



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

MEMORANDUM

To: Attorney General Dana Nessel
From: James Olson, President and Legal Advisor
Elizabeth Kirkwood, Executive Director
For Love of Water (FLOW)
Date: February 8, 2018
Re: Constitutionality of Act 359 and Referenced Tunnel or Related Agreements

On January 1, 2019, Governor Gretchen Whitmer submitted a request for a formal Opinion of the Attorney General (“OAG”) to Attorney General Dana Nessel, dated January 1, 2019, on the constitutionality of Act 359 of the Public Acts of 2018 (“Act 359”), together with the validity or legal effect on a tunnel and other agreements referenced in the Act.¹

Governor Whitmer’s Request for OAG seeks a legal opinion on six questions.² Attorney General Nessel announced on January 2, 2019 that she would form an opinion panel from her staff of lawyers, Assistant Attorney Generals, to research and advise her on the questions. Attorney General Nessel also invited interested persons or entities to submit a legal brief or legal memorandum on all or any of the six questions or questions implicitly included in or related to the six questions.

This legal memorandum addresses the following: (1) summarizes the stark differences between the amended 2018 Public Act 359, the original 1950 Public Act 21, and 1952 Public Act 214 Mackinac Bridge Authority laws, together with the multiple and related agreements signed by Governor Snyder, MDEQ, MDNR, Mackinac Straits Corridor Authority (“MSCA” or “corridor authority”) and Enbridge that are referenced as part of Act 359; (2) submits a legal analysis for your review and opinion on Questions 1, 2, 5, and 6 as set forth in Governor Whitmer’s Request for OAG; and (3) submits a legal analysis of a directly related question of the constitutionality or validity of Act 359, and referenced agreements, under Article 4, Section 30 of the State Constitution and the Great Lakes Submerged Lands

¹ Letter from Governor Gretchen Whitmer to Attorney General Dana Nessel, dated January 1, 2019, requesting formal Opinion of Attorney General on several questions related to constitutionality or validity of Act 359 and certain related agreements (hereafter “Request for OAG”).

² *Id.*, p. 3.

Act (“GLSLA”), MCL 234.3201 et seq., which incorporate inherent limitations to protect the waters and soils of the Great Lakes under the “equal footing” and public trust doctrines.³

A. SUMMARY OF LAWS, AGREEMENTS, AND PROCEEDINGS SURROUNDING ACT 359 AND GOVERNOR WHITMER’S REQUEST FOR THE OAG

In 1950, the legislature established the independent state institution, the Mackinac Bridge Authority (“MBA”), to conduct a feasibility study for the construction of a bridge over the Straits of Mackinac to connect the state and federal highway system and to replace the ferry service between the upper and lower peninsulas.⁴ In 1952, the legislature enacted the Mackinac Bridge Authority Act that established the MBA and authorized it to acquire, construct, and operate a highway bridge connecting the upper and lower peninsulas for the motoring general public.⁵ There was and is *no* private entity involved in the ownership, construction, operation and maintenance of the Mackinac Bridge. The legislature established and authorized the MBA for one purpose and one purpose only: the acquisition and operation of the public highway bridge through transfer of lands, power to acquire private lands, including eminent domain, revenue bond financing, and contracts. Notably, the law exempted the bridge authority from consent or approval from any state agency or department.⁶ The bridge opened on November 1, 1957.

From the introduction of proposed Senate Bill 1197 on November 8, 2018, through the hasty consideration of the substitute bill (S-1197) on December 5, to the passage of the enrolled SB 1197 and enactment of Act 359 on December 12, 2018, the legislature shoehorned a completely different and unfitting public-private project on to an existing public bridge authority by establishing a new corridor authority to build a mostly privately controlled tunnel and pipeline for the next 99 years. Act 359 vests the MBA with the power to build a utility tunnel, with no notice in the title that the authority is authorized to build and enter into a public-private venture for a tunnel and privately-owned crude oil pipeline under the Great Lakes. Moreover, Act 359 automatically transfers this utility tunnel authority over to the corridor authority upon the appointment of the members of the MSCA.⁷ Governor Snyder appointed the members on the same day of Act 359’s enactment on December 12, 2019. The primary scheme of Act 359 was and is to provide legislative cover for a unilateral public-private agreement between the State of Michigan and Enbridge, public trust easements and assignments, and a 99-year-lease for Enbridge to build a tunnel and operate a new oil pipeline under the Great Lakes.

The original 1950 and 1952 MBA laws established an independent authority empowered to do only one thing—build the Mackinac Bridge, maintain it, keep it safe, and pay off the bond debt.⁸ It is important to understand that the MBA Act established a *public* authority, with *public* bonds, to acquire, build and maintain a *public* bridge as part of the federal and Michigan highway system for the general motoring public. It is a public project for a wholly public purpose for use by the general *public*. As discussed below, the enactment of Act 359 and the authorization of the MBA to acquire, construct, operate a utility tunnel, with easement, 99-year-lease, tunnel agreement and other agreements with and for Enbridge Energy to locate and operate a replacement segment in the Straits of Mackinac as part of its privately-owned Line 5 pipeline. The amended title of Act 359 grafts a utility tunnel onto the state’s bridge authority and provides for a transfer of the bridge authority’s powers to a newly created state corridor

³ The fact that this legal memo does not address Questions 3 and 4 should not be construed as any indication regarding the answers to those questions; it was determined that given the extensive case law on republication in Question 3, and “special” or “local” acts in Question 4, there is nothing new to add.

⁴ 1950 PA 21.

⁵ 1952 PA 214, section 1(c).

⁶ 1952 PA 214, section 11.

⁷ Act 359, section 14d(1).

⁸ The repayment debt in 2019 is \$60 million.

authority. Based on the amended title’s authorization of a utility authority, there is absolutely no mention of a legislative scheme in the body of the bill through the addition of Section 14 and Sections 14a through Section 14e in the enrolled SB 1197 or Act 359. The title adds a new state corridor authority along with the bridge authority to build a public tunnel in the same way it acquired and built the Mackinac Bridge. But the body or amendments to the Mackinac Bridge Authority established under Public Act 21 of 1950 and Public Act 214 does almost the opposite: Sections 14 and 14a through 14e established a corridor authority to oversee a predominantly privately financed, mixed private and public project, that transfers rights and leases to Enbridge soils and waters of Lake Michigan and the tunnel for 99 years so the company can locate and operate a new segment of Line 5 in the Straits to Enbridge.

