

1967 O. A. G.

the legislative branch and the judicial branch. While it is true that the government of 1967 is far more complicated in Indiana than was the government of 1851, the manifold precedents established in this area could be carefully analyzed. A public policy could then be enunciated which would ease the minds of members of the Legislature who might be serving on some non-paying body in a local community as a public service or some minimal position such as a notary public in furtherance of business necessities. Even more important, the citizenry would then have a further test when measuring the qualification of any person who stands for elective office, not only in the General Assembly but in any other division of our state, county or municipal government.

OFFICIAL OPINION NO. 2

January 18, 1967

**STATE OFFICERS—Governor as Having Power
to Alienate State-Owned Realty.**

Opinion Requested by Hon. Roger D. Branigin, Governor.

This is in response to your request for an Official Opinion concerning the power of the federal government to acquire the Indiana Dunes State Park.

The United States has the power under the Supremacy Clause of Art. 6, of the Constitution of the United States to condemn lands owned by a state even though such lands are already dedicated to a public use. *United States v. Carmack*, 329 U.S. 230, 91 L. Ed. 209, 67 S. Ct. 252 (1946), *United States v. Certain Parcels of Land*, 314 F. 2d 825 (7th Cir. 1963), *Linning v. United States*, 328 F. 2d 603 (5th Cir. 1964), *United States v. South Dakota*, 212 F. 2d 14 (8th Cir.

OPINION 2

1954), *Minnesota v. United States*, 125 F. 2d 636 (8th Cir. 1942). The only possible limitation on this power is the principle of construction that property devoted to a prior public use cannot be taken for another public use except by virtue of specific legislation which authorizes it to be done in express words or by necessary implication arising from the subject matter. *City of Davenport v. Three Fifths of an Acre of Land*, 252 F. 2d 354 (7th Cir. 1958), *United States v. 929.70 Acres of Land*, 205 F. Supp. 456 (D.S.D. 1962), *United States v. .8677 Acre of Land*, 42 F. Supp. 91 (E.D.S.C. 1941), *United States v. Certain Parcels of Lands*, 30 F. Supp. 372 (D. Md. 1939).

The act under consideration for the establishment of the Indiana Dunes National Lakeshore, P. L. 89-761, 80 Stat. 1309, 16 U.S.C. §§ 460u—460u-9, expressly provides for the acquisition of property by condemnation. Acquisition, however, by the Secretary of the Interior of the property comprising the Indiana Dunes State Park is expressly limited. The Act provides:

“. . . The Indiana Dunes State Park may be acquired only by donation of the State of Indiana, and the Secretary is hereby directed to negotiate with the State for the acquisition of said park.”

The result of this express limitation is that the State has full discretion in the matter of the disposal of its property encompassing the park. It may retain the park in its present situation or it may give it to the United States. If the State refuses to make such a gift, it would not be subject to federal condemnation.

The act does not define or describe “Indiana Dunes State Park.” The State could, therefore, acquire other property and include it in the state park, thereby precluding federal condemnation of such property for use in the Indiana Dunes National Lakeshore project. The terms “Indiana Dunes State Park,” under the Act, must be interpreted to mean that land within the state park at the date of filing of an action by the federal government for condemnation.

The question arises, however, whether the State has already consented to federal acquisition of the property under Burns § 62-1021, in the absence of consent by the Governor.

Burns § 62-1021, provides:

“The consent of the state of Indiana is hereby given to the acquisition by the United States of America by purchase, gift, or condemnation with adequate compensation such lands in the state of Indiana as the United States of America may desire to purchase and acquire, pursuant to any act of congress for the acquisition, establishment, maintenance, and development of fish hatcheries, wild life preserves, forest preserves, or for agricultural, recreational, or experimental uses.”

The power to dispose of real property owned by the State rests with the Legislature. 1941 O.A.G., pp. 187, 190. See also *Federated Income Properties, Inc. v. State*, 82 Cal. App. 2d 893, 187 P. 2d 460 (1947). State officers cannot dispose of real property owned by the State unless the power and authority is conferred by express statutory provisions. *McCaslin v. State ex rel. Auditor*, 99 Ind. 428 (1885), *State v. Portsmouth Savings Bank*, 106 Ind. 435, 7 N.E. 379 (1886); 1953 O.A.G., p. 100.

The question under consideration however, does not involve the power of disposal, but the authority of disposal. The Legislature has under Burns § 62-1021, made express provision for the disposal of the State property by conveyance to the United States. The Legislature is silent, however, in § 62-1021, on who the officer shall be disposing of the property. In the face of such silence that officer must be the Governor.

The executive power of the State is vested in the Governor under Art. 5, § 1, of the Constitution of Indiana. Under that provision and Art. 3, § 1 of the Indiana Constitution, embracing the separation of powers doctrine, the power to execute the laws is vested in the Governor. *Tucker v. State*, 218 Ind. 614, 35 N.E. 2d 270 (1941). 1966 O.A.G., p. 168.

The court in the *Tucker* case said at page 681, at 295 of 35 N.E. 2d:

OPINION 2

“The Legislature does not have general authority over the property of the state, and that it has such general authority has never elsewhere been asserted to our knowledge. The management of the state’s property is an executive function. The General Assembly may legislate concerning the state’s property, the court may adjudicate concerning it, but the Governor, vested with the executive power, must manage the state’s property.”

The Governor alone has the power to execute Burns § 62-1021. Under this statute execution would include the negotiation, agreement, and conveyance of the state’s property to the United States.

The statute creating the Indiana Dunes State Park is silent concerning its disposal. Acts 1923, ch. 94, Burns §§ 60-808-811. Burns § 62-1021 would, therefore, govern its disposal.

Should the Governor, as the officer empowered to execute disposal of the state park, consider conveyance to the United States to be contrary to the best interests of the State, he could reject such proposed dispositions. Burns § 62-1021 does not automatically vest title to the property in the United States. Until the Governor signs and executes the deed, title remains in the State.

The federal statute conforms to this procedure since the act limits federal acquisition to consent by the State. To say that title would automatically vest in the United States under Burns § 62-1021 would raise a conflict between the State and Federal statutes contrary to the Supremacy Clause of Art. 6, of the Constitution of the United States, since the federal statute envisions negotiation and agreement on the conveyance of the property.

The Governor’s acquiescence is required, however, by Indiana law, thereby making the Supremacy Clause question academic.