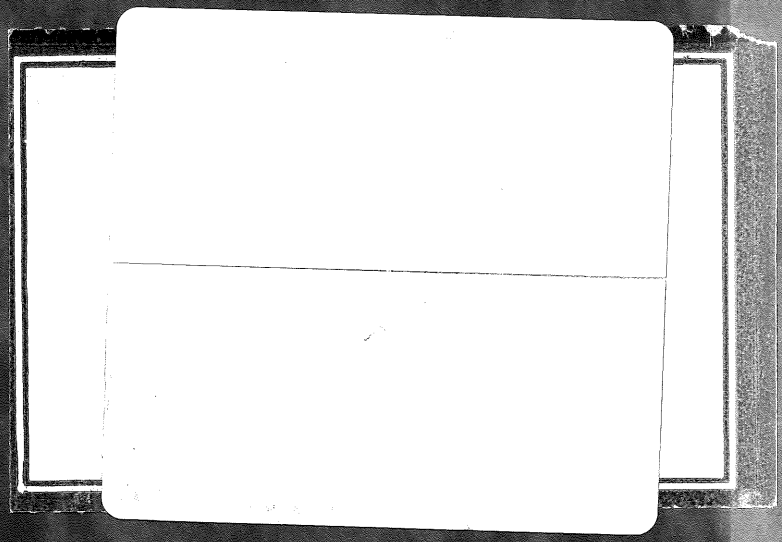

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REPORT TO LEGISLATIVE COMMISSION ON MINNESOTA RESOURCES CONCERNING CURRENT AND POTENTIAL SUBMERGED LAND MANAGEMENT POLICIES AND PROCEDURES

Minnesota Department
of Natural Resources
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EXECUTIVE SUMMARY

In 1987, the Legislative Commission on Minnesota Resources (LCMR) funded preliminary research into the subject of the use and regulation of "submerged lands" in Minnesota. The results of that preliminary research are presented in this report.

"Submerged lands" is a term that is coming into popular usage. Because the term is susceptible to many interpretations, its use may cause confusion. For the purposes of this summary, "submerged land" is defined to include the following two categories: beds of "navigable bodies of water", which are owned by the state; and beds of other bodies of water, which are owned by riparian land owners who have certain rights under law. Management of submerged lands also involves the issue of occupancy of overlying public waters, rights in which the state has an interest whether the underlying submerged lands are state-owned or riparian.

This report focuses on management of state-owned submerged land and on the broader issue of regulating occupancy of waters defined as public waters under applicable statutes. Besides examining existing policies and practices in Minnesota, and exploring potential opportunities for generating additional revenue, the report summarizes submerged land management in several other states.

Although the definition of "navigable bodies of water" has been well established by the courts, no complete inventory of waterbodies meeting the requirements of "navigability" has ever been developed. The cost of such an inventory would be prohibitive, given the complexity of the task and the vast number of lakes and streams in the state. Further, any inventory that is created without final court rulings on each water body would be uncertain. Any such inventory would involve substantial risk of failing to include some waters which should be included.

The extent of the state's submerged land ownership and the degree to which the beds of "navigable waters" have been occupied by private development, are uncertain. On the other hand, occupancies of public waters by various types of development are much easier to identify and inventory. The DNR has issued permits for several thousand such occupancies, and there are many more which require no permit or which pre-date the permit system.

Current Policy & Practices

State-owned submerged land was managed for mineral development starting in the early 1900's, after the legislature, in 1917, authorized lake bed and underwater iron ore mining leases and directed that revenues from such leases be deposited in the Permanent School Fund. Subsequent legislation authorized underwater leases for gold and other metallic minerals, as well as sand, gravel and marl. Several such leases were issued and total revenue of over $2 million has been generated.

In recent years, environmental and water-use concerns have caused the state to proceed with extra caution regarding mineral leases on submerged land.

The metallic minerals lease covering part of the bed of Shagawa Lake, near Ely, is the only lake bed mineral lease now in effect.

Current state law regulates use of public waters and of submerged land beneath both non-navigable and navigable waters. Much of the statutory basis of regulation is contained in the definition of public waters and wetlands and the permit system of chapter 103G of Minnesota Statutes. The regulatory system established thereby has been held to be a constitutional exercise of the state's police power. In all cases where there are public waters and wetlands, as defined in chapter 103, the state can regulate in the public interest the use of the waters and the beds beneath the waters.

Under rules developed pursuant to chapter 103G, and other law, permits or licenses are required for various regulated activities, such as drainage, filling, structures, including docks, wharves, breakwaters and hydroelectric dams, mining activities, and utility crossings. Nominal application fees are charged for such permits, designed to recover the cost of processing the applications. Except for mining and utility crossings, which generate royalty income and fees for occupancy of public land or waters, there are no charges for use of public space.

Historically mineral revenues have been the greatest source of income from lake bed leasing, and will be a source of revenue in the future. Occupancy fees for public waters utility crossing licenses issued during the F.Y.1988-1989 biennium amounted to approximately $46,000. With revised fees adopted pursuant to Laws of 1990, Chapter 594, water crossing occupancy fees are expected to rise to over $100,000 per biennium.

Opportunities for Revenue Generation

The opportunity for generating additional revenue for the state from submerged lands hinges on the following issues:

1. Should fees be charged only for occupancy of state-owned submerged lands, or should fees be based on occupancy of public waters, whether they are navigable or not?

A fee system based on occupancy of public waters common space may do more for the public trust than charging for occupying state-owned submerged lands, and generate more income for less cost. However, charging rent for the use of state-owned land may be easier to understand than charging rent for the appropriation of a common water area not "owned" by anyone in a proprietary sense.

2. Should fees be assessed for pre-existing uses, or only for uses occurring subsequent to establishment of the fee system?

The question of whether to charge for pre-existing uses involves legal, economic and public policy issues. Legally, particularly as to filling and docks, the Minnesota Courts have consistently ruled that a landowner adjacent to a navigable water holds title to the low water mark and has the exclusive right of access to the water in front of the riparian land, including the right to build and maintain wharves, piers, landings, and docks beyond the low water mark

to the point of navigability, subject only to the rights of the public relating to navigation.

Economically, the issue is whether charges to pre-existing uses would cause economic dislocation, or whether the charges would be too small a part of business' cost to bother it. Revenues from a fee system that exempts pre-existing uses will likely be much less than revenues from a system that does not, since future occupancies of submerged lands and public waters will be far less than in the past due to changing use patterns and environmental regulation.

From a public policy viewpoint, the issue is one of balance between the state's interest in encouraging economic development and the right of the public to use public waters which are occupied by private landowners exercising riparian rights that are limited by the public right of navigation. It may be that port authorities, which are encouraged by state law, should not be subject to fees for occupying public waters when that occupancy furthers the improvement of waterborne shipping. On the other hand, the public may nevertheless be entitled to a share of profits generated by such development, if its profitability is owed in part to use of public resources.

3. Should the state charge for the exercise of riparian property rights? If fees are imposed, which occupations of waters and submerged lands should be subject to fees?

It may not be appropriate to impose fees on reasonable residential riparian uses that do not infringe substantially on public navigation, such as private residential boat docks. These are the most frequently occurring use of public waters and submerged lands, and are firmly within the "riparian rights", subordinate to the paramount public right of navigation. More obvious sources of revenue for a fee system are "for profit" uses such as marinas, fills and wharves for commercial docking, barge fleeting, boathouse/houseboat moorings, hydroelectric dams and public projects such as roads, bridges, harbors, marinas and moorages.

4. Would revenues from a fee system justify the cost of establishing and administering the system?

Both potential revenues and likely costs of a fee system for public waters occupancies are uncertain, since no inventory of current occupancies exists. However, some indications of potential revenues are available. As noted elsewhere, utility crossings of public waters are expected to generate over $100,000 per biennium with newly revised fee schedules. Over 8,400 existing permitted encroachments occur on Minnesota public waters. When this number is reduced by private docks, lawful fills, and inland excavations (which, under existing law, may be exempt) about 300 such encroachments exist. A revenue schedule charging an annual fee of $100, the minimum fee charged for public waters encroachments by the state of Iowa, could generate $30,000 per year or $60,000 per biennium.

Costs for establishing a fee system would depend in part on the resources required to inventory existing occupancies and on the results of possible legal challenges. Administrative costs would likely be at least partially offset by application fees, as they currently are with utility

crossings. Depending on the resulting fee system, revenues may or may not exceed costs over time.