The purpose of Acts 21 and 214 is to build a public infrastructure to transport vehicles over the Great Lakes and unite Michigan’s two peninsulas, while the purpose of Act 359 is to build a primarily private tunnel and pipeline to transport oil for the next century. The new title of Act 359 adds the term “utility tunnel” but fails to mention that this infrastructure is achieved by a wholly different scheme between a public authority and a private corporation that grants land, possession, and substantial control over its assured use and any use by other privately-owned utilities. Act 359 corrupts the “Public-Public Project” title-object as envisioned by the 1950 legislature by grafting a new “Public-Private Partnership” between the state and Enbridge. As seen below, in comparing the titles of the original acts and Act 359 with the provisions of the laws to achieve the object of the laws, the two are not the same; they involve substantially different legal and constitutional implications, questions, and complexities for a fundamentally different objective or purpose.

1950 PA 21:

1. Established the Mackinac Bridge Authority as an independent state institution;
2. Authorized and funded the bridge authority to undertake a feasibility study for the state to build a federal and state highway bridge connecting the upper and lower peninsulas to replace the state’s car ferry service.

1952 PA 214:

1. Authorized the Mackinac Bridge Authority to acquire, construct and operate a public bridge as part of the state and federal public highway system for the general public;⁹
2. Authorized the bridge to finance the bridge with state or public bonds.¹⁰
3. Authorized the authority to acquire property rights, easements, and land necessary for the bridge, including the public trust bottomlands of the Lake Michigan.¹¹

⁹ 1952 PA 214, Title: “An Act authorizing the Mackinac bridge authority to acquire a bridge connecting the upper and lower peninsula of Michigan...;” Section 4 of 1952 PA 214: “... authorized and empowered to construct a bridge joining and linking the upper peninsula and lower peninsula... to operate, maintain, improve, and repair such bridge.”

¹⁰ *Id.*, Section 4, 1952 PA 214, MCL 254.314; Section 5(1), MCL 254.315(1).

¹¹ *Id. Illinois Central Railroad*, 146 US 387 (1892). Under the public trust doctrine, there can be no transfer or disposition of control, use, occupancy, easements or other agreements for state public trust waters and soils without express legislative authorization based on application and findings that comply with the standards (public trust improvement or purpose and non-impairment) of the public trust doctrine. *Obrecht v National Gypsum Co.*, 361 Mich 399 (1960); *State v Venice of America Land Co.*, 160 Mich 680, 125 NW 70 (1910); *State v St. Clair Fishing Club*, 127 Mich 580, 87 NW 117 (1901); Great Lakes Submerged Lands Act, MCL 324.32501 et seq.; see *infra*, Section B, these comments.

4. Granted the authority the power of condemnation for the bridge.¹²
5. Granted the authority the full easements and rights-of-way of any state lands necessary for the Bridge.¹³
6. Granted the right to charge tolls and rents from use and leases for utility lines and equipment not inconsistent with the use of the bridge, collected as public funds for the use of the bridge and highway purposes, and no other purpose.¹⁴
7. Granted authority to obtain federal or state aid or grants for construction of the bridge.¹⁵
8. Exempted from securing required consent from any state board, department, or agency.¹⁶
9. Declared the public bridge a public purpose and exempted it from real property and other taxes.¹⁷
10. Assured bondholders that the public bridge is insulated from competing ferries or other vehicle bridges or tunnels.¹⁸

2018 PA 359:

1. Enlarged and changed the title of the MBA act from bridge to bridge and utility tunnel and from bridge authority to bridge authority and corridor authority;
2. Added a tunnel corridor authority to acquire a corridor tunnel;¹⁹
3. Authorized private ownership of tunnel during construction and private financing; specifically prohibits public or state bond financing that was used for the bridge;²⁰
4. Authorized control and use of tunnel for new oil pipeline by Enbridge by lease and easements for 99 years; essentially, authorized tunnel and other agreements to implement the purpose of the act through a “public-private partnership,”²¹ fundamentally different from the purely public bridge and highway owned and controlled by the bridge authority because it provides for long-term private control, use, and private purpose.²²
5. The tunnel corridor will be used specific purpose of locating a crude oil and petroleum pipeline pursuant to a “tunnel agreement,” which grants easement and long-term lease of state public trust bottomlands for such purpose.²³
6. The tunnel agreement is a specific agreement called for by paragraph G. in the “Second Agreement” between Governor, MDEQ, MDNR and Enbridge, dated October 3, 2018, as

¹² *Id.*

¹³ *Id.*

¹⁴ Section 7, 1952 PA 214, MCL 254.317.

¹⁵ *Id.*, Section 8, MCL 254.318.

¹⁶ *Id.*, Section 11, MCL 254.321.

¹⁷ *Id.*, Section 17, MCL 254.327.

¹⁸ *Id.*, Section 18, MCL 254.328. See OAG 1957-58m Bi, 3167, p. 524, confirming that a ferry service from Frankfort to Menominee would violate this section, except for ferries placed in service by the MBA if the bridge is out of service.

¹⁹ 2018 PA 359, Title: “... an act to acquire a bridge *and a utility tunnel* connecting the Upper and Lower Peninsulas...” and “authorizing the creation of the Mackinac Straits corridor authority; authorizing the operation of a utility tunnel by the authority [the MBA] or the Mackinac Straits corridor authority...”

²⁰ *Id.*, Section 5(4).

²¹ See “Second Agreement,” Oct. 3, 2018, paragraph G, p. 6.

²² *Id.*, Section 14(e).

²³ *Id.*, Section 14(d).

required by Section 14d of 2018 PA 359, and as described in the “Third Agreement” between the State and Enbridge, dated December 19, 2018.²⁴

7. Specifically, dictated that the tunnel agreement or a series of agreements must be submitted by Governor on or before December 21, 2018, and signed by the corridor authority by December 31, 2018, or within 45 days of the date the agreement was submitted to the authority.²⁵
8. The cost and financing of construction of the tunnel and pipeline are borne by Enbridge;²⁶
9. Because of the private party, initial ownership of lands, including bottomlands for construction, will transfer to corridor authority on completion; because the tunnel is to be used by Enbridge for a new Line 5 segment, the power of eminent domain is prohibited.²⁷
10. Enbridge’s long-term lease and pipeline are subject to real property taxes.²⁸
11. The tunnel agreement provides Enbridge a 99-year-lease whereby Enbridge is authorized to receive revenues from subleasing space in the tunnel to other utilities who may want to relocate, except for reimbursement to the bridge authority for loss of revenues, if any, in the event of such relocation.²⁹
12. The tunnel agreement, signed by the state and Enbridge, December 19, 2018, references the Second and Third Agreements, and Act 359;³⁰ the Second and Third agreements, along with tunnel agreement, easement, and lease, transfer control to Enbridge over the use of tunnel and the public trust soils under of the Straits in Lake Michigan;³¹
13. The corridor authority and/or Enbridge must secure and obtain all permits and approvals required by law for the construction and operation of the tunnel and pipeline;³² on appointment of the corridor authority board, the powers related to the utility tunnel have transferred by law from the MBA to the corridor authority.³³

