OFFICIAL OPINION NO. 89-22, Senate Bill 192/Lake Thompson

July 25, 1989

John J. Smith, Secretary
Department of Water and Natural Resources
Joe Foss Building
Pierre, SD 57501

**OFFICIAL OPINION NO. 89-22**

Senate Bill 192/Lake Thompson

Dear Mr. Smith:

You have asked my opinion concerning the following factual situation:

**FACTS:**

The Lake Thompson watershed encompasses approximately 596 square miles (325,000 aces) including about half of Kingsbury County and parts of Lake, Miner, Clark and Hamlin counties. In 1983 Lake Thompson was a 9,000 acre meandering lake with water levels at 1668.2 mean sea level (msl). Lake Thompson was an extremely popular location for duck hunting and deer hunting, and it has been that way as long as people can remember.

Due to a number of years of above normal precipitation, in 1986 Lake Thompson reached a water level of 1690.1 msl and encompassed over 18,000 acres with depths of over 20 feet. The extraordinary rise in lake levels has caused substantial property damage, a major loss of productivity and income for the involved landowners, and a number of property tax and legal problems for the landowners, the counties and the state.

As a result of the unprecedented flooding of Lake Thompson and the damage such flooding caused, Governor Mickelson commissioned a task force to examine problems and develop solutions associated with the high water levels. The task force report concluded the various technical solutions, such as draining the lake, were either not feasible, too expensive, or both. The task force further concluded that one long-term solution was to adapt to the situation and develop a wetland restoration plan. The task force pointed out that wetland restoration will not alleviate the financial hardships experienced by the area landowners, but

will improve wildlife habitat and create repositories for excess precipitation while simultaneously providing some financial assistance to the landowners for participating in the wetland restoration program.

State funding limitations have precluded to date the implementation of any major wetland restoration efforts. Approximately 9,000 acres of private land have been flooded in the lake basin and 1.2 million dollars would be required to purchase this land assuming a value of $200 dollars per acre. Federal funds are also quite limited for acquisition. Only a small percentage of the 9,000 acres of farmland have been acquired for wetland restoration and, at the current rate, it will take several years to complete the restoration program.

In an attempt to find alternative solutions to the Lake Thompson situation and provide assistance to the landowners, certain local interests suggested that the state review and revise existing state law pertaining to SDCL 43-17-29 and public access rights. The matter was presented to the 1989 Legislature which adopted Senate Bill 192, which became effective July 1, 1989. Several questions have arisen concerning the meaning of SDCL 43-17-29 and Senate Bill 192, and we would appreciate your assistance in addressing those questions.

Based upon these facts, you have asked the following questions:

**QUESTIONS:**

1. SDCL 43-17-29 provides that if water levels rise above the ordinary high water mark of a navigable lake, the right of the public to enjoy the lake may not be limited except that access shall be by public right-of-way or by permission of the riparian landowner. Inasmuch as an ordinary high water mark has not been determined for Lake Thompson, and inasmuch as Lake Thompson may or may not qualify as a navigable lake, does SDCL 43-17-29 apply to water levels which have reached extraordinary levels over the past few years?

2. Does Lake Thompson qualify as a navigable lake, and what are the legal ramifications relative to ownership and property taxes to the state and the local owner if Lake Thompson is defined as a navigable lake or is found to be non-navigable?

3. Does the state legislature have the authority, as exercised in SB 192, to give landowners control over the use of their inundated land below or above the ordinary high water mark, including entering into sublease agreements for uses such as fishing and hunting in special

circumstances where water levels have far surpassed average lake levels or ordinary high water mark levels, or does such a revision to existing law conflict with public trust doctrine?

**IN RE QUESTION NO. 1:**

SDCL 43-17-29 provides as follows:

If any water level rises above the ordinary high water mark of a navigable lake, the right of the public to enjoyment of the entire lake may not be limited, except that access to the lake shall be by public right-of-way or by permission of the riparian landowner and is subject to 43-17-2, 43-17-31, 43-17-32 and 43-17-33.

This statute was adopted by the Legislature in 1985 in response to questions that were arising as a result of unusually high water levels in many lakes in the northeastern part of this state. It was amended in 1989 to add the last clause. Your inquiry addresses the applicability of this statute to Lake Thompson which, as you point out, has never had an ordinary high water mark (OHWM) established by the Water Management Board or by judicial decision.