Activities In Other States

Submerged land management programs in several other states were surveyed. Those states include: Michigan, Wisconsin, Maine, Oregon, California, Florida and Iowa. It does not appear that any of the states surveyed have attempted a comprehensive inventory of state-owned submerged lands (lands beneath navigable bodies of water). Most state programs focus on tide lands (owned by coastal states to the three-mile territorial limit) and boundary waters.

Most of the revenue from submerged land leasing in the states surveyed has been generated by oil and gas leases. Some states have sold or otherwise conveyed the public's interest in submerged lands. The bulk the revenue generated by the Michigan submerged land program has been obtained in this way.

Recommendations

1. Selling submerged lands. Given the vast public interest in Minnesota's submerged lands, and the limited revenue obtained through sales in other states, conveyance of the state's interest in the beds of navigable waters for a fee is not recommended.

2. Mineral leasing of submerged lands. The DNR plans to continue its present policy, under which it does not offer meandered waters and any non-meandered waters of greater than ten acres in size at a public lease sale. The department will consider requests for negotiated leases on beds of waters adjacent to existing land leases.

3. Sand and gravel lease rules. The DNR recommends revision of the rules governing leasing of beds of waters for the removal of sand and gravel in order to: update the rules for statutory changes; clarify divisional authority; and increase royalty rates to reflect current market values. In large part, this update of the rules will not change the status of sand and gravel mining in public waters or increase the level of activity.

4. Assumptions of navigability. The DNR will continue to assume that public waters are navigable unless the facts clearly demonstrate otherwise or a court decides otherwise.

5. Basis for a revenue schedule. The DNR recommends that any fee requirements that are proposed for Minnesota be based on the "for-a-fee" occupation of public waters for commercial use, and should apply to all public waters regardless of ownership of the beds.

6. Exemption for certain riparian development. The DNR recommends that individual private docks or occupations less than a predetermined size, and shore maintenance, be exempt from occupancy fees.

7. Fees for pre-existing development. The DNR recommends that if a fee schedule is implemented, pre-existing commercial occupations of public waters, except for lawful fills, should be charged on an equal footing with any new development. It is not recommended that any fees be made retroactive.

Next Step

The department's analysis suggests that a fee system for occupancy of public waters has the potential to generate revenue over and above the cost of establishing and administering the system. Therefore, we recommend continued study of the issue to accomplish the following:

-- Develop an inventory of public water occupancies of the kind and size that might be subject to fees; this to be done on a computer database usable for statistical and geographical evaluation.

-- Estimate the cost of establishing and administering a fee system;

-- Estimate potential revenues based on a theoretical fee system; and

-- Evaluate past permit experience in order to estimate the rate of future public waters occupations;

-- Evaluate rule amendments to require mitigation as part of permits to occupy public waters.

The recommended study would require independent legislative funding. Funding for the study should include funds for development of a geographical information system (GIS) database and mapping system. These would facilitate evaluation of proposed fee systems as to potential revenues, costs, and local economic impacts. They would also aid in implementation and administration of whatever system is eventually adopted.

REPORT TO LEGISLATIVE COMMISSION ON MINNESOTA RESOURCES CONCERNING CURRENT AND POTENTIAL SUBMERGED LAND MANAGEMENT POLICIES AND PROCEDURES

I. INTRODUCTION.

In 1987, the Legislative Committee on Minnesota Resources (LCMR) funded preliminary research into the subject of the use and regulation of "submerged lands" in Minnesota. The preliminary research resulted in further discussions and analyses within the divisions and bureaus of the Department of Natural Resources. This report:

1. explains Minnesota law concerning ownership of submerged lands;
2. surveys current Minnesota law and practice regarding the regulation of public waters and exclusive occupation of public water;
3. describes the scope of current monetary charges for uses of the beds of navigable waters and exclusive occupation of public waters in Minnesota;
4. surveys current operation of programs which generate revenue from "submerged lands" of various descriptions in other states;
5. identifies issues to be resolved prior to changing Minnesota's law and policy concerning generation of revenue for use of submerged lands and occupation of the state's public waters.

II. THE MEANING OF "SUBMERGED LAND."

In its broadest sense "submerged land" may mean all lands beneath any waters in the state. However, the term is often also used to describe more limited categories of land. This can result in significant ambiguities or misunderstandings. If the term continues to be used at all, it should be used with care.

In general there may be said to be two major kinds of "submerged land." One kind is land forming the bed of a "navigable body of water," as that term is used and applied by United States courts. The state owns such submerged lands, subject to various rules and definitions discussed later.

A second kind of submerged land is land beneath bodies of water that are not navigable. Ownership of such land is governed by who owns the shore land (also called riparian land). In general, the riparian owners each own part of the submerged land--the exact pattern of ownership often is not possible to ascertain without a court action. Ownership can be private or public, or a combination of both, depending on the riparian ownership. Riparian related ownership is also subject to various rules and definitions discussed later.

Often confused with the concept of submerged land ownership is the concept of state regulation of the water

overlying the land. Minnesota has an extensive program, authorized by statute, for regulation of public waters and wetlands. This permit program, embodied largely in chapter 103 of the statutes, regulates water appropriations, changes in the course, current or cross section of protected waters and wetlands, attempted filling of any land beneath the ordinary high water level, and various other water related activities. This water permit system exists and is effective regardless of who owns the submerged land itself. In discussing the use and regulation of submerged land, it is important to articulate what is or can be done by the state as a matter of its police power over public waters and wetlands, and what is or can be done by the state as a matter of exercising the rights of a landowner.

In summary, the term "submerged land" may mean different things to different people. The term must be used with caution. It is probably more useful to refer, where appropriate, to specific kinds of submerged land (e.g., state owned beds of navigable waters) or to the concept of public waters and wetlands as regulated by the use of the state's police power.

III. BEDS OF NAVIGABLE BODIES OF WATER.

A. General Ownership.

One kind of submerged land is land which forms the bed of a navigable body of water. What makes this kind of land unique is that it is owned by the state. The legal rules in this regard are relatively straightforward. Pursuant to the federal acts authorizing and admitting the State of Minnesota into the federal Union on an "equal footing with the original states," (which states succeeded to the rights of the British monarchy to the ownership of the beds of navigable waters), title to the beds of navigable waters located within the exterior boundaries of a state passed to the state upon admission to the union.1/ The United States Supreme Court and the Minnesota Supreme Court have affirmed the title of the state to beds of navigable waters in various court decisions.2/ State ownership of the beds of navigable waters extends to the ordinary low water mark of the waters and extends beyond the ordinary low water mark to the ordinary high water mark to the extent that the state can protect and reclaim the area for public navigational purposes without compensation.3/ State ownership of these beds has also been expressed by the State legislature in Minn. Stat. Sections 92.70 and 465.18.

B. Definition of "Navigable Bodies of Water."

Since the state acquired title only to beds of "navigable" bodies of water, the definition of the term obviously becomes important. The United States Supreme Court has given this definition:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had,--whether by steamboats, sailing vessels or flatboats,--nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

(Emphasis added.)4/ This definition is applied to bodies of water as of the date the state entered the Union (in Minnesota's case, May 11, 1858).5/

The test of navigability obviously is largely factual and historical, but ultimately the facts and history must be interpreted by the courts before a final, unassailable conclusion can be made about any particular body of water. Hence, there currently is no binding list of navigable bodies of water for ownership purposes in Minnesota. Ownership of only a few beds of navigable waters has been determined by the courts.6/ These have been complex and time-consuming proceedings by a state agency. Creation of a list of what is considered to be navigable bodies of water would be a long and labor intensive project, would inevitably involve problems of reliability, and would invite legal challenges.

C. Limitations on State's Ownership Interests.

1. Use of Boundary Waters for Interstate Travel.

Although the state may be deemed to own the beds of navigable bodies of water, there nonetheless may be certain legal limitations over how it exercises its ownership interests. Article II, section 2 of the Constitution of the State of Minnesota states:

> Sec. 2. Jurisdiction on boundary waters. The state of Minnesota has concurrent jurisdiction on the Mississippi and on all other rivers and waters forming a common boundary with any other state or states. Navigable waters leading into the same, shall be common highways and forever free to citizens of the United States without any tax, duty, impost or toll therefor.

Thus, the state's management of boundary waters is required by its constitution to provide common, non-exclusive rights of navigation to its citizens and citizens of other states.

2. Rights of Riparian Owners.

Riparian owners, or owners of the land abutting navigable bodies of water, have certain rights to use the beds notwithstanding the state's ownership. The Minnesota Supreme Court has described these rights as follows:

> he (the riparian owner) has certain riparian rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low-water mark, and, to this extent, exclusively to occupy for such and like purposes the bed of the stream, subordinate only to the paramount public right of navigation. These riparian rights are property, and cannot be taken away without paying just compensation therefor.

