29 N.W.2d at 667. I am not aware of any Minnesota case that has addressed whether there can be reliction when the drainage is sudden but proves to be permanent.

Whether the proposed removal of the dam and subsequent drainage of Lake Shady will constitute a reliction or an avulsion is a question of fact. As noted above, opinions of this Office cannot resolve factual questions.

2. You ask whether the legislature will have to approve any conveyance of this property to the City or adjoining landowners if it is determined that the exposed bed is owned in fee by the State of Minnesota.

First, the beds of navigable waters owned by the State are often referred to as "public trust lands." The nature of a state's title in public trust land was set forth in the case of *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892). In 1869 the Illinois legislature ceded approximately 1000 acres, comprising the whole of the Chicago harbor, to the Illinois Central Railroad. Four years later, the legislature repealed this grant. Subsequently, the Illinois Attorney General brought suit to quiet title to the land. The railroad defended by asserting that the attempted repeal violated the contracts clause and the due process clause of the United States Constitution. The Court affirmed the decision of the lower court quieting title in favor of the state. In so doing the court explained the public trust doctrine:

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 which 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. ... But that is a very different doctrine from the one that 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 ... 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 waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. ... A grant of all the 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 trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, 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.

*Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452-456, 13 S. Ct. 110, 118-119 (1892) (emphasis added).

Second, the Minnesota Supreme Court has expressed its agreement with the foregoing principles and the standard under which the State must administer these public trust lands:

In the language quoted, the state's ownership was thus distinguished from the ownership of the king under the ancient English doctrine that the latter was in the nature of a private estate in the beds of navigable waters which might be conveyed to any subject. The repudiation of this doctrine did not of necessity negative the absolute title of the state, subject only to its public trust, nor in any manner constitute a restriction on the state's right as trustee to dispose of beneficial interests in such lands, provided that in so doing it (a) acted for the benefit of all the citizens, and (b) did not violate the primary purposes of its trust, namely, to maintain such waters for navigation and other public uses.

In the exercise of its trust, it cannot be seriously doubted that the state has the power, and, in fact, the duty rests upon it, to use such lands for the greatest public good, and, where they can be put to productive use, not to permit them to lie waste and unproductive. In so doing, of course, it cannot parcel or alienate them or otherwise interfere with the public purposes of the trust in which they are held.

*State v. Longyear Holding Co. et al.*, 224 Minn. 451, 473, 29 N.W.2d 657, 670 (1947). In addition, the Court determined that the State may, in limited situations, dispose of certain interests in those lands:

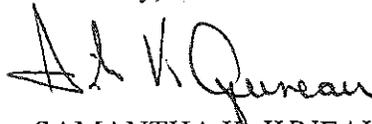
It is made clear by the decisions of the United States Supreme Court subsequent to statehood, particularly in the case of *Illinois Central R. Co. v. State of Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L.Ed. 1018, *supra*, that in the exercise of such trust the state may dispose of partial interests in such lands, in the interest of all the people of the state, provided the primary purposes of the trust are not unduly abridged or burdened thereby.

*Longyear*, 224 Minn. at 472, 29 N.W.2d at 669. Accordingly, the State must act in such a manner as to promote these principals in any conveyance of the bed of a navigable water.

Third, as to whether legislative approval is required for the conveyance of the beds of navigable waters, the *Longyear* case provides some guidance. In *Longyear*, the Court determined that consistent with the public trust doctrine, the State of Minnesota, under proper statutory authority, may provide for the removal of ore beneath the beds of its navigable waters. *Longyear*, 224 Minn. at 478, 29 N.W.2d at 672; *see also Putting the Public Trust Doctrine to Work*, prepared by the Coastal States Organization, Inc. (June 1997 2nd Ed.), p. 231 (citing cases from other jurisdictions which have held that clear legislative authority and intent is required.). Thus, in order to convey the bed of a navigable water, the State of Minnesota must act in conformity with the public trust doctrine and pursuant to proper statutory authority.

I thank you again for your letter.

Sincerely,



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