First it must be noted that the statute deals with use of the water and access to the water, not ownership of the land underlying the water. The applicability of this statute does not depend on whether an ordinary high water mark has been established pursuant to SDCL 43-17-21. If Lake Thompson is "navigable" it has an OHWM:

The OHWM is established by the processes of nature and the Board's setting thereof is merely a formal recognition of the mark established by nature.

S.D. Wildlife Federation v. Water Management Board, 382 N.W.2d 26, 33 (S.D. 1986).

SDCL 43-17-29, in essence, provides that in times of high water, for example, when the water line is above the OHWM, the use of the lake by the public is not impacted by the fact that a portion of the water overlies privately-owned lands. Thus, for purposes of use of the water, the exact location of the OHWM is irrelevant.

The statute further recognizes, however, that the question of access to the water is altered in such cases. Usually, when the water line is below the OHWM, the general public has access to the water by virtue of SDCL 43-17-2. Recognizing that the water line, when it rises above the OHWM, does not carry with it the state's public trust access rights (see

AGR 77-61), the Legislature made clear that access to the water in such instances would be only by public right-of-way, or by permission of the landowner.

For purposes of access to the water it does not appear to be significant whether the lake is navigable or not. If the present water line lies on privately-owned land, access to the water will have to be either by public right-of-way or by landowner permission. That is true if the lake is non-navigable, as well as in those cases where it is navigable and the waterline is above the OHWM. Obviously, this reasoning presumes that the public has the right to use the water in either case and it is to that question I now turn.

**IN RE QUESTION NO. 2:**

Navigability may be important for purposes of determining the public's right to use the water. Two questions appear pertinent:

1. Is Lake Thompson "navigable?"

2. What use of the lake water can the public make if the lake is not navigable?

If Lake Thompson is navigable, the public has the right to use the water pursuant to case law and the plain terms of SDCL 43-17-2, and 43-17-29; this right extends to wherever that water may reach. If the lake is not a navigable lake, the question is more problematic.

Navigability has come to mean different things in different settings. First, there are two distinct federal definitions. One definition is used in Commerce Clause inquiries, and finds a water to be navigable if it is, in fact, used or susceptible of being used in its natural condition, or with reasonable improvements, for trade and commerce purposes. United States v. Appalachian Power Co., 311 U.S. 377 (1941). The second definition is used to determine the respective rights of the federal government and the states regarding the title to the beds of rivers and streams. It is similar to the commerce clause definition, except that it is applied to the water in its natural condition, and the determination is made as of the date of statehood. United States v. Holt Bank, 270 U.S. 49 (1926); Utah v. United States, 403 U.S. 9 (1971). Other federal definitions have also arisen in a variety of situations. See e.g., United States v. Riverside Bayview Homes, Inc., 106 S.Ct. 455 (1985).

South Dakota's definition of "navigable" as articulated by the South Dakota Supreme Court in Flisrand v. Madson, 152 N.W. 796 (S.D. 1915) is more expansive:

In the early history of the common law the rights of the public in navigable waters were confined to navigation. But the term "navigable" has been extended and includes waters that are not navigable in the ordinary sense. In Flisrand v. Madson, 35 S.D. 457, 152 N.W. 796, 798, it was held, after a consideration of many of the leading cases, that whether or not waters are navigable depends upon the natural availability of waters for public purposes taking into consideration the natural character and surroundings of a lake or stream. This division of lakes and streams into navigable and non-navigable is the equivalent to a classification of public and private waters.

Hillebrand v. Knapp, 274 N.W. 821, 822 (S.D. 1937).

The Flisrand court, relying extensively on the Minnesota decision in Lamprey v. State, 53 N.W. 1139 (Minn. 1893) considered the following factors in making that public/private distinction.

Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used--and as population increases, and towns and cities are built up in their vicinity, will be still more used--by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.