The Act and the referenced agreements purport to direct and commit the State of Michigan to authorize and participate in the location, use, and occupancy of the state-owned bottomlands of Lake Michigan in the Straits of Mackinac for the construction, ownership, use, operation and maintenance of a corridor tunnel to be leased to Enbridge Energy Partners, a private foreign corporation, for 99 years. Under the terms of Act 359 and the referenced agreements, the State of Michigan transfers and commits or will transfer and commit ownership, easements, use and occupancy, and appropriation of state-owned lands, including the public trust bottomlands of the Great Lakes, for the Enbridge tunnel corridor and pipeline. Further, under the Act and referenced agreements, Enbridge is authorized to sublease the tunnel to other utilities who may wish to relocate existing pipelines or cables in the tunnel; the proceeds of these leases are paid to Enbridge and can be applied to help Enbridge recoup its costs of construction of the tunnel; the

²⁴ *Id.*, Section 14d(4). Section 14d refers to a “tunnel agreement or a series of agreements,” which by reference was known or assumed to be known by the legislature in passing and changing the purpose of the MBA 1952 PA 214.

²⁵ *Id.*, Section 14d(1)(a).

²⁶ *Id.*, Section 14d(e).

²⁷ *Id.*, Section 14d(f).

²⁸ *Id.*, Section 14d(h).

²⁹ *Id.*, Section 14d(j); Tunnel Agreement, Dec. 19, 2018, 3.3, p. 7.

³⁰ *Id.*, Section 14(2) authorizes the MBA Authority to acquire lands under water (bottomlands and soils of the Straits); Section 14(3) authorizes the MBA Authority to enter on any public land for certain activities, and grants full use, rights of way, easements to MBA through, across, over, under public lands, including bottomlands and soils of the Straits, for the utility tunnel.

³¹ Tunnel Agreement, 3.1, 3.2, pp. 6-7 and attached DNR Utility Tunnel Easement and Assignment of Easement, 99-year Utility Tunnel Lease; Second Agreement, paragraphs F and G, pp. 5-6, Third Agreement, paragraph 4.2.

³² *Id.*, Section 14d(g).

³³ *Id.*, Section 14d(1).

authority cannot sell the tunnel without Enbridge’s consent, and in such event, Enbridge has the right to the assigned easement and to purchase the tunnel.³⁴

In sum, the historic building and operation of the Mackinac Bridge federal and state highway project through the MBA under 1950 PA 21 and 1952 PA 214 was and is a wholly *public project*, with *public ownership*, and *public control*, *public financing*, *public management*, and *public accountability*. The tunnel corridor, tunnel and other agreements, 99-year-easement and lease of the public trust soils and waters of the Great Lakes are a completely different end with wholly different mechanisms and means to achieve a “public-private partnership”—a complex mix of *public-private ownership*, *public-private purposes*, *public-private control*, *private-financing*, joint *public-private management*, *public and private contractual accountability*—to allow Enbridge to keep operating the existing Line 5 in the Straits for at least another seven to 10 years until a tunnel and new Line 5 are built.³⁵

B. QUESTIONS AND LEGAL ANALYSIS

Question No. 1:

Does Act 359 violate the Title-Object Clause (Const 1963, art 4, § 24) because it embraces more than one object, the object embraced is not stated in the law’s title, or because SB 1197 was altered or amended on its passage through the legislature so as to change its original purpose?

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

This constitutional provision requires that 1) a law shall not embrace more than one object, and 2) the object of a law must be expressed in its title. *Advisory Opinion re Constitutionality of 1975 PA 227*, 396 Mich 123, 128; 240 NW2d 193 (1976). There are three kinds of challenges that may be brought against statutes on the basis of the Title-Object Clause: “(1) a ‘title-body’ challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge.” *People v Kevorkian*, 447 Mich 436, 453; 527 NW2d 714 (1994), cert den *sub nom Hobbins v Kelley*, 514 U.S. 1083; 115 S Ct 1795; 131 L Ed 2d 723 (1995).

(1) The test for a “title-body” challenge or “one object” constitutional limitation is to insure that both the legislators and the public have proper notice of legislative content and to prevent deceit and subterfuge. *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 465; 208 NW2d 469 (1973). The “one object” provision is to be construed reasonably and not in so narrow or technical a manner as to frustrate the legislative intent. *Kuhn v Dep’t of Treasury*, 384 Mich 378, 387-388; 183 NW2d 796 (1971).

³⁴ Lease Agreement, sections 19.1 and 19.2, p. 15.

³⁵ As stated in Paragraph G, the Second Agreement, p. 6, and now carried through with Act 359, the tunnel agreement, and the Third Agreement, “The State and Enbridge agree to negotiate a public-private partnership agreement with the Mackinac Bridge Authority (“Authority”) with respect to the Straits tunnel for the purpose of locating the Line 5 Straits Replacement segment, and to the extent practicable, Utilities in that Tunnel.” It provided that the parties would grant Enbridge control of the tunnel for its replacement segment of Line 5, and the right to operate the existing line until the tunnel was completed, and assured that Enbridge’s existing rights under the 1953 Easement for the existing line would not be altered. This the parties agreed to, as they did in the tunnel agreement and Third Agreement, and as called for by Act 359, without compliance with the conveyance, occupancy and use agreements required for the Great Lakes and soils under them under the “equal footing” and public trust doctrines, that vests absolute and irrevocable title in these waters and soils in the State of Michigan. *Illinois Central Railroad*, 146 US 387 (1892); fn 11, *supra*, *Obrecht v National Gypsum Co.*, *State v Venice of America Land Co.*, *State v St. Clair Fishing Club*.

An act may contain all matters *germane to its object* and *any provisions which “directly relate to, carry out and implement the principal object.”* *Advisory Opinion, supra*, pp 465-467; *People v Kevorkian*, 447 Mich 436, 454-455, 527 NW2d 714 (1994).

The central question under the “title-body” test for constitutionality is whether the new title and provisions in the body of the amendment or law are whether the object and provisions are “germane” and “directly relate to, carry out, and implement the principal object.” *Advisory Opinion re Constitutionality of 1972, supra.*; *Pohuski v City of Allen Park*, 465 Mich 675, 691, 641 NW2d 291 (2002); *Loomis v Rogers*, 197 Mich 265, 267, 163 NW 1018 (1917); The plain meaning of “germane” is “closely akin” or “fitting,” “relevant” and “important.”³⁶ While there is a presumption of constitutionality of enactments of the legislature, *Pohuski, supra*, 465 Mich at 490, the presumption cannot be used to obscure the underlying requirement that the title-body must be “germane” or “directly related to” the title or object. In other words, the provisions must be closely connected to the object. *Pohuski, Id.* For example, in *Klinke v Mitsubishi Motors*, 458 Mich 582, 581 NW2d 272 (1998), the Supreme Court ruled that it could not mix motor vehicle code violations with civil liability in products liability law, holding that the seat-belt statute did not apply to a product liability action. While both seat-belt code provisions and product liability provisions may apply to motor vehicle accidents, they are distinct subjects, and the title of one code could not be enlarged to include the other, quoting Justice Cooley, *In re Hauck*, 70 Mich 396, 403, 38 NW 289 (1888).