(Citation omitted.)7/ Since these rights likely cannot be denied to a riparian owner simply because the state owns the underlying bed, certain limitations are going to exist for any management program based on the state's rights as a landowner.

3. Constraints on State's Right to Alienate.

Although the federal government turned over to the states the beds of navigable waters, states are not able to do whatever they please with this kind of property. There is a special kind of public trust attached to those lands which states must recognize. The trust is of a different nature than the school trust involved in the grant of certain sections of land to states upon statehood for education purposes, and beds of navigable waters are not school trust fund lands by virtue of any federal doctrine. Rather, the trust has been described by the United States Supreme Court as:

> a title different in character from that which the State holds in lands intended for sale. . . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . 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 an interest, <u>cannot be relinquished by a</u>

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.

(Emphasis added.)8/ The state is under some obligation to preserve and protect these lands for the public; however, certain disposals of the land can be made if the disposals promote, or perhaps do not diminish, the public's interest in the navigable bodies of water.

4. Private Fill on Beds of Navigable Bodies of Water.

There continues to be some controversy over situations where a riparian has placed fill on the beds of navigable bodies of water, creating dry land thereby. In some ways this is an issue associated mostly with the past, because such activity today would be generally prohibited by the permit system which regulates activities in all public waters and wetlands, navigable or not. Minnesota courts occasionally have confronted such situations, with results that are sometimes not well understood. An important recent decision of the Minnesota Supreme Court is the 1971 case of State v. Slotness.9/

Slotness involved part of the bed of Lake Superior that had been filled by a riparian owner. The specific question was whether the state had to condemn the fill for purposes of making a road, since the fill was on top of state owned lake bed. The court said that condemnation was necessary because the building of a road was not one of the purposes for which the state held the lake bed in trust for the public. In so holding, the court made several observations.

With regard to state ownership, the court said:

The state owns the bed of navigable waters below the low-water mark in trust for the people for public uses, which include commercial navigation, the drawing of water for various private and public purposes, recreational activity, and similar water-connected uses.10/

With regard to riparian owner rights, the court said:

The riparian owner may, to facilitate access to the water, build and maintain wharves, piers, landings, and docks on and in front of his land and extend the same into the water, even beyond low-water mark, to the point of navigability. He may, for the same reason, improve, reclaim, and occupy the surface of submerged land out to the point of navigability.

(Emphasis added; citation omitted.)11/ This statement is consistent with earlier Minnesota court opinions which affirmed the right of a riparian owner to improve and even occupy submerged lands to the point of navigability.12/ Some of those earlier decisions also upheld the right of a riparian owner to convey ownership rights in the fill over the submerged lands to another, even though the underlying bed was still owned by the state. In Hanford v. St. Paul & Duluth Ry. Co., 13/ for example, the Minnesota Supreme Court said:

> We suppose that the land-owner might grant to one having no riparian possession in the vicinity the right to use his wharf, or the improved or reclaimed shore-lands, for any purpose, whether connected with navigation or not, just as the owner himself might do. No individuals whose rights were not prejudiced could complain; and so long as the public rights are not interfered with, the state is not interested to oppose such use, but rather is interested to encourage and sanction it, without regard to the fact whether or not the use be associated with the use of the upland.

(Emphasis added.)

The Slotness decision in 1971 also quoted with approval wording in the early Hanford14/ case about the public value served by the development of certain submerged lands:

> "It is for the interest of the state," as we long ago stated in Hanford v. St. Paul & Duluth R. Co. (cite omitted) "that such lands, not available for the public purposes for which alone the state exercises authority over them, shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive." The state, moreover, by establishing lines of navigability, has impliedly invited riparian owners to reclaim submerged lake beds out to the point of navigability. Lands and structures developed in the bay area of Duluth, enormously important to the economy of Northeastern Minnesota, have been the result of such invitation.15/

The above wording in Slotness, combined with the holdings in other early Minnesota court opinions, raises serious doubts as to whether certain past private uses of the beds of navigable waters can be altered or interfered with by the state today, except to reclaim for public navigational purposes.

In addition, the Slotness case ended with an observation about future uses of the beds of navigable waters. The court specifically acknowledged that:

> We do not, by this decision, in any way determine the state's power to establish restrictions upon a

> riparian owner's future improvement or reclamation of the submerged lake bed of navigable waters necessary to the environmental interests of the people in public waters.

(Emphasis added).16/ And in fact such activities are regulated under Minn. Stat. ch. 103G.

D. Summary.

The state has ownership interests in the beds of navigable bodies of water. Although the definition of "navigable bodies of water" is well established, its application to 15,000 or more individual lakes and over 25,000 miles of streams depends upon historic facts applicable to each particular waterbody. Therefore there was no complete list of "navigable waters" supplied to the state in 1858, at the time of statehood, and there has been no requirement or justification for compiling such a list since. The state's ownership in the beds also is subject to certain rights of private riparian owners to use the bed. These rights of use have been ratified by past Minnesota court opinions. The state now regulates all such uses, which is different from the past.

IV. BEDS OF NON-NAVIGABLE BODIES OF WATER.

If a body of water is not navigable under the federal test discussed earlier, the submerged land is owned in fee by the riparian owners; each riparian owner having title to a portion of the bed out to the middle.17/ The state's ownership interest in such lands exists only to the extent it is a riparian owner on that particular water body. There are two major factors which affect the use of submerged lands beneath non-navigable waters: the rights of other riparians and the state's police power.

Riparian owners on non-navigable waters have the same rights as those on navigable waters. The Minnesota case of Johnson v. Seifert18/ described the rights of riparian owners as follows:

> (A)n abutting or riparian owner of a lake, suitable for fishing, boating, hunting, swimming, and other uses, domestic or recreational, to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners, regardless of the navigable or public character of the lake and regardless of the ownership of the bed thereof.19/

Riparian owners therefore have certain common law rights which cannot be interfered with by others, even if other persons own parts of the submerged land.

V. MINNESOTA'S PROPRIETARY CONTROL OF SUBMERGED LANDS FOR MINERAL LEASING.

The state has been issuing mineral leases covering state owned lands since 1889. Interest in the leasing of submerged lands arose in 1903. Under the state's mineral leasing program, the submerged lands leases are known as lake bed leases or underwater leases.

The state has issued lake bed mineral leases and underwater mineral leases covering a variety of mineral commodities over a period of 87 years.

A. Iron Ore Leasing Program.

1. 1903 Interest in Lake Bed Leasing.

The first applications for iron ore leases covering lake beds were received by the state in 1903. The state auditor, who was then in charge of issuing state mineral leases, was uncertain as to whether the existing law authorized leasing of lake beds.

Therefore, in September of 1903 he issued two prospecting leases to a John M. McClintock covering a portion of the bed of Three Mile Lake (also known as Manganika Lake) in St. Louis County. The other applications were put on hold as a court case was commenced to determine the legal authority for such leases.

It appears that a case was brought to the Minnesota Supreme Court in 1904, but the case was not heard on its merits due to a procedural issue. Legislation was sought from the 1905 legislature, but no new legislation was adopted.

In June of 1905, the state auditor cancelled the two leases issued to John M. McClintock and rejected the 201 pending applications for lake bed leases. He wrote these parties that it was his decision to not issue leases covering lake beds until the legislature or courts authorized the department to do so.

2. Legislation Adopted in 1917.

The Minnesota legislature adopted the first underwater leasing law in 1917. The act gave the governor, attorney general, and state auditor authority to enter into contracts for mining iron ore situated under waters of public lakes or rivers. Contracts were to be awarded on the basis of royalty bids, with a minimum royalty of $.50 per ton. Royalty was to be

credited to the permanent school fund. All contracts were to be sold at public sale to the highest bidder.20/

3. Lake Bed Leases Issued Under 1917 Law.

a. Syracuse Lake Bed Lease.

The first request under this new law for an iron ore lease covering a portion of a lake bed was received by the state in 1918. After meetings and a public sale, a lease was awarded to John R. VanDerlip of Minneapolis. The property covered part of Syracuse Lake, located on the Mesabi Iron Range in St. Louis County.

The lease was for a term of 50 years. It contained a royalty rate of $.50 per ton of ore. The lease also required a minimum production of 10,000 tons annually, or annual payment of $5,000.