Flisrand, supra, 152 N.W. at 799, quoting Lamprey, 53 N.W. at 1143. The South Dakota Supreme Court has consistently adhered to this position in cases involving lakes in the state. See South Dakota Wildlife Federation, supra; Anderson v. Ray, 156 N.W. 591 (S.D. 1916); Waldner v.Blachnik, 274 N.W. 837 (S.D. 1937); Parsons v. City of Sioux Falls, 272 N.W. 288 (S.D. 1937); Olson v. Huntamer, 61 N.W. 479 (S.D. 1894). Several of these cases involve questions of land title under the waters. Clearly, the use of a navigability test broader than the federal definition to determine land ownership issues is troublesome.

The broad definition is troublesome because of the ramifications bound up in the determination of navigability. Under the federal title test, the United States held title to the beds of navigable waters in trust for the states. Thus, under the equal footing doctrine, South Dakota succeeded to ownership of all lands under navigable waters upon statehood,

such lands to be held in trust for the benefit of the public, up to the high water mark. Shivley v. Bowlby, 152 U.S. 1 (1984). It is for the state, however, to define the limits of the lands held subject to this public trust. See Phillips Petroleum Co. v. Mississippi U.S. ____ (1988). In South Dakota those limits are prescribed by SDCL 43-17-2, which provides:

Unless the grant under which the land is held indicates a different intent, the owner of the upland, if it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark. All navigable rivers and lakes are public highways within fifty feet landward from the water's nearest edge, provided that the outer boundary of such public highway may not expand beyond the ordinary high water mark and may not contract within the ordinary low water mark, and subject to 43-17-29, 43-17-31, 43-17-32 and 43-17-33.

The area between the OLWM and the OHWM is, however, subject to a public trust as follows:

While the title of the riparian owner on navigable or public waters extends to ordinary low-water mark, still his title is not absolute, except to ordinary high-water mark, and as to the intervening shore space between high and low water mark the title of the riparian owner is qualified or limited by and subject to the rights of the public.

Flisrand, supra, 152 N.W. at 801.

These rules clearly apply when a body of water is navigable under the federal definition. Of greater concern here is what rules apply if a lake is navigable under the state definition, but is not under the federal definition.

Where the United States owns the bed of non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling: and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies.

Oklahoma v. Texas, 258 U.S. 574, ____ (1922); see also Hardin v. Jordon, 140 U.S. 371, 384 (1891). In government patents which contain no language showing a purpose to define the rights of riparian landowners, the presumption is that state law governs those rights.

Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact in such a case, navigability vel non is not a local question.

Brewer-Elliott Oil and Gas Co. v. United States, 260 U.S. 77, 89 (1922); but see, United States v. Oregon, 295 U.S. 1 (1935).

Indeed, many states have adopted definitions of navigability which are less burdensome than the federal test. Some of the states utilize the liberalized test for purposes of addressing the public's right to use the waters and tteat the question of title to the bed of the stream or lake as immaterial. See Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1092 (Mont. 1984); Hitchings v. Del Rio Woods Recreation and Park District, 127 Cal.Rptr. 830, 837 (Cal. 1976); Southern Idaho Fish and Game Association v. Picabo Livestock, Inc., 528 P.2d 1295, (Idaho 1974); North Dakota State Water Commission v. Board of Managers, 332 N.W.2d 254, 258 (N.D. 1983).

South Dakota has gone farther and has applied the state's definition even in title cases. Brewer indicates that this may be permissible if it does not conflict with federally granted rights of the patentee. But see, Oregon v. United States, supra. What are the ramifications of these state definitions? If a lake is navigable under the Flisrand test, SDCL 43-17-2 controls. If a lake is not navigable under Flisrand, the riparian owner owns the land to the center of the lake under the Olson case.

Thus, for Lake Thompson, if the lake is navigable under the federal title definition, the state owns the bed of the lake to the OLWM, with certain public access rights up to the OHWM. There is simply not enough evidence presented to determine whether the lake is federally navigable. That is a question of fact regarding whether, under natural conditions prevailing at the time of statehood, the lake was used for, or was susceptible to be used for, trade and commerce.

If the lake is non-navigable under the federal definition, state law arguably determines the bed ownership question, unless the grant of lands from the federal government indicates otherwise, at least in those cases in which the United States is not a party to the dispute. Assuming, for the sake of argument, that the patents surrounding Lake Thompson show no intent to convey the bed to the upland owners, state law will govern regarding the extent of the riparian ownership. Therefore, if the lake is navigable under the South Dakota definition, the riparian owner would take to the OLWM as set forth in Flisrand. If the lake is non-navigable under the state definition, the riparian owns the bed to the center of the lake proportionally with other riparian owners.