Here, there is nothing in 1950 PA 21 or 1952 PA 214 that is “closely akin” to or “fitting” or “connected” to the original object and body of the laws establishing the MBA to acquire and operate a *public* highway Mackinac Bridge; nothing in the title to acquire a public bridge or “utility tunnel” suggests it would be acquired, owned, controlled, leased or used for 99 years by a private corporation through a mixed public-private partnership project to move oil under the Great Lakes. In fact, the provisions in Section 14 and 14a-14e of Act 359 impose an entirely new public-private partnership relationship on to the MBA through a series of agreements to resolve a completely different object (Enbridge Line 5 pipeline continued operation in the open waters of the Straits, along with eventual removal of existing line) by means that are far different than those required to achieve a public project. There is no public financing; Enbridge owns and controls the public trust soils under the Straits during construction; when the tunnel is finished, the authority owns the tunnel, but all rights, easements, use of bottomlands are leased back to Enbridge for 99 years.

The title makes the “utility tunnel” sound like it is simply another project like the Mackinac Bridge, when it is anything but. First, a utility tunnel has nothing to do with serving the traveling motoring citizens of Michigan. Second, it has nothing to do with operating a bridge. Third, it is for utilities and utility projects that while they may approve as a public utility in the future, are and will be privately owned. Fourth, the financing, lease-back, and shared revenues, obligations, liabilities, and even shared legal defense weave a project with a predominant private purpose into a public project law and title. Mere assertion of a public purpose does not satisfy the test.

For these reasons, Act 359 is unconstitutional at its core, and the entire Section 14 and Sections 14a through 14e are invalid in total. The reading of the words “utility tunnel” as stated in the title of Act 359 are reasonably understood to mean acquisition of a public utility tunnel like the Mackinac Bridge; the provisions in the body of Act 359, Section 14 and Sections 14a through 14e, authorize a public-private partnership that transfers substantial control, state land, and property rights to Enbridge for 99 years,

³⁶ Merriam-Webster Dictionary, <https://www.dicintoary.com/brose/germane>; Cambridge English Dictionary, <https://www.dictionary.cambridge.org/us/dictionary/english/germane>.

including an option should the state want to terminate the lease or not own the tunnel, for Enbridge to purchase it.³⁷

(2) The test for constitutionality under “Title-Object” multiple object challenge under Mich Const. 1963, art. 4, 24, is the “object” of a law or its general purpose or aim. *Local No 1644, AFSCME v Oakwood Hospital Corp*, 367 Mich 79, 91; 116 NW2d 314 (1962). *Livonia v Department of Social Services*, 42 Mich 466, 496-498, 378 NW 2d 402 (1985). To find a general purpose, “One looks to the body of the act, not the title, to determine whether it has a single object.” *Kevorkian, supra*, 477 Mich 459; *Keep Michigan Wolves Protected v State* (Unpublished opinion, Michigan Court of Appeals, No. 328605). If the act contains “subjects diverse in their nature, and having no necessary connection,” it violates the Michigan 1963 Constitution, art 4, § 24. *Advisory Opinion*, 396 Mich 131, quoting *People ex rel Drake v Mahaney*, 13 Mich 481, 494-495 (1865).

In *Keep Michigan Wolves*, the court of appeals ruled that a provision to provide free hunting and fishing licenses to veterans, while perhaps worthy, did not fall within the general purpose or aim of a law whose title was to implement sound scientific principles in the management of wolf populations. See also *People v Milton*, 393 Mich 234, 246-247, 224 NW2d 266 (1974). The one-object provision may not be circumvented by creating a title that includes different objects. *Hildebrand v Revco Discount Drug Centers*, 137 Mich App 1, 11, 357 NW2d 778 (1984) (The addition in the title of an act to add a new section in the body of the act did not cure the constitutional infirmity); *Klinke v Mitsubishi Motors, supra*. The “prohibition against the passage of an act relating to different objects expressed in the title makes the whole act void.” *Skinner v Wilhelm*, 63 Mich 568, 30 NW 311(1886).

Here the inclusion of a public-private partnership scheme to build a utility tunnel west of the Mackinac Bridge for location of a privately-owned utility company’s pipeline for 99 years does not fall within the general purpose of the title or the body of 1950 PA 21 and/or 1952 PA 214. While it could be argued that both link an activity between the upper and lower peninsulas, the objects or aims of those purposes and activities or uses are not remotely or even reasonably similar. They are diverse and different in their basic purpose and nature, with different risks and measures. The sweeping “public-private partnership” or privatization scheme³⁸ with a public body authorized to build and manage wholly public facilities for a limited number of privately-owned utilities is diverse and surely not necessary to the purpose and object of the MBA and the acts in question. Accordingly, Act 359 must be held unconstitutional and invalid.

(3) The test for a “change of purpose challenge” is similar to the analysis regarding whether amendments or provisions in a bill or substitute provisions are “germane” to the title of a bill, discussed under Question 1, above. *People v Kevorkian, supra*, 447 Mich at 461; see discussion regarding the meaning and application of “germane” or “closely akin” to the title in numbered paragraph (1) above. Moreover, the purpose of the “change of purpose” provision is to prevent a slight of hand from one law, amendment,

³⁷ Lease Agreement, paragraphs 19.1 and 19.2.

³⁸ Public-private partnership or privatization (“P3 projects”) of public lands, facilities, services involve a distinctly different range of means and complexities. They are vastly different from purely public funded, designed, bid, built, owned, and operated facilities and services. Typically, a P3 project involves new legislative authority, consistent with the state constitution involved, with oversight boards of private involvement and implementation of a project, different delivery methods (design-build, private financing, design-build ownership and management, long-term leases, management only, private control subject to oversight; the also involve open-bidding and compliance with equal opportunity requirements, joint liability and indemnity arrangements, and several other matters. To date, P3s have been limited to publically owned highways, and not privately owned utility projects. See Jason Tomasulo, “Pennsylvania Passes Public-Private Partnership (P3) Law,” <https://www.construcionlawnowblog.com/infrastructure/pennsulvania-passes-public-private-partnersship/law>; “Public Private Partnership Laws/Concession Laws,” <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp/>.

bill or substitute bill, to final bill; there is a particular emphasis on scrutiny where legislation, like SB 1197, S-1197, and various changes, are rushed by hasty legislation, where the original bill title is changed, and provisions are added that would accomplish a different purpose than the purpose of the title. *Id.*, 447 Mich at 460, citing *Anderson v Oakland Co. Clerk*, 419 Mich 319, 329, 353 NW2d 448 (1984).

