

State Land, Ownership and Control of lands between High and Low Water Mark of Navigable Lakes and Streams.

Ownership of such lands is an inherent right of sovereignty. Removal of sand or gravel from such lands may be permitted by the state.

February 3, 1911.

Hon. Fred Whiteside, Chairman,
Carey Land Act Investigating Committee,
Helena, Montana.

Dear Sir:

In accordance with your request, made yesterday when I was in attendance before your committee as a witness, to furnish you with a memorandum of authorities sustaining my position with respect to the state's ownership and control of land between high and low water mark and that comprising the bed of navigable streams or lakes, I respectfully submit the following:

Section 1, Article XVII, of the State Constitution dealing with the subject of administration of public lands provides in part as follows:

"All lands of the state that have been, or that may hereafter be granted to the state by congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; and none of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States."

The great preponderance of all authority in the highest courts of England and of the United States sustains the rule of law in accordance with the opinion which I gave, viz., that the shores of the navigable waters and the soil under them were not granted by the constitution of the United States, but were reserved to the states respectively, and new states have the same rights, sovereignty and jurisdiction under this subject as the original states. The ownership and

control of the beds of navigable lakes and streams is an inherent right of sovereignty in the state subject to the public rights of navigation, fishing and the like and so long as there is no inclosure of the waters, the rights of the public are not restricted or abridged and the state in the exercise of its police power for the protection of harbors and promotion of commerce, may prescribe reasonable regulations and provisions concerning docks and wharves and the use to which such character of its lands may be devoted.

Permitting the removal of sand or gravel from the bed of navigable lakes or streams would not under the authorities seem to be objectionable in any particular, as such removal would in all instances have the tendency of benefiting navigation by a deepening of the channel or harbor and would not in any way interfere with the inherent rights of the people. The authorities are quite numerous covering various phases of the statements hereinabove mentioned and your attention is now directed to a number which I have collected.

Lord Hale-Hargreaves Law Tracts A 5;
 Attorney General vs. Parmeter, 10 Price 378;
 Shively vs. Bowlby, 152 U. S. page 1;
 U. S. vs. Bain, 24 Fed. Cases, 940;
 Eisenbach vs. Hatfield, 26 Pac. 539;
 Pollard vs. Hagan, 3 Howard 212;
 Martin vs. Waddell, 16 Peters 367;
 Goodlittle vs. Kibbe, 9 Howard 471;
 Barney vs. Keokuk, 94 U. S. 324;
 Packer vs. Burr, 137 U. S. 661;
 Hardin vs. Jordan 140 U. S. 371;
 Kaukauna Wat. Co. vs. Green Bay Canal Co. 142 U. S. 254;
 Rossmiller vs. State, 89 N. W. 839;
 Attorney General vs. Smith, 85 N. W. 512;
 Ill. Cen. Ry. Co. vs. Ill. 146 U. S. 387;
 Wat. Pow. Co. vs. Commissioners, 168 U. S. 349;
 U. S. vs. Chandler Dunbar Wat. Pow. Co., 209 U. S. 447;
 Kansas vs. Colorado, 206 U. S. 46.

Yours very truly,

ALBERT J. GALEN,

Attorney General.