The lease covering part of Syracuse Lake has been the largest revenue producer under the underwater leasing program. No mining occurred under the lease until 1944. The lease had by then been transferred to Lake Mining Company of St. Paul. Total ore shipped from this property over a 20-year period was 3.968 million tons. Revenue received under this lease totaled $1.984 million. Pursuant to statutory requirements, this money was deposited into the permanent school fund.

There was litigation concerning the ownership of the bed of Syracuse Lake. In State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1948), the Minnesota Supreme Court held that Syracuse Lake was navigable at the time of Minnesota's admission to statehood, so that the state held title to the lake bed below the low water mark. The court determined that the state had authority to issue leases for removal of ore from the lake bed free of claims of riparian owners.

b. Rabbit Lake Bed Leases.

The second lake bed lease issued under the 1917 law covered part of the bed of Rabbit Lake. The lease was issued by public sale in 1924 to Rogers-Brown Ore Company. Rabbit Lake is located on the Cuyuna Iron Range in Crow Wing County.

The lease was also for a term of 50 years and contained a royalty rate of $.50 per ton of ore. The lease required a minimum production of 10,000 tons annually, or annual payment of $5,000. As with the Syracuse Lake lease, the lease contained a provision that called for payment of royalties into an escrow account if there was a dispute as to ore ownership or title to royalty payments.

Rogers-Brown Ore Company (which was renamed Youngstown Mines Corporation in 1927) made agreements with riparian owners

at or about the same time as the issuance of the state lease. These agreements provided for a royalty of $.25 per ton in the event the state did not own the lake bed, and $.125 per ton to the riparian owners even if the state prevailed in its title claim. Thus, on lake bed ore, the lessee would have a cost savings of $.375 per ton if the state's title to the ore was defeated.

Dispute as to the lake bed ownership arose soon after the lease was issued. Royalties began to be paid into an escrow account in July of 1925.

Although no mining had yet occurred, the state brought action in district court to require payments into the state treasury. Judgement was entered for the state in December of 1944.21/

Litigation concerning the ownership of the beds of Rabbit Lake extended over several years. In State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957), the state sought to determine adverse claims to the beds of certain lakes and connecting streams in the Rabbit Lake chain. The court, after extensive testimony, found that Rabbit Lake was not navigable at the time of Minnesota's admission to statehood. The court found that title to the beds of these waters was in the riparian owners.

Youngstown Mines Corporation brought suit to recover royalties it had paid to the state under the state lease since 1924. The Minnesota Supreme Court held that since the state's claim of title to the lake bed was defeated, the money must be refunded.22/ The refund amounted to $559,789.55.

4. Legislation Adopted in 1943.

The 1917 law authorizing iron ore underwater leases was repealed in 1943 and a new law adopted. Under this act, the commissioner of conservation was given authority to issue permits and leases for iron ore situated in the bed of any public lake or river. Minimum royalty was to be at least the same as for iron ore not situated under public waters. Revenue was to be deposited into the permanent school fund.23/

5. Issuance of Exploration and Mining Permits and Lease Under 1943 Law.

Between 1943 and 1951, 11 prospecting permits were issued under the 1943 law. Four leases were subsequently issued. Two of the leases covered a part of the bed of Mahnomen Lake on the Cuyuna Iron Range in Crow Wing County. One of the leases covered part of the bed of Jeune Lake on the Cuyuna Iron Range in Crow Wing County.

The other lease covered part of the bed of Longyear Lake on the Mesabi Iron Range in St. Louis County. Part of the Longyear Lake is within the village of Chisholm.

Shortly after the issuance of the Longyear lake bed lease, opposition to development arose from a resident of Chisholm. The state became involved in the dispute and a temporary injunction was issued by the courts. The lease was subsequently cancelled by the state due to non-payment of rental. The lessee filed claims for damages due to the impact of the injunction on mining plans for Longyear Lake and the Euclid Mine. In 1955, the lessee was awarded $35,000 in damages.

The other three lake bed leases were held for an average of six years. A small amount of mining occurred under one of the lessees. Total revenue received from these four leases was approximately $105,000.

No iron ore prospecting permits and leases covering lake beds have been issued since 1951. There have been no iron ore lake bed leases in effect since 1958.

Due to the litigation concerning the lake bed leases, the Division of Minerals assigned staff to a lake bed unit. This staff gathered data regarding lake and stream evaluations and other data on lakes, including historic use data, that could be used for any future legal challenges. The initial work concentrated on the over 100 lakes found within the iron ranges. This work was later expanded to areas of interest for metallic minerals. The lake bed unit was eliminated in 1980 due to budget cuts.

B. Metallic Minerals Leasing Program.

1. Gold and Other Ores Under Waters of Any Meandered Lake or Stream.

The commissioner of conservation developed and adopted rules in 1936 for the issuance of permits and leases covering gold and other ores under waters of any meandered lake or stream. These rules were issued under the authority of a law adopted in 1935,24/ and the rules were approved by the state executive council, which consists of the state's constitutional officers.

The rules25/ provided that the commissioner of conservation, with the approval of the then existent Conservation Commission and the Executive Council, may issue permits to prospect for gold, silver, copper, cobalt, coal, graphite, petroleum, sand, gravel, stone, natural gas, and all other minerals, other than iron ore, under the waters of any meandered lake or stream in Minnesota. If the permittee complied with the terms of the permit, they were entitled to receive a lease during the life of the permit.

Five gold prospecting permits covering lake beds were issued under these rules. The permits covered parts of the beds of Rainy Lake (Koochiching County), Vermilion River (St. Louis County) and Loon Lake (Cook County). All of the permits were issued in 1936, and all were cancelled in 1937.

2. Metallic Minerals, Except Iron Ores and Taconite Ores.

Copper and nickel were discovered southeast of Ely in 1948. The state began working on lease rules in the 1950's, but did not come to agreement before interest declined.

In 1966, upon renewed interest, the state completed copper, nickel, and associated minerals leasing rules.26/ The rules were subsequently amended in 1982 and 1988, and their title changed to "permits and leases for metallic minerals, other than iron ores and taconite ores."

Under these rules, the commissioner of natural resources, with the approval of the State Executive Council, may issue leases to prospect for metallic minerals on state owned lands and in the beds of public waters. The leases are primarily issued through public sale. The lease contains minimum rentals that increase with the passage of time, the payment of royalty for all ore mined and removed, the submission of data and other reports, and the addressing of environmental considerations. In addition, the state lessee must comply with all applicable laws.

Five public lease sales were held within the period of 1966 through 1971. The department's standard policy was to include within the areas covered by the leases the lake beds of non-meandered waters and lake beds of some meandered waters.

In 1973, this policy was changed to not offer meandered waters and not offer any non-meandered waters of greater than 10 acres in size at a public lease sale. The department adopted the position that if exploration on leased land would justify continuing the exploration under adjacent waters, the department would consider a request for a negotiated lease for the beds of adjacent waters.

Due to a regional study on potential social, environmental, and economic impacts associated with copper-nickel mining, the state did not hold lease sales from 1974 through 1981. Starting in 1982, the state has been holding metallic minerals lease sales on an annual basis, provided there is interest shown.

In April of 1988, the state received an application for a negotiated metallic minerals lease covering a portion of the bed of Shagawa Lake. This lake is adjacent to Ely, Minnesota in St. Louis County.

In recognition of possible public concerns over this proposal, the department, at its discretion, prepared an environmental assessment worksheet (EAW). The EAW found that any adverse environmental effects during the first few years of exploration were anticipated to be of low magnitude and temporary in nature. The commissioner of natural resources found that the project did not have the potential for significant environmental impacts and no environmental impact statement was required. (An environmental impact statement would be required if the project proceeds to a proposal to mine.)

On October 4, 1989, the state Executive Council approved the issuance of a negotiated metallic minerals lease to BHP-Utah International Inc. covering 288 acres of the bed of Shagawa Lake. Unlike the iron ore leases issued earlier in the decade, this state lease provides that no drainage of the lake would be allowed if mining occurred.

The metallic minerals lease conveying part of the bed of Shagawa Lake is the only lake bed mineral lease currently in effect. Exploration on this property, with drilling through the ice, was conducted in February and March of 1990. The mineral of most interest on this site is gold, and a discovery and subsequent development would result in additional revenue to the permanent school fund.

C. Industrial Minerals Leasing Program.

1. Sand and Gravel Under Waters of Meandered Lakes or Streams.

In 1946 the commissioner of conservation, with the approval of the State Executive Council, adopted rules covering permits and leases to mine and remove sand and gravel under the waters of meandered lakes or streams. During the life of the permit, the permittee was entitled to receive a lease upon compliance with the requirements of the permit.