SB 1197 and its summary originally amended the Mackinac Bridge Authority law by adding provisions that would authorize the authority to build a utility tunnel. Because of the unique purpose, structure, authority, and powers, the Mackinac Bridge Authority statutes seemingly provided the ideal vehicle for Enbridge to secure state-owned lands without applying under modern day environmental statutes like the Great Lakes Submerged Lands Act. The trouble was and remains that the purpose of the Mackinac Bridge Authority is to finance, acquire, operate, maintain, and improve the Mackinac Bridge as an entirely public facility operated by an entirely public board.

The addition of the corridor authority to acquire a tunnel to the bill so fundamentally changed the purpose and threatened the integrity of the bridge authority and bridge, that a substitute bill S-1197 was submitted. This bill added “acquire utility tunnel” to the title, but did not disclose that it was to be accomplished and implemented by a public-mostly private partnership, with substantial differences from a purely public authority. Moreover, the substitute bill authorized the MBA to acquire the tunnel after it was built by Enbridge, then transfer the tunnel back to Enbridge by a grant of easement and the 99-year lease. Similarly, the enrolled SB 1197, Act 359, did the same, without disclosure in the title for legislators or the public during the short 27 days from the introduction of the original bill to the changed substitute bill on December 5, 2018, and the rushed, hasty consideration of the substitute bill between December 5 and the day it was passed on December 12, 2018.³⁹

Accordingly, the body of the bill substantially changed the approach and purpose of the original bill, and for the reasons discussed in (1) above, those changes enacted by the enrolled SB 1197, Act 359, are not closely related to, akin, or germane to the title or purpose of a public owned, built, operated, utility tunnel. The entire purpose of Act 359, as described in the last-minute addition of Section 14 and Sections 14a through 14e implemented a public-private project and partnership with substantial private control, gain, benefit, and purpose not full disclosed in the title or amended title. This change of overall purpose differs vastly and is not germane to a public bridge or totally public project.

Question No. 2:

Does the requirement that members of the board of the Corridor Authority serve for six years or more violate the constitutional mandate under section 3 of article 5 of the Michigan Constitution of 1963 that the terms of office of any board or commission created or enlarged after January 1, 1964 must not exceed four years?

Yes. Act 359’s six-year term for the members of the board of the Corridor Authority violates the constitutional mandate under Article 5 Section 3 of the Michigan Constitution, which expressly limits all board terms to no more than four years. The real questions are: What is the effect of this unconstitutional provision of Act 359. Can an unconstitutional section be severed?

Article 5, Section 3 of the Michigan Constitution of 1963 clearly states in unambiguous language that the term of office of any board or commission created or enlarged after January 1, 1964 must not exceed four years. “Terms of office of any board or commission created or enlarged after the effective date of this constitution shall not exceed four years except as otherwise authorized in this constitution.” Section

³⁹ The rushed atmosphere and confusion surrounding the changes in structure and purpose from the original bill that barely complied with the 5-day-wait rule for enactment of a substitute bill required by Mich Const., art. 4, sec. 26.

14b(2) of Act 359 explicitly violates this constitutional requirement as the law states the board members of the Mackinac Straits Corridor Authority (“MSCA”) serve six-year terms: “Members of the corridor authority board shall serve for terms of 6 years or until a successor is appointed and qualified, whichever is later.”

This extended six-year term is not a legislative omission or oversight, nor an appendage of Act 21 of 1950 or Act 214 of 1952. Rather, this six-year term was an intentional end-run attempt to preclude the next incoming Governor from appointing new board members within her four-year constitutional term, and the facts support this. Despite strong public opposition at the SB 1197 committee hearings, Governor Snyder signed Act 359 into law on December 12, 2018, and immediately appointed three members pursuant to Section 14(b)(2): Geno Alessandrini (D), Tony England (D), Michael Zimmer (R). The following day, Geno Alessandrini resigns and Snyder names James “J.R.” Richardson (R) as his replacement. Mike Zimmer was Snyder’s cabinet director and a member of the Mackinac Bridge Authority. Recognizing the statutory violation of Section 14(b) (8) which prohibits Mackinac Bridge Authority members from serving on the board of the corridor authority, Governor Snyder then appointed Mike Nystrom (R). The three current corridor authority board members include Tony England (D), James “J.R.” Richardson (R) and Mike Nystrom (R) whose appointment to six-year terms clearly contravene and violate the clear and unambiguous language of the Constitution restricting board terms to four years.

While it is undisputed that statutes cannot contravene the constitution, courts presume the constitutionality of statutes and, if possible, construe and apply a statute to uphold their validity. *Evans Products v. State Board of Escheats*, 307 Mich 506, 533-535 (1943). A facial challenge is “the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

In 2005, Attorney General Mike Cox’s opinion no. 7178 addressed a similar constitutional board term issue raised in Public Act 66 (2001), which amended the Michigan Historical Commission Act, 1913 PA 231, MCL 399.1 et seq. The OAG concluded that Article 5, Section 3 of the Michigan Constitution invalidates only those provisions of Act 66 that specify a term of office in excess of four years and does not affect the remaining provisions of the act. In examining the question of what effect the Constitution has on PA 66, the OAG concluded that Article 5, Section 3 is self-executing by operation of law because it supplies a sufficient rule by means of which the rights given may be enjoyed and protected and that no legislation is necessary to give effect to a prohibition. Therefore, according to Cox’s OAG legal reasoning, the terms of the MSCA are 4 years by operation of law, and the creation of the board itself remains, along with all other sections of Act 359.

Factually, however, the Michigan Historical Commission and the Mackinac Straits Corridor Authority are quite different because the unconstitutionally formed corridor authority then took legally binding actions that committed state public trust resources for 99-years to benefit a private purpose. In the instance of the Historical Commission, no legally binding agreements were at issue.

As directed by Act 359, the corridor authority immediately committed state public trust resources to an easement and a lease for 99-years for the primarily private benefit and purpose to transport oil under the Great Lakes. Because this unconstitutionally formed board took substantia legal action that purported to transfer lands, including bottom lands of Great Lakes, easement, and long-term lease, turning over nearly

exclusive use and control of these lands and the tunnel to Enbridge, the Michigan Supreme Court should strike down all legal agreements entered into by the Mackinac Straits Corridor Authority board.

Question No. 5:

Does the Corridor Authority have any authority or power that is not constitutionally and explicitly granted by Act 359?

No. The corridor authority does not have any authority not expressly delegated by the legislature under Act 359. As a matter of law, absent a constitutional grant of power, such as a local government’s control over streets,⁴⁰ a board or authority created by the legislature has no more power than that which is expressly delegated or necessarily implied by the enabling act. *Ranke v Corp & Securities Div.*, 317 Mich 304, 309, 26 NW2 898 (1947).