Again, this is a factual determination and the factual description is not sufficient to enable me to render an opinion on whether Lake Thompson is navigable. The depth and size of the lake and the purposes for which it has been used during times of ordinary high water in the past, enter into that determination. See Anderson v. Ray, supra.

If Lake Thompson is navigable, the state owns the land below the OLWM and state-owned land is not subject to taxation. S.D. Const., Art. XI, 5. But see, SDCL 41-2-21. If the lake is not navigable, its bed is owned to the middle by the adjacent landowners, and would be taxable. But see, SDCL 10-18-2(4).

A resolution of the navigability issue does not necessarily answer your question regarding SDCL 43-17-29 or SB 192. The pertinent question is the public's right to use waters lying over privately-owned land. Even if the state owns the bed of the lake, it seems to be the working assumption, at least as identified in SB 192, that the lake in its present configuration at least partially overlies privately-owned land. I assume for the sake of discussion that this assumption is correct. Thus the query becomes an identification of the pertinent public rights to utilize the waters and an examination of the legislative power to alter those rights. Stated simply, the question is whether South Dakota has, by statute or case law, followed the reasoning of other states in allowing public use of waters regardless of the ownership of the lands underlying those waters. In my opinion, it has.

An examination of the implementation of the OHWM statutes in 1978 indicates a legislative intent to treat the question of use of the water separate from the issue of the ownership of the land. House Bill 1019 was an Act of the 1978 Legislature which was intended, according to its title, to "establish high and low water marks on public lakes." (Emphasis added.) Section 2 of the Act provided for establishment of the marks on " public waters which are

used for public purposes including, but not limited to, boating, fishing, swimming, skating, picnicking, and similar recreational pursuits." (Emphasis added.) Section 6 referred to the establishment of a priority list for the determination of marks on "public lakes."

The bill, as introduced, thus applied to "public lakes." The term "navigable" was not used. On the floor of the House, however, Representative Joe Barnett moved to amend the bill by adding a new section which stated:

Nothing in this Act shall be construed to affect rights of ownership and use of any lands bordering upon navigable lakes or streams or those portions of such lands between ordinary high water mark and ordinary low water mark.

House Journal 287, January 16, 1978. It is of great interest that the amendment refers to "navigable" waters and not "public lakes." In my view, the Legislature properly found that it could not, by adopting the Act and this amendment, see SDCL 43-17-26, affect any rights of ownership or use of those lands riparian to "navigable" waters. Those rights were set out in existing law. The amendment, however, left open the possibility that rights around non-navigable but public waters could be affected.

Seen in this way the amendment suggests that the Act be read as allowing the Water Management Board to recognize the existence of public non-navigable lakes and to set high and low water marks around them. Furthermore, the Legislature recognized that when those lines were set the public would have the right to use the lands between the low and high water marks just as if the lakes were, in fact, navigable.

Thus, the area between the high and low water mark on "public" but "non-navigable" lakes is available for public purposes including, but not limited to, boating, fishing, swimming, skating, picnicking and summer recreational pursuits. See SDCL 43-17-21.

This analysis is strengthened by a 1981 amendment. In that year, House Bill 1120 proposed repeal of the Barnett amendment of 1978 and the addition of a new section which would state that notice should be given to persons who "own property which might be affected by a water mark determination." Representative Barnett, however, successfully opposed repeal of his 1978 amendment. Instead, the 1978 amendment, as codified at SDCL 43-17-26, was amended in 1981 to change the term "affect rights of ownership or use" to "alter rights of ownership or use." House Journal 258-259, January 21, 1981.

As enacted by the Legislature, the statute retained the 1978 Barnett language as amended. See SDCL 43-17-26. See also, SDCL 43-17-29.

The legislative history of these two acts thus reveals that the Legislature exercised two types of authority. First, the traditional ownership of property was addressed to some degree by the exceptions in the Barnett amendment. These matters were left to existing property law.