These leasing rules were subsequently amended in 1952.27/ The enabling legislation had been amended in 1949 to require that a public hearing be held on any application for such a sand or gravel permit or lease. Riparian landowners were required to be notified of such a hearing.

The state issued four sand and gravel permits under these rules between 1962 and 1968. Four leases were issued pursuant to the terms of the permits. The river beds covered by these leases were the Mississippi River, the LeSueur River, and the Blue Earth River.

2. Marl Under Waters of Public Lakes or Streams.

In 1956 the commissioner of conservation developed and adopted rules for the prospecting of marl under the waters of

public lakes or streams or on state owned lands.28/ The purpose of the rules was to encourage the development of a cement industry and the construction of processing plants in Minnesota.

One prospecting permit was issued in 1961 to American Marietta Company. The permit covered a portion of the beds of First, Mud and Long Lakes in Wright County. A waters permit authorizing work in the beds of these waters was also issued. The permits terminated in 1962 without development.

D. Summary.

The State has had an active interest in leasing lake beds and river beds. The various mineral leasing programs have often encountered environmental and water use concerns from the public and legal challenges. This is an area of its leasing program in which the state proceeds with extra caution. Nonetheless, the mineral leasing program for the lake beds has brought in over $2 million in revenue for the permanent school fund, and the opportunity may exist for further revenue.

VI. Current State Regulation and Policies.

A. Introduction.

Great constraint on the use of submerged land beneath both non-navigable waters and navigable waters comes from exercise of the state's police power. Minnesota has a system of extensive regulations which govern what a riparian owner--or anyone else--can do with the land beneath the water. Much of the statutory basis of regulation is contained in the definition of public waters and wetlands, and the permit system, of chapter 103G of Minnesota Statutes. The declaration of policy in section 103A.201 states that: "Subject to existing rights, public waters and wetlands are subject to the control of the state." The permit system established in section 103G.245 includes, in part, the following at subdivision 1:

> A person must have a public waters work permit to ... change or diminish the course, current or cross section of public water ... by any means, including filling, excavating, or placing of materials in or on the beds of public waters.

This regulatory system has been held to be a constitutional exercise of the police power of the state.29/ In all cases, where there are public waters and wetlands as defined in chapter 103G, the state can regulate in the public interest the use of the waters and the beds beneath the water, regardless of ownership interests./30

B. Regulation of Activities.

Minn. Stat. ch. 103E is the basic statutory authority relating to the drainage of waters for agricultural and other purposes, exclusive of mining. Minn. Stat. ch. 93 contains provisions relating to the mining and removal of ore from the beds of public waters and the reclamation of mined lands. See also Minn. Stat. 117.47.

Pursuant to chapters 103E and 103G, dredging, filling, and draining is strictly regulated and severely limited at the present time in comparison to earlier years of the state's history when there was little or no regulation of these activities.

Rules have been adopted to provide detailed procedures relating to these statutorily regulated activities. Examples of such rules are Minn. Rules pts. 6115.0150-.0280, Standards and Criteria for Granting Permits to Change the Course, Current, or Cross-Section of Protected Waters; 6115.0300-.0520, Dams; 6115.0600-.0810, Review of Permit Applications for Appropriation and Use of Waters; ch. 6120, Shorelands and Floodplain Management; and ch. 6130, Mineland Reclamation.

The above list is not exhaustive. It does illustrate the extensive regulatory system that guides the management of submerged lands in Minnesota. Here is how they apply to various activities that use or occupy submerged lands.

1. Drainage.

Drainage is not permitted unless another waterbody is created to replace the one lost. Minn. Stat. Section 103G.211 and 103G.221, drainage of navigable waters today is an unlikely event.

2. Filling.

Filling to create upland for development is generally prohibited. Minn. Rules pt. 6115.0190, subp. 3. The only significant exceptions are for public roads when there is no alternative, or for fills to federal harbor lines or navigable depths conforming to a commissioner-approved port authority development plan. Other filling allowed is beach sanding, shore riprap, replacing shore lost to erosion, and riparian navigational access when it cannot be achieved by dock or excavation. Minn. Rules pts. 6115.0190-.0191.

3. Structures.

Private, seasonal riparian docks are allowed, and also permanent ones when conditions dictate. Wharves are allowed only within a port facility. Breakwaters are permitted where there is no reasonable alternative. Marinas are permitted. Bridges are permitted when it is not feasible to route the road around the waterbody. Minn. Rules pts. 6115.0210-.0211.

4. Mining Activities.

Exploration and development of minerals within the beds of waters is regulated by a large body of state law. Exploratory drilling work is regulated under the exploratory borings law. Minn. State. ch. 103I. This law requires all drillers for metallic minerals and petroleum to be registered with the DNR, licensed by the Department of Health, and comply with requirements for properly abandoning drill holes in order that the groundwater is protected.

Before a party could obtain permits for metallic minerals mining activities, the party would be required to prepare an environmental impact statement. The EIS reviews alternatives to the proposed action and explores methods to mitigate adverse environmental impacts. The EIS is then used by the state agencies in their decisions on whether or not to issue permits.

Any alteration of the waters to mine iron ore, taconite, copper, nickel, nonmetallic minerals and peat would require a permit for alteration from the Division of Waters, DNR. Minn. Rules pts. 6115.0270 and 6115.0280.

Any metallic mineral operation and most peat operations require a permit to mine from the Division of Minerals, DNR. Minn. Stat. Sections 93.44-93.51 and the rules adopted thereunder. The permit to mine provides a reclamation plan upon cessation of mining and contains requirements for conducting mining operations.

A mining operator would also be required to obtain noise, air and water discharge permits from the Pollution Control Agency. Other permits from state agencies would probably be required before mining could occur in the beds of waters.

C. Current and Possible Fee System.

1. Utility Crossings.

The Department of Natural Resources currently charges fees for licenses issued to utility companies for crossing public waters with pipelines, electric transmission and distribution lines, and telephone or telegraph lines. Utility license fees were established in 1974 in Minnesota Rules, parts 6135.0400 to 6135.0800, adopted pursuant to Minnesota Statutes, section 84.415, subdivisions 1 and 5. Revision of the fee schedules contained in these rules was ordered by Laws of 1990, Chapter 594, Article 1, section 79, to adjust for inflation.

Water crossing fees include an application fee in addition to a fee for occupancy of public waters. The occupancy fee is based on the total length of each crossing and, in the

case of underwater crossings, the width of the crossing as well. During the F.Y.1988-1989 biennium, occupancy fees for public water crossings amounted to $45,977, with an average of 135 licenses issued per year. Application fees for water crossings totalled roughly $27,100 in addition.

The revisions required by Laws of 1990, as noted above, increased utility crossing fees by approximately 150 percent. Thus, the revised fees are expected to increase utility crossing fee revenue for occupancy of public waters to well over $100,000 per biennium.

2. All Other Uses.

Mining of submerged lands generates royalty income to the owner of the bed just as upland mining does. But there is currently no system in Minnesota that generates revenue or for the occupancy of state owned submerged lands by fill for marinas, docks, houseboats, breakwaters, barge fleeting, hydroelectric dams or other structures. There are permit fees, which are set at levels calculated to recover the cost of handling the permit application, but there is no revenue generation requirement for the use of public space, except as discussed in V and VI.C.1 above.

Such revenue generation could be founded on either of two concepts. One is use of state lands: the road fill or the rock crib or the breakwater is resting on state land; or the dock posts are driven into it; or mooring buoy anchors are set on it; or the floating dock floats over it. The other concept is the occupancy of water the use of which is otherwise available to all who have access to the waterbody. The former is based on the state's property ownership and relies on the water being navigable. The latter is based on the state's police power authority and the public right to use the waters, and is not dependent on a determination of navigability. Neither concept can overlook the rights of riparian landowners or the public trust as discussed earlier.

A revenue schedule based on the latter authority has certain advantages. The public waters are already inventoried, unlike navigable waters. Further, appropriation of a common area for a particular--usually private--use is perhaps the more real public policy concern than is the occupancy of state owned real estate. Third, it may not be sensible that a slalom ski course on a waterbody which is navigable in 1858 should pay a fee where the same installation on a non-navigable lake need not. On the other hand, charging rent for the use of state owned land is easy to understand, whereas charging rent for the appropriation of a common area which is not "owned" by anyone has a less obvious legal basis.

Precedent, however, is not lacking. The State of New Jersey received unequivocal support from the U.S. Supreme Court

for a law assessing fees for water appropriation from the Delaware River.

> The state undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the state to prevent waste and to economize its water resources.