Question No. 6:

If the Corridor Authority was not created in a manner that conforms to or is in violation of the Michigan Constitution, is the Authority, its board, and/or any action taken by the Authority’s board void or invalid?

To the extent that Act 359, including its express reference to the “tunnel agreement” and “series of agreements,” violates or is not in conformity with Article 4, Section 24 and Article 5, Section 3, discussed in the answers and legal analysis to Questions 1 and 2, above, the Act, and, therefore, the tunnel agreement, easement, lease, and any other agreements entered into by the corridor authority or state in furtherance of the authorization of a tunnel authority are void.

As a general rule, an unconstitutional statute is *void ab initio*; this means it is void for any purpose, that is, the unconstitutional statute has no legal effect from the date it is enacted. *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135 (1977); *Briggs v Campbell Wyant & Cannon Foundry*, 379 Mich 160 (1967). Where a statute fails based on title-object, multiple purposes, or change in purpose grounds, the “whole act is void.” *Skinner v Wilhelm*, 63 Mich 568, 30 NW 311 (1886); *Advisory Opinion re Constitutionality of 1975 PA 227*, 396 Mich 123, 130-131, 240 NW3d 193 (1976).

The radical splicing or grafting the MBA Act transformed the bridge authority law into a law that authorizes a public-private utility tunnel through private and public agreements or “public-private partnership” is not germane or necessary to a public highway bridge or a public utility tunnel acquired by the MBA or a corridor authority. Accordingly, the entire Act 359, and any agreements referenced by it, such as a “tunnel agreement” or “series of agreements” (including the DNR Easement and Assignment of Easement for the tunnel and new pipeline for Line 5 to Enbridge, a privately-owned corporation) are void. The additional provisions added in the Substitute 1197 on December 5, 2018 and passed on December 12, 2018 substantially changed the body from the title by authorizing new means and measures not within the

⁴⁰ Mich Const., art.7, sec.29.

bill or title itself and otherwise not germane, closely akin, or directly and necessarily related to a public bridge or utility tunnel.

Moreover, as established under Question 2, above, Act 359 established terms of board members for more than four-years in violation of Article 5, Section 3. The violation was effective on the date of passage of the amendment on December 12, 2018, seven days before the corridor authority met and signed the tunnel agreement on December 19, 2018. While the provision may be self-executing, that does not cure the fact that Act 359 was void *ab initio*. *Skinner, Briggs, Stanton, supra*. If it was void *ab initio*, then the provision, even if severable, was void before the corridor authority was established and powers transferred to it from the bridge authority on appointment of its members. If the law authorizing the appointments was void *ab initio*, then the Governor's appointments are void and of no legal effect; as a result, the corridor authority's action in approving and signing the tunnel agreement, including the attached easement, assignment of easement, and 99-year-lease agreement, would be void. It is submitted that it is legally impossible for members of a board with terms of more than 4 years in violation of the constitution, where the statutory provision authorizing them to take action is void on enactment.

C. ADDITIONAL COMMENTS ON VALIDITY OF ACT 359, REFERENCED AGREEMENTS, AND ATTACHMENTS

1. Article 4, Section 30

The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of money or property for a local or private purpose.

The Constitution prohibits an appropriation of money or property of the state for local or private purposes, unless it is approved by a vote of two-thirds of the members serving in each of the Senate and House. The courts decline to review an appropriation of property where there is a two-thirds vote because it is considered constitutionally acceptable.⁴¹ Where the two-thirds vote is lacking, the courts exercise judicial review to assure the appropriation serves a public purpose. The language or nearly identical language to Article 4, Section 30 has appeared in every constitution adopted in Michigan since 1850.⁴²

While the courts defer to legislative declarations of public purpose, the legislature is not insulated from the two-thirds requirement; a law passed without two-thirds assent granting access to election form information at public expense constituted a private purpose in violation of art. 4, sec. 30. *Grebner v State*, 480 Mich 939, 744 NW2d 123 (2007). Conveyances of state land and money for private entities, including nonprofit organizations are prohibited unless approved by a two-thirds vote,⁴³ including forestry districts to help pay for cost-sharing agreements;⁴⁴ and appropriation of state land to the Red Cross for \$ 1.00.⁴⁵ The essential question is whether a conveyance of state land, property, or money is for

⁴¹ *Advisory Opinion on the Constitutionality of Act 346 of Public Acts of 1966*, 380 Mich 554 (1968).

⁴² It first appeared in Const. 1850, art. 14, sec. 6, growing out of the economic benefits or state land given to friends under Governor Mason's administration.

⁴³ OAG 1955, No. 2090.

⁴⁴ OAG 1983, No. 6123,

⁴⁵ Footnote, 43, *supra*.

fair value or compensation; if there is fair value without a subsidy in the legislative scheme, there is no violation.⁴⁶

Under a closely related provision of the Constitution that prohibits conveyance of land or money paid for by the taxpayers unless for a public purpose,⁴⁷ the Court struck down a conveyance of public property by the City of Flint without consideration to the federal government—a conveyance or appropriation for less than fair value was not a valid public purpose.⁴⁸ When the city turned around and conveyed the property based on the appraised fair market value, the Court held it was a proper public purpose.⁴⁹

In another context, the Supreme Court reinstated a strict public purpose standard in the exercise of condemnation powers⁵⁰ in *Wayne County v Hathcock*, 471 Mich 445, 684 NWA2wd 765 (2004).⁵¹ In doing so, the Court overruled the *Poletown*, concluding that the exercise of eminent domain to take land for a public use or purpose, and transfer the land for the creation of a private, technological-park land development; jobs, economy and other incidental benefits did not constitute a valid public purpose. *Poletown Neighborhood Council v Detroit*, 310 Mich 616, 304 NW2d 455 (1981).

Across the constitutional landscape in Michigan, the transfer of state or public land for private purposes is prohibited, or in the case of an appropriation for private purpose requires a two-thirds vote of each house. The tests are whether the conveyance is for a public use or private use based on payment of fair market value; if not, there is an underlying subsidy and it is a private, not a public purpose. Further, an additional test is whether there is a conveyance, lease, or private use under control of a private corporation—that is, if the private corporation grantee or lessee has control over the independent decision of a governmental authority, it constitutes an unconstitutional purpose.