Second, the Legislature exercised its police power with regard to both navigable and non-navigable lakes defining these as lakes which could be used for "public purposes." SDCL 43-17-21. Through this recognition the Legislature intended that these lakes be available for use by the public.

In so doing the Legislature exercised its police power over the waters and associated lands to the high water mark. Such regulations are, of course, constitutional unless they deprive the owner of the economically viable use of land. See United States v. Riverside Bayview Homes, Inc., 106 S.Ct. at 459.

Other sections of the Code support this reasoning. For example, SDCL ch. 41-13, which regulates fishing waters, uses the term "water of the state" to define its scope, uses the term "public waters" four times, and also refers to "any particular waters." See SDCL 41-13-1 to 41-13-7, inclusive.

The term "public waters" is used in several other sections in Title 41 dealing with Game, Fish and Parks. See e.g., SDCL 41-2-18(23); 41-3-13; 41-3-14; 41-12-3; 41-12-9; 41-12-9.1; 41-15-16.1. SDCL 41-12-2, on the other hand, refers to "private waters;" SDCL 41-1-1(3) and 41-8-5 refer to "waters of the state;" SDCL 41-12-13 refers to "any waters;" and ARSD 41:04:03:01 defines "meandered water areas." Likewise, when the Legislature defined its authority to regulate watercraft, it did not use the term "navigable waters" but rather used broader terms. For example, jurisdiction over traffic, piloting and navigation of vessels is exercised in "public waters." See SDCL 42-8-1.1(4), (5), (6) and (7); 42-8-2(4). The same chapter also used the term "waters of the state." See SDCL 42-8-3, 48.

Moreover, it is quite important to note that the Legislature has assumed jurisdiction over all the "waters of the state" for the purpose of the control of pollution. See SDCL 34A-2-27. The term "waters of the state" is defined in SDCL 34A-2-2(b) very broadly as follows:

All waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private situated wholly or partly within or bordering upon the state . . . .

Similarly, the state exercises affirmative statutory control of the use of waters with no regard whatsoever for their status as navigable or non-navigable. For example, SDCL 46-1-1 states:

It is hereby declared that the people of the state have a paramount interest in the use of all water of the state and the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection. (Emphasis added.)

Thus, the state water rights law encompasses both surface waters, see SDCL 46-5, some of which are navigable and some non-navigable, and ground waters, see SDCL 46-6, none of which are navigable. See also SDCL 46-1-3.

South Dakota statutes occasionally use the term "navigable waters" or "navigable lakes." See, for example, using the term "navigable," SDCL 5-2-5, 5-2-8, to 43-17-3, and SDCL 43-17-29. Compare, statutes using the term "non-navigable," SDCL 43-17-4, 43-17-13.

It is significant that the Legislature has confined its use of the term "navigable" to situations in which actual ownership of land or property is implicated. Regular use of the term "navigable" in such circumstances and use of terminology such as "public waters" in situations relating to the mere regulation of waters leads to an implication that the Legislature intended that these concepts be kept separate. See SDCL 43-17-26.

Moreover, attention should also be directed to statutes which indicate that the Legislature sometimes intended control over both navigable and non-navigable waters. SDCL 46-5-1.1 states:

No person may obstruct the free navigation of any navigable watercourse within this state. No person, except under lawful authority to do so, may intentionally obstruct, tamper with or interfere with the stage, level or flow of the public waters of this state by any means, including a ditch, drain or dike, so that the stage, level or flow of water in any lake, stream,

river or other public watercourse is raised or lowered or its natural flow interfered with in any way.

The use of the term "navigable waters" in the first sentence of the statute and the term "public waters" in the second sentence quite clearly evidences an intent to exercise regulatory authority over most of the waters of the state.

Thus, it is clear that the Legislature has undertaken the regulation of various waters of the state for a wide variety of purposes, in many instances regardless of the navigability of such waters. In short, use of the waters is regulated, irrespective of the ownership of the underlying land. Such a division is not directly dealt with in state case law, but is hinted at in Parsons v. City of Sioux Falls, 272 N.W. 288, 291 (S.D. 1937), and is certainly supported by the reasoning employed in Flisrand and subsequent cases. Whether navigable or not, in my opinion, Lake Thompson is a "public lake" and thus the use of these "waters of the state" are subject to legislative regulation, whoever owns the lake bed. Thus, while some question the viability of the state's navigability definition in a setting which involves questions of land ownership, I am of the view that the state definition of navigable is proper in terms of defining permissible public use of waters.