City of Trenton v. State of New Jersey, 262 U.S. 182 (1923) (emphasis added). The Minnesota Supreme Court has said:

> It is fundamental, in this state and elsewhere, that the state in its sovereign capacity possesses a proprietary interest in the public waters of the state. Riparian rights are subordinate to the rights of the public and subject to reasonable control and regulation by the state.

State v. Kuluvar, 266 Minn. 408, 124 N.W.2D 699, 706 (1963). A fee system which sought to equate the cost of water occupancy with the cost of upland occupancy would remove the present economic bias toward use of water space because it is free. However, rights of riparian owners, discussed in part II, cannot be ignored in formulating such a system. Also, it may be argued that the regulatory system is already sufficiently effective, so that adding occupancy fees in order to influence investment decisions is overkill. However, this argument neglects the fact that regulatory fees are set to cover only the administrative cost of the application process, and do not provide any compensation to the public for granting exclusive use of a public resource.

D. Are There Opportunities to Generate Revenue?

This topic has three aspects: which uses to charge for; whether to charge for pre-existing uses; and whether the income generated would be worth the cost and difficulty of establishing the program.

The most frequently occurring use of public waters and submerged lands is the private residential dock used for swimming or tying up a boat or both. Such uses are firmly within the uses considered "riparian rights" and are subordinate only to the paramount public right of navigation. Thus it would seem inappropriate to impose fees on such reasonable residential uses which do not infringe substantially on public trust navigation.

More obvious sources for revenue generation are "for profit" projects such as marinas, fills and wharves to provide commercial docking, barge fleeting, boathouse/houseboat mooring, aquaculture, hydroelectric dams and public projects such as roads, bridges, harbors and marinas that benefit certain people but not all Minnesotans.

Once the type of activity to be assessed is determined, it must be decided whether to start charging now for projects put in place when there was no charge. The obvious examples are the century-old fills in Duluth harbor, the ore docks in Lake Superior, fills in the Mississippi River, and marinas. The issues are legal, economic, and political. Legally, particularly as to the filling and docks such as at Duluth, it is questionable whether the state can start charging now for the occupancy of submerged lands that it once openly invited by establishing harbor lines. See the discussion in III.C.4 above.

Economically, the issue is whether the new charge would cause economic dislocation, or whether the charge would be too small a part of the business' cost to bother it. From a public policy point of view, beyond income generation, is there reason to charge now when it is too late for the charge to affect the decision to occupy the public space? On the other hand, should the public continue to be denied compensation or mitigation for ongoing private use of public waters simply because it hasn't been compensated in the past? In Oregon, legal challenge to charges for occupation of waters by wharves, docks and log booms failed, even though the uses preceded the legislation authorizing the charges. See Oregon, discussion below.

It may be that port authorities, which are encouraged by state law, should not be subject to fees for occupying public waters when that occupancy furthers the improvement of waterborne shipping. Oregon exempts such facilities when they are wharves, but not when they are fills. However, while encouraging port authority development and operation, the public may nevertheless be entitled to a share of profits generated by commercial development occupying public waters, if such development owes its profitability in part to its exclusive use of public welfare resources. The previous discussion of riparian rights, however, indicates that the question of what charges can be imposed on certain riparian uses needs to be clarified.

As to future projects, the question is whether there will be enough of them to warrant a revenue system. A fee system is already in place for mining. A fee system is also in place for utility crossings of public waters. New fills and wharves to facilitate water shipping are now rare. Road crossings of waters have been severely curtailed by environmental laws. Fills to create upland for development are flat-out prohibited. New marinas, harbors and moorings are the activities that can be expected to continue in any volume. Marinas, harbors and moorings supply docking to non-riparians and, to some extent, they are an exercise of a riparian right. If they are charged a fee, but resident riparian dock owners are not, the state could be accused of favoring riparian over

non-riparian recreational use of public waters--which would be contrary to present state policy.

Because no inventory of current public water occupancies exists, the magnitude of potential revenues from a fee system is uncertain. However, some indications are available. As previously noted, occupancy fees for utility crossings of public waters are expected to amount to over $100,000 per biennium with the newly revised fee schedules. Beyond that, the Division of Waters has issued over 8,400 permits for structural or earthen encroachments on public waters. If each of those encroachments still exist and (not withstanding the issue of riparian rights) they were assessed an annual fee of $100--the minimum annual lease fee assessed by the state of Iowa for encroachments on its public waters--revenues would amount to at least $840,000 annually, or $1.7 million each biennium. However, if you do not charge for private docks, lawful fills, and inland excavations, the encroachment would be reduced to about 300 or $30,000 annually ($60,000 each biennium).

Further examples of potential revenue from occupancy fees for public waters include the Minneapolis city river terminal operation, which generated gross revenues for the city of over $582,000 in 1988, the St. Paul city marina, with 1988 gross revenues of nearly $320,000, and the Duluth city convention center with 1988 gross revenues of over $2.1 million, according to the State Auditor's Office. Combined 1988 gross revenue for these three developments was over $3 million. A three percent share of these revenues for occupancy of public waters--the rate charged by Oregon for marina leases--would have amounted to over $90,000.

An alternative to the fee system could be to modify rules to require a developer to mitigate the loss of public value resulting from the occupation of public waters. These might include alternative public access opportunities such as a public fishing area incorporated into a breakwater; a public access site in connection with a commercial marina; or a requirement that new fish, wildlife or native plant habitat be created to compensate for habitat destroyed by the development.

E. Summary.

Future new occupancies of submerged lands and public waters will be far less than what has occurred in the past due to changing use patterns and environmental regulation. The public policy question is whether to start charging now for pre-existing occupancies. A fee system based on occupancy for public waters common space may do more for the public than charging for occupying state owned submerged lands, and generate more income (being applied to all public waters, not just those that are navigable) for less cost (because no navigable waters inventory is required). Potential revenues from a fee system for occupancy of public waters--new and pre-existing--are

undetermined, as are the costs of establishing and administering the system. However, depending on the system and the results of any legal challenges, revenues may or may not be greater over time than the cost of establishing and administering the system.

V. Activities in Other States.

Several states convey title to or easements over their interests in the beds of navigable waters. Some states enter into leases for occupancy of the beds of navigable waters and for the water area itself, and for off-shore mining and drilling.

The following is a brief comparison of programs charging fees for the use of the public interests in the beds of navigable waters and the water itself in Michigan, Wisconsin, Maine, Oregon, and California. The following topics are considered:

1. State efforts to identify or inventory the "submerged lands" or waters over which the state exercises control.

2. Types of authority exercised:
--Conveyance of formerly public interests in lands;
--Lease of the beds of waters, e.g., mining, structures anchored in the beds;
--Lease of the beds and surface of filled lands;
--Lease of water area, e.g., marinas, docks.

3. Revenues gained by exercise of authority over the beds of waters.

4. Comments.

A. Michigan.

1. Identification of state owned "submerged lands."

Michigan's Great Lakes Submerged Lands Act, Mich. Stat. 322.701, et seq., applies only to lands in the Great Lakes within the boundaries of the State of Michigan, which include Lake Superior, Lake Michigan, Lake Huron, Lake St. Clair, and Lake Erie. The ordinary high water mark of each, which is the boundary of the state's jurisdiction, is set by statute. Since the state has not established a program for inland waters, no issues arise concerning identification of which of these waters were navigable at the time the state entered the Union.

In marked contrast to public ownership of the beds of navigable waters in Minnesota, the beds of navigable lakes and rivers in Michigan not part of the Great Lakes are owned by the riparian owner, not the state.31/ That title is subordinate to

the public right of navigation if the public has a lawful means of access to the water.32/

2. Types of authority exercised.

The Michigan statute provides for:

a. the sale, lease, exchange or other disposition of unpatented land; 33/and

b. the private or public use of waters over patented and unpatented land; and

c. permission for filling patented submerged lands. This authority is to be exercised only when it is determined that the private or public use of such lands and waters will not substantially affect the public use thereof for hunting, fishing, swimming, pleasure boating or navigation or that the public trust will not be impaired.

3. Revenue.

From June 11, 1956 through December 31, 1989, a period of approximately 30 years, the total revenue from the conveyance of 638 parcels (1513.66 acres) was $1,616,862.62. For the same period, 169 leases and agreements of various kinds concerning 714.29 acres yielded $492,720.00. In 1989, leases yielded $59,251.00. (Data provided by Chris Shafer of the Michigan Department of Natural Resources, Land and Water Management Division.)