Act 359 did not receive the assent of two-thirds of the members serving the house. As described at length above, Act 359, the tunnel agreement, the easement and lease for private use of the soils under the Straits grants Enbridge control for 99 years. Act 359 and the tunnel agreement require the transfer of state lands, including bottomlands and soils under the Straits, to the corridor authority and, in turn, directly to Enbridge for its private pipeline. Among other provisions, there is no requirement of compensation for the conveyance and lease; Enbridge retains dominant control of the tunnel, the easement, the leased property, controls whether another utility can use the tunnel and state lands, and even has assurances that it can purchase the tunnel should the authority terminate the lease or not want the tunnel. Moreover, as will be seen in the next section, neither the corridor authority nor Enbridge are required to obtain authorization for the conveyance based on findings of public purpose and no impairment that are required for a conveyance of an easement, lease, or other occupancy and use agreement of the soils and bottomlands of the Great Lakes under the common law of public trust.⁵²

Act 359, the tunnel agreement and related documents and agreements violate art. 4, sec. 30, because the law and agreements convey public land and rights in state lands for a primarily private purpose and

⁴⁶ OAG 1994, No. 6804.

⁴⁷ Mich Const. 1908, art. 10, sec. 12 (Now Mich Const. 1963, art. 9, sec. 18) (“The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private.”).

⁴⁸ *Young Lass v City of Flint*, 345 Mich 576, 77 NW2d 84 (1956).

⁴⁹ *Sommers v City of Flint*, 355 Mich 655, 96 NW2d 119 (1959).

⁵⁰ Mich Const. 1963, art. 10, sec. 2.

⁵¹ The Court overruled the broader interpretation of “public purpose” in *Poletown Neighborhood Council v Detroit*, 310 Mich 616, 304 NW2d 455 (1981).

⁵² *Illinois Central and Obrecht*, *supra*, fn 11.

control and/or for non-public purpose without sufficient and fair market value. Accordingly, the Act and related agreements, easement, and 99-year-lease to Enbridge are void.

2. The Public Trust Doctrine and Great Lakes Submerged Lands Act (“GLSLA”)

When Michigan joined the United States in 1837, the State of Michigan took title, absolutely, as sovereign for its citizens under the “equal footing” doctrine to all of the navigable waters in its territory, including the Great Lakes, and “all of the soils under them” below the natural ordinary high mark.⁵³ All of these waters and the soils beneath them are held in and protected by a public trust.⁵⁴ The public trust doctrine means that the state holds these waters and soils beneath them in trust for the public for the protection of preferred or dedicated public trust uses of navigation, fishing, boating, swimming, bathing, drinking water, and other recreation.⁵⁵ As a general rule, there can be no disposition, transfer, conveyance, occupancy or use of any kind of these public trust waters and the soils beneath them, unless there is a statute or law that expressly authorizes the proposed disposition, occupancy, or action and the statute contains and requires a consideration that the following standards for the narrow exception to the rule have been duly satisfied:⁵⁶

- (1) The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest or interest (such as navigation, fishing, etc.), not a private one; and
- (2) The proposed disposition, occupancy, or action will not interfere with or impair the public trust waters, soils, habitat, wildlife like fish and waterfowl, or one or more of the public-trust uses.⁵⁷

From the foregoing discussion of the original MBA in 1950 PA 21 and 1952 PA 214, and Act 359 and the provisions that require signing of the tunnel agreement by the MSCA (corridor authority), it is clear that the legislature authorized the grant or conveyance of rights, easements, and the 99-year-lease in the Great Lakes and the soils beneath them. It is also clear that pursuant to Act 359, the MSCA obtained an easement from MDNR in the soils and bottomlands of the Great Lakes (the Straits) for the utility tunnel, and reassigned the easement to Enbridge as required by the tunnel agreement. This scheme was set up by paragraph G of the Second Agreement between the Governor, MDEQ, MDNR and Enbridge, which called for the State of Michigan to transfer necessary public property for the tunnel and the long-term lease back of the property to Enbridge to control the tunnel and locate its pipeline in the tunnel within the soils and bottomlands of the Great Lakes. In addition, the Third Agreement between the State of Michigan and Enbridge, signed the same day as the tunnel agreement between the MSCA and Enbridge, authorizes Enbridge to continuing using and occupying the bottomlands and waters of the Straits for the existing dual pipelines “until such time that the Straits Line 5 Replacement Segment is placed into service with the Tunnel.”⁵⁸

Section 3.1(a) of the tunnel agreement provides that the MSCA will acquire from the MDNR a “tunnel easement” to grant lawful right to enter, occupy, and use lands beneath the lakebed of the Straits... necessary for the construction, use, operation, and maintenance of the Tunnel.” Under Section 3.1(b) on the signing of the tunnel agreement, the corridor authority was required to assign the easement or “subsurface right of way” to Enbridge to occupy, use, construct, operate, and maintain the tunnel. At the

⁵³ *Shively v Bowlby*, 14 S. Ct. 548 (1894); *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *State v Venice of America Land Company* 160 Mich 680 (1910); *Glass v Gackle*, 473 Mich 667 (2005).

⁵⁴ *Id.*; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).

⁵⁵ *Id.*, *Illinois Central*, *Obrecht*, *Glass*.

⁵⁶ *Id.* p. 416.

⁵⁷ *Id.*

⁵⁸ Third Agreement, Dec. 19, 2018, paragraph 4.2, p. 4.

same time, Section 3.2(a) of the tunnel agreement provides for acceptance of title of the tunnel after Enbridge completes construction, coupled with a simultaneous lease-back to Enbridge for 99 years for exclusive use of the easement or subsurface right-of-way for its new or replacement Line 5 segment. Section 3.2(b) provides that other utilities may request permission from the MSCA, subject to consent or non-interference with Enbridge’s rights and use, for other utilities in their discretion to locate electrical, cable, or other pipelines in the tunnel.⁵⁹ Section 17.4(c) grants Enbridge the right to the continued use of the tunnel easement for 99 years if the tunnel agreement is terminated.⁶⁰

The MDNR’s easement to the corridor authority issued on December 17, 2018 only cites the authority of MCL 254.324a(3) and MCL 254.324d(1) for the purpose of granting the authority to place, construct, operate, maintain... and use” the subsurface soils beneath the lakebed of the Straits and Lake Michigan. The easement authorizes the corridor authority to assign the easement to Enbridge upon signing the tunnel agreement with the corridor authority. Under the assignment of the easement, the MDNR is prohibited from entering into any other third-party assignment, grant, lease or licenses without Enbridge’s consent.⁶¹ The easement and assignment of the easement grant all rights to Enbridge to the “underground lands” “specifically lands located beneath the lakebed to which the state has title.”⁶² As discussed below, this language is asserted to limit the authorization for the easement and lease to the area beneath the lakebed of the Straits in an unlawful attempt to avoid the public trust doctrine and explicit standards imposed by the Great Lakes Submerged Lands Act (“GLSLA”).⁶³