Therefore it is my opinion that the Legislature could validly provide for public use of the waters which overlie privately-owned land, as it did in SDCL 43-17-29. Your third question seeks to identify whether the Legislature may be limited in restricting use of such waters by virtue of the public trust doctrine.

**IN RE QUESTION NO. 3:**

That South Dakota has a public trust doctrine cannot be doubted. One aspect of the public trust is specifically referenced in Flisrand and Hillebrand. The Court in South Dakota Wildlife Federation, supra, held that the doctrine did not apply to establishing the OHWM, recognizing that the public trust was subject to change in relation to changes in the character of the lake. That case, however, does not question the existence of the public trust. Further, the public trust is specifically mentioned in SDCL 34A-10-1; is strongly implied in SDCL 46-1-1, 46-1-2, and 46A-1-1; and can be implied from a variety of sections in Title 41 on Game, Fish and Parks.

It is equally as clear, however, that the full contours of the public trust doctrine in South Dakota have not yet been defined. Flisrand makes clear that a riparian owner does not have

the right to interfere with the public's use of the waters of a public lake for "navigating, boating, fishing, fowling and like public uses." Flisrand, supra, 152 N.W. at 801. The nature of the state's interest in the bed of the lake, if any, is also specified in Flisrand. SDCL 43-17-21 also identifies public purposes contemplated on public lakes. Further, SDCL 34A-10-1 speaks to "the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." See also SDCL 34A-10-5; 34A-10-7 to 34A-10-10, inclusive. Our Supreme Court, however, has never been called upon to determine the extent of the public trust doctrine as it relates to the public's right to use water outside of title questions. Therefore, not surprisingly, it has never opined on what limitations might restrict the Legislature when acting in its capacity as public trustee.

The question then becomes whether SB 192 is consistent with the public trust doctrine, at least as articulated to date. To answer that question it is necessary to determine what SB 192 provides. SB 192 retains the substance of SDCL 43-17-2 and 43-17-29, and adds three new sections which deal with access to taxable property which lies above the water's edge and above the OHWM of the navigable lake, when at least five thousand acres of private land have been inundated for at least three years.

Although the Legislature's intent is not entirely clear, it appears that the Legislature intended to deal with the subject of the use of inundated land, and did not address the question of the use of the water. Section 3 of SB 192 speaks to access to

1)Taxable property which has been
2)inundated for at least 3 years, and
3)borders the water's edge, and
4)lies above the OHWM of a navigable lake where
5)at least 5,000 acres of private land is inundated.

The section goes on to provide:

A landowner who chooses to deny access to his inundated lake property pursuant to this section shall request the Department of Game, Fish and Parks to mark the boundaries of the effected property, and the Department shall, upon request, clearly mark the restricted area so that the markings are plainly visible and understandable to the user of the lake.

Similarly, Section 4 of SB 192 speaks to private, taxable,inundated property and public access thereto. Section 5 also deals with "public access to taxable private lands."

Frankly, I am unable to read these three new provisions as impacting the public's right to use the water of the lake. While that may well be what some members of the Legislature intended, the plain words of the statute do not permit that interpretation. Water is not "taxable property;" neither is it privately-owned property. See SDCL 46-1-3. Furthermore, water can hardly be thought of as "inundated property."

Senate Bill 192, viewed in that light, does not, in my opinion, raise public trust concerns. The Legislature was simply describing what use a landowner can make of his privately-owned lands in those instances where the lands are covered by an overabundance of public water. Because the statute, by its terms, deals with those lands located above the OHWM, it does not appear to me that the public trust is implicated. Therefore, while SB 192 would allow a landowner to keep the public off of his lands, it would not authorize the landowner to attempt to restrict the use of the public waters. In my opinion serious public trust questions would be raised if SB 192 were interpreted in a way that allowed a private landowner to restrict the use of public waters.

Finally, you question what uses the landowner may make of his inundated property. Assuming that the uses contemplated are otherwise consistent with law, it is my opinion that the landowner could make any use of the inundated property which does not interfere with the public's right to use the waters.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL

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