B. Wisconsin

1. Identification of state owned "submerged lands."

Wis. Stat. Section 24.39 authorizes the Board of Commissioners of Public Lands to lease submerged lands on boundary water including Lake Michigan, Lake Superior, the Mississippi River, the St. Croix River, a portion of the Fox River, and to segments of other bodies of water in which the U. S. Army Corp of Engineers provides and maintains commercial navigation channels.

2. Types of authority exercised.

Leases and conveyance of public interests in lands.

3. Revenue.

In fiscal year 1988, the ten leases managed by the Board of Commissioners of Public Land yielded revenue in the amount of $10,820.17. (Approximately $7,000 of this amount was received as lump sum payments for long-term leases.)34/

C. Maine.

1. Identification of state owned "submerged lands."

The State of Maine by Me. Rev. Stat. Ann. tit. 12, Section 558-A defines "submerged lands" (not necessarily state owned) to include (1) all coastal land from the mean low water maker or a maximum of 1,650 feet seaward of the mean high water mark out to the three mile territorial limit; (2) all lands below the low water mark of tidal rivers to the farthest natural reach of the tide; (3) all land below the natural mean low water mark of ponds which in their natural state are 10 or more acres in size; and (4) the river bed of international boundary rivers lying between defined banks.

2. Types of authority exercised.

Me. Rev. Stat. Ann. tit. 12, Section 559 authorizes relinquishment of the state's interest in the public trust on submerged lands. That section declares that lands that were filled prior to October 1, 1975 (the date of the submerged lands act) are "released to the owners of any such filled lands by the State free of any claimed ownership in the public trust to the extent that the areas of properties and lands were not submerged or intertidal lands on that date." Upon application, persons may receive certification of such a release as to property. No lease payments need be made for use of such property.

Me. Rev. Stat. Ann. tit. 12 Section 558-A provides for leases for the right to dredge, fill or erect permanent causeways, bridges, marinas, wharves, docks, pilings, moorings or other permanent structures on submerged and intertidal land owned by the state. The statute provides some guidance in setting lease rates and conditions.

3. Revenue.

In 1987, approximately, 1,600 leases and easements yielded $38,498--about $25 per lease. Structures legislatively "grandfathered" in for a 30 year period outnumber the current leases and easements. The certification process does not generate revenue.35/

D. Oregon.

1. Identification of state owned "submerged lands."

In the 20 years of operation of the Oregon submerged lands program, eleven rivers and two lakes have been identified as navigable at the time the state entered the Union (1859). This identification has been done in one of three ways: (1) A declaration by the State Land Board, consisting of the Governor, the Treasurer and the Secretary of State; (2) a decision by a

court of law; (3) a list based on historic evidence of navigability 36/

2. Types of authority exercised.

The State of Oregon does convey interests in the beds of navigable waters on which filling has taken place. It actively leases the beds of a small number of rivers for sand and gravel, aquaculture, industrial or commercial areas, houseboat moorages, log booming areas, wharves and marinas. Oregon does not appear to charge for past fills or for wharves expressly authorized by statute prior to lease legislation taking effect. There is no charge for occupancies of surface area less than 3,000 square feet.

3. Revenue.

In the fiscal year July 1, 1988-June 30, 1989 approximately 340 waterway leases yielded $572,269. In the same period approximately 40 sand and gravel leases, about 95% of which are on submerged lands, resulted in revenue of $351,937.

4. Comments.

The leading Oregon case on the issue of the extent and limits of "riparian rights" as they may be impacted by a leasing program is Brusco Towboat Co. v. State, 284 Or. 627, 589 P.2d 712 (1978). The Oregon Supreme Court found that neither prior statutes nor case law had recognized an irrevocable right to construct structures, even in aid of navigation, on the state owned lake bed. The court found the leasing system to be constitutional.

E. California.

1. Identification of state owned "submerged lands."

The State of California, in its sovereign capacity, possesses legal title to 3,000,000 acres or 4,687.5 square miles of tide lands and submerged lands beneath the ocean seaward three geographical miles, exclusive of inland waters.37/ The state also owns the beds of streams and lakes which were navigable at the time the state entered the Union.

2. Types of authority exercised.

As of 1976 California had, by acts of its legislature, granted approximately 330,000 acres of tide and submerged lands to 71 trustees, which were predominantly local units of government.38/ The trustees manage and lease these lands for harbors, marinas, dredging, docks, wharves, marinas and other purposes. A 1934 amendment to the Constitution of the State of California gave the state authority to lease lands for fees.

3. Revenue.

The approximate total annual income from leases other than for oil and gas on submerged lands, referred to as "sovereign" land leases, is $4,600,000.00. This includes, among other categories, 196 commercial leases yielding $1,067,000.00; 91 industrial leases yielding $2,100,000.00; 737 right-of-way leases yielding $443,000.00; and 264 recreational leases yielding $571,000.00.

The majority of the revenue from submerged lands in California comes from oil and gas leases. Off-shore oil and gas leases, together with some inland gas fields, yield approximately $118,000,000.00 annually.39/

F. Florida.

1. Identification of state owned "submerged lands."

The State of Florida recognizes as state lands all sovereignty lands and, with certain exceptions, all state-owned lands. Sovereignty lands include tidal lands, islands, sand bars and lands under navigable (fresh or salt) waters, to which Florida gained title upon statehood. State-owned lands include lands that have accrued to the state from various sources. Excluded lands, relevant to the discussion of submerged lands, include road and canal rights of way, spoil areas or borrow pits, and lands whose title is vested in a port authority, flood control district, or other agency created by special or general act.

2. Types of authority exercised.

In 1981, Florida developed a State Land Management Plan that, among other things, recognized the value of state submerged lands and required that the public receive a fair rate of return for granting use rights on such lands to private interests.

Florida Statutes chapter 253 requires leases for commercial activity or other structures preempting more sovereignty land than required for reasonable ingress or egress. This includes all revenue generating, income-related activities, aquaculture, oil and gas exploration and development, and mining.

Activities that do not completely preempt submerged lands, such as utility crossings, road and bridge crossings, breakwaters and other shoreline protection structures and public navigation project channels, oil and other pipelines, and spoil disposal sites, require an easement. Easement fees are determined by appraisal and may also reflect enhanced property value or profit gained by the applicant.

Structures built prior to the date that current rules were in effect but that would have required a lease if the rules had been in effect at the time of construction, required grandfather registration (involving a one-time fee) until 1988. After that, such structures were converted to leases.

Compensation in the form of a one-time payment is required for any severance of dredge material from sovereignty submerged lands.

Of particular interest to submerged land management in Minnesota is Florida's marina leasing policy. Under that policy, Florida charges an occupancy fee per square foot of state land occupied plus a percentage of "potential" gross income, defined as the per-slip rental fee times the total number of slips, whether or not they are all rented. Discounts are granted for developments to be used by the public. A differential fee structure distinguishes between commercial marinas and condominium docks.

F. Summary.

1. It does not appear that any of the states surveyed have attempted a comprehensive inventory of the waters which were navigable at the time the state entered the Union. Most state programs focus on tide lands (owned by coastal states to the three-mile territorial limit) and boundary waters. Oregon has identified a handful of inland rivers which have been administratively determined to be navigable.

2. The largest revenues gained from submerged lands leasing programs have been for oil and gas production. Minnesota has a program in place which has produced income from royalties for iron ore and which has the potential to produce revenues from mineral deposits, should significant mineral resources be discovered on submerged lands in the future.

3. Some states have sold or otherwise conveyed the public's interest in submerged lands. The bulk of the revenue obtained from the Michigan submerged land program has been obtained in this way.

VIII. RECOMMENDATIONS.

1. Selling submerged lands. Conveyance of the state's interest in the beds of navigable waters for a fee is not recommended. The rights of the public in these lands for navigation purposes and for revenue from mineral discoveries are currently protected by statute, rules and common law. Given the valuable public interests in these lands and the limited revenue obtained through sales in other states, sound public policy dictates that the state retain all ownership interests.

2. Mineral leasing of beds of waters. Historically, the leasing of lake beds and river beds for mineral exploration and development has been the largest source of revenue from submerged lands. This activity is also an opportunity for additional revenue.

The department plans to continue its current policy on metallic minerals leasing of lake beds for mineral development. As described above, this policy is that the state will not offer meandered waters and any non-meandered waters of greater than 10 acres in size at a public lease sale. If exploration on leased land justifies continuing the exploration under adjacent waters, the department will consider a request for a negotiated lease covering the beds of adjacent waters.