Like the easement, the lease transfers possession to Enbridge to use, control, and operate the tunnel and its new Line 5 segment for the 99-year term. The lease provides for possible use by other utilities subject to Enbridge’s consent and determination that it will not interfere with its private use of the tunnel for its pipeline. In the event another utility subleases from Enbridge, the costs of operating the tunnel can be apportioned, to reduce Enbridge’s cost obligations.⁶⁴ As noted above, if the lease is terminated under certain circumstances, the assignment of the subsurface easement for the tunnel “will remain in effect;⁶⁵ and Enbridge has a right to purchase the tunnel and all rights to subsurface if the corridor authority wants to abandon its ownership and oversight of the tunnel and lease.⁶⁶ Enbridge was not required to pay any fair market compensation for the assignment of the easement or lease for the rights of construction, occupancy, use, and operation of the tunnel and its Line 5 segment to the tunnel and soils and bottomlands of Lake Michigan beneath the lakebed. While Enbridge is required to pay real estate taxes for its leasehold interest and replacement pipeline segment, the land and tunnel are exempt from real property taxes, so those taxes are not passed along to Enbridge as they would be in normal circumstances. The corridor authority assures Enbridge it will not terminate the tunnel easement during the term of the lease.⁶⁷

a. Act 10 of Public Act (“Act 10”) Easements for Public Utilities Over, Under or Through State Lands and State-owned Public Trust Bottomlands

The legislature enacted Act 10 in 1953 to authorize the state to grant easements over, though, under, and upon any and all lands belonging to the State of Michigan, including “the unpatented lake bottomlands

⁵⁹ See also Tunnel Agreement, section 6.1, p. 10.

⁶⁰ See also Assignment of Utility Easement for Utility Tunnel, paragraph 2.

⁶¹ *Id.*, paragraph

⁶² *Id.*, p. 1.

⁶³ MCL 324.32502; MCL 324.32503 et seq.

⁶⁴ Tunnel Lease, Art. 9, pp. 5-6.

⁶⁵ *Id.*, 18.3, p. 15.

⁶⁶ *Id.*, 19.1 through 19.3, p. 15.

⁶⁷ *Id.*, 20.1, p. 16.

belonging to or held in trust.” Act 10 was reenacted as part of NREPA, MCL 324.324.2129, and is the basis for the Easement for the Utility Tunnel in lands and soils beneath the lakebed of the Straits. Section 2129, MCL 324.2129, authorizes “easements” (not leases or conveyances) for *public* utility projects certified by the Michigan Public Service Commission (“MPSC”). However, the MPSC has not certified this utility tunnel easement at issue. Act 10, now MCL 324.2129, clearly applies to public trust bottomlands and lakebeds beneath the Great Lakes.

In 1955, two years after the enactment of Act 10, the Michigan legislature passed the GLSLA. The GLSLA supplied for the first time in the State of Michigan’s history express authorization for conveyances, easements, leases, and occupancy or use agreements for the waters and soils under the Great Lakes. The GLSLA inserted standards to incorporate the prohibition against disposition, leases, and occupancy of the public trust soils, lakebed, and waters pursuant to the seminal case of *Illinois Central Railroad*. Before the GLSLA, Act 10 (and MCL 324.2129 now) did not incorporate public trust standards for the narrow exception for disposition, easements, leases, and occupancy of these public trust bottomlands and soils. In *Obrecht v National Gypsum Co*, the Michigan Supreme Court adopted *Illinois Central* principles and standards that were incorporated into the GLSLA. As such, any public utility easement authorized under MCL 324.2129 is now subject to the GLSLA and its required authorization based on due recorded findings of fact that the public trust standards under public trust law are satisfied.

Accordingly, the transfer of state bottomlands to the authority and Enbridge for a tunnel and the grant of the tunnel easement, its assignment, the lease, and other use and occupancy assurances to Enbridge granted under MCL 324.2129 have not been authorized pursuant to the required public trust standards and findings under *Illinois Central* and *Obrecht*.

a. Great Lakes Submerged Lands Act of 1955: Limited Conveyances, Leases, Agreements, or Actions Over, On, In, or Through Soils and Bottomlands of the Great Lakes.

The GLSLA prohibits any conveyance, lease, agreement, occupancy, use or other action in the waters or on, in, through or under the bottomlands of the Great Lakes, unless authorized by the Michigan DEQ pursuant to the public trust standards in the GLSLA and the common law of the public trust doctrine.⁶⁸

This part shall be construed to *preserve and protect the interests of the general public* in the lands and waters described in this section...to provide for the sale or lease or other disposition...or permit filling in [including dredging or removal of materials]...If it is determined by the department that the public or private use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, boating, or navigation or that the public trust in the state will not be impaired by those agreements use, sale, lease or other disposition.”⁶⁹

* * *

(4) Agreements for lands or water... described in section 32502 may be granted with local units of government for public purposes.⁷⁰

No agreement or lease can be authorized for Enbridge’s 99-year tunnel lease and crude oil pipeline because: (1) it is not for a recognized public trust purpose such as fishing, boating, navigation, and recreation, and (2) it will interfere with and impair navigation, fishing, and cause massive disruption to fish, habitat, and other public trust uses. Moreover, under the GLSLA, the public trust soils and waters of

⁶⁸ MCL 324.32501 et seq., specifically sections MCL 322.32502 and 32503.

⁶⁹ MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

⁷⁰ MCL 324.32505(4).

the Great Lakes cannot be used for construction for a privately leased and operated tunnel and pipeline unless Enbridge proves under rule of law that there are no other feasible and prudent alternatives.⁷¹

In this instance, the MDEQ, MDNR, Governor and Enbridge inserted language in the Tunnel Easement that states, “The easement and right of way do not include any lands or interests in land on or above the lakebed.”⁷² This language was a calculated attempt by the State of Michigan and Enbridge to circumvent the required authorization and findings to comply with the public trust doctrine under the GLSLA. Failure to do so violates the GLSLA, and the tunnel agreement, easement, and lease are therefore void. Moreover, the attempted avoidance of the GLSLA also violates the title vested in and held by the state under the trust imposed on *all navigable waters and the soils under them* by the equal footing doctrine.⁷³

Therefore, the transfer of bottomlands by Act 359, the tunnel agreement, easement and use, as well as the assurances to continue the operation of the existing dual lines in the Straits of Mackinac must be authorized by the GLSLA in addition to MCL 324.2129. If not, the authorization under MCL 324.2129 fails for lack of the required public trust standards and findings imposed by the public trust doctrine.

⁷¹ GLSLA Rule 1015. R 322.1015.

⁷² Easement to Construct Underground Utility Tunnel at the Straits of Mackinac, second paragraph, p. 1.

⁷³ *Shively v Bowlby*, 14 S. Ct. 548 (1894); *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *State v Venice of America Land Company* 160 Mich 680 (1910); *Glass v Gackle*, 473 Mich 667 (2005).

⁷³ *Id.*; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).