3. Rules revisions regarding leases for removal of sand and gravel. The department is reviewing the existing laws on leasing beds of waters for the removal of sand and gravel. Currently, two parties have expressed interest in these leases. The rules need to be revised to reflect changes in statutory laws since the rules were adopted, clarify divisional authority for the issuance of the leases, and increase royalty rates to reflect current market values.

4. Assumptions of navigability. The department will continue to assume that public waters are navigable unless the facts clearly demonstrate otherwise or a court decides otherwise. The state has experienced lengthy litigation over some challenges to navigability. As may be expected, these challenges are most likely to arise when there is an opportunity for large amounts of economic return. The state has established a history of defending the public rights in public waters and in beds of navigable waters, and will continue to defend these rights.

5. Basis for a revenue schedule. An attempt to formulate a comprehensive list of "navigable waters" is not recommended. The department recently completed an inventory of public waters, which required more than a decade to accomplish. The issues involved in compiling a list of navigable waters are much more complex and more difficult to resolve from both a legal and factual standpoint. Importantly, no precise definition of the ordinary low water mark exists, even though this is the landward limit of the state's absolute ownership. Nor has a methodology for determining the ordinary low water mark been formulated. Additionally, factual determination of navigability must be made with reference to factual conditions relating to the water in 1858.

If it is determined that a program to charge fees should be attempted, it should be based largely on the private commercial occupation of public waters, and should apply to waters regardless of a determination of ownership of the beds. (It is only reasonable to assume that most occupations of waters

by such activities as commercial marinas and wharves will be on waters which were navigable in 1858.) Any benefits to be derived from creation of a list of navigable waters should be weighed against the hazards of working from an incomplete list and disrupting the state's current source of submerged lands revenues, mineral leasing and utility license fees.

6. Individual private docks or occupations less than a predetermined size and shore maintenance should be exempt. A fee may be considered for other public, nonprofit, and commercial occupations of public waters which exclude the public from use of the occupied area for free navigation, giving due consideration to rights of riparian owners.

7. Pre-existing commercial occupations of public waters, except for lawful fills, should be charged on an equal footing with new installations but not retroactive to the date of original occupancy.

Next Step. The department's information at this point is that a combination revenue system for occupancy of public waters has the potential to generate revenue over and above the cost of establishing and administering the system. Therefore, we recommend continuing study of the issue.

If the legislature wishes to continue the study with a goal of establishing public policy on this issue, we recommend developing over the next two years an inventory of occupancies of public waters which are of the kind and size for which a fee might be charged. This inventory should be on a computer database usable for statistical and geographical information evaluation. It should identify the relevant costs, and develop a theoretical fee schedule in order to estimate revenues which might be generated. At the same time, past permit experience should be evaluated to determine the rate of future new occupancy formations. Such a study would require independent Legislative funding in an amount sufficient to create a valid pilot project on which to base a public policy decision.

FOOTNOTES

1/ FEDERAL ACTS AND STATE CONSTITUTION:
Act of Congress Authorizing a State Government for Minnesota, Feb. 20, 1857; Act of Congress Admitting Minnesota to the Union, May 11, 1858; Minn. Const. art. II, 1, accepted the terms of the federal act of 1857 authorizing a state government "on equal footing with the original states."

2/ COURT DECISIONS:
See, e.g., United States v. Holt State Bank, 270 U.S. 49 (1926); State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957), cert. denied, 358 U.S. 826 (1958); State v. Longyear Holding Co., 224 Minn. 451, 29 NW.2d 657 (1947), cert. denied, 336 U.S. 948 127, Minn. 60, 148 N.W. 617 (1914). The specific explanation of this concept in the Holt State Bank case appears at 270 U.S. 54-55:

> It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly.

3/ State v. Slotness, 289 Minn. 485, 185 N.W.2d 530 (1971); State V. Korrer, 127 Minn. 60, 148 N.W. 617 (1914); State V. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947), cert. denied, 336 U.S. 948 (1949); Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893). Case law on the meaning of "ordinary low water mark" is vague and confused, and Minnesota has no statute defining it. On navigable lakes with a flat littoral area, the ownership of extensive areas of lake bed can hinge on small differences in the vertical elevation of the ordinary low water level.

4/ United States v. Holt State Bank, 270 U.S. 49, 56 (1926).

5/ State vs. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947, cert. denied, 336 U.S. 948 (1949).

6/ Examples of such rulings are: United States v. Holt State Bank, 270 U.S. 49 (1926) (Mud Lake, Marshall County, state owned); State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957), cert. denied, 358 U.S. 826 (1958) (Rabbit Lake, not state owned); State v. Longyear Holding Co., 224 Minn. 451, 29 N>W>2d 657 (1947), cert. denied, 336 U.S. 948 (1949) (Syracuse Lake, state owned); State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914) (Longyear Lake, Chisholm, state owned); Minneapolis Mill Co. v St. Paul Water Works, 56 Minn. 485, 58 N.W. 33 (1894) (Mississippi River, state owned).

7/ Union Depot, Street Railway & Transfer Co. v. Brunswick, 31 Minn. 297, 301, 17 N.W. 626 (1883).

8/ Illinois Central Ry. Co. v. Illinois, 146 U.S. 387, 452-53 (1892). See also State v.Slotness, 289 Minn. 485, 185 N.W.2d 530 (1971); State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947), cert. denied, 336 U.S. 948 (1949); Hall v. Hobart, 186 F. 426 (8th Cir. 1911).

9/ 289 Minn. 485, 185 N.W.2d 530 (1971).

10/ 185 N.S.2d at 532.

11/ Id. at 532-33.

12/ Hanford v. St. Paul & Duluth Ry. Co., 43 Minn. 104, 42 N.W. 596 and 44 N.W. 1144 (1889 and 1890); Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N.W. 1066 (1892).

13/ 43 Minn. 104, 115, 42 N.W. 596 and 44 N.W. 1144 (1889 and 1890).

14/ Id. at 113.

15/ 185 N.W.2d at 534.

16/ Id.

17/ Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893).

18/ 257 Minn. 159, 100 N.W.2d 689 (1960).

19/ Id. at 168-69.

20/ 1917 Minn. Laws, ch. 110, codified at Minn. Gen. Stat. Secs. 6428-6430 (1923), and repealed by 1943 Minn. Laws, ch. 208, Sec 8.

21/ State ex rel. Burnquist v. Zontelli, No. 79547, Crow Wing County District Court (filed Jan. 20, 1944).

22/ Youngstown Mines Corp. v. Prout, 266 Minn. 450, 124 N.W.2d 328 (1963).

23/ 1943 Minn. Laws, ch. 208, codified at Minn. Stat. Sections 93.351-93.356.

24/ 1935 Minn. Laws, Ex. Sess., ch. 42, codified at Minn. Stat. Sections 93.08-93.12.

25/ These rules are now numbered Minn. Rules pts. 6125.1000-6125.1900.

26/ The rules are now numbered Minn. Rules pts. 6125.0100-6125.0700. They were adopted under the authority of Minn. Stat. Sections. 93.08-93.12 and 93.25.

27/ These rules are now numbered Minn. Rules pts. 6125.6000-6125.7100. The statutory authority for the rules is Minn. Stat. Sections 93.08-93.12.

28/ These rules are now numbered Minn. Rules pts. 6125.4500-6125.5700. The statutory authority for the rules is Minn. Stat. Sections 93.08-93.12.

29/ Crookston Cattle Co. v. Minnesota Department of Natural Resources, 300 N.W.2d 769 (Minn. 1981); State v. Kuluvar, 266 Minn. 408, 123 N.W.2d 699 (1963); State v. Feehan, 412 N.W.2d 309 (Minn. Ct. App. 1987).

30/ The definitions do not reach all waterbodies, but omissions of navigable waters should be very rare. See Minn. Stat. 105.37, subds. 14 and 15.

31/ Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953).

32/ Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926).

33/ The scope of this authority is discussed in Superior Public Rights, Inc. v. State Department of Natural Resources, 263 N.W.2d 290, 296 (Mich. 1977).

34/ Annual Report of the Board of Commissioners of Public Lands of the State of Wisconsin for the fiscal year ending June 30, 1988.

35/ Bureau of Public Lands/Department of Conservation "Submerged Lands Study," January, 1989.

36/ This information was received in a telephone conversation on December 21, 1989 with Jeff Kroft, Manager of Mineral Resources and Waterway Leases Division, Oregon State Land Bureau.

37/ "A Report on the Use, Development, and Administration of Granted Tidelands and Submerged Lands," California State Lands Commissioner, January, 1976.

38/ Id.

39/ Correspondence dated January 8, 1990 from Alan Scott,
Supervisor, Special Projects Unit, Land Management Section, California State Lands Commission.