
No. 46A05-1404-PL-00146

IN THE INDIANA COURT OF APPEALS

LBLHA, LLC, et al.,

Appellants,

v.

TOWN OF LONG BEACH, INDIANA, et al.,

Appellees.

On Appeal from the LaPorte Circuit Court
Case No. 56C01-1212-PL-1941
Honorable Thomas J. Alevizos, Judge

**BRIEF OF AMICUS CURIAE PACIFIC LEGAL
FOUNDATION IN SUPPORT OF APPELLANTS**

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 41 of the Indiana Rules of Appellate Procedure, Pacific Legal Foundation (PLF) respectfully files this brief amicus curiae in support of Appellants LBLHA, LLC, Margaret L. West, and Don H. Gunderson. A verified motion for leave to appear as amicus curiae and file a brief on behalf of Appellants is pending before this Court.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. PLF has numerous supporters and contributors nationwide, including in the State of Indiana.

Since 1973, Pacific Legal Foundation has litigated in support of property rights. PLF has participated, either through direct representation or as amicus curiae, in every major property rights case heard by the United States Supreme Court in the past three decades, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. U.S. Evtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has also been involved with many cases raising similar questions to those presented in this case. *See, e.g., State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 955 N.E.2d 935 (Ohio 2011); *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009) (addressing a legislative expansion of public beach access effecting a taking of private property); *Evtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.*, 187 P.3d 888, 897 (Cal. 2008) (addressing a proposed expansion of the public trust doctrine over all wildlife). Moreover, PLF attorneys have contributed to the body of scholarly literature on the public trust doctrine and the background principles of property law. *See, e.g.,* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and*

the (Mis)Use of Investment-Backed Expectations, 36 Val. U. L. Rev. 339 (2002); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Env'tl. Aff. L. Rev. 1 (2002).

PLF's attorneys are familiar with the legal issues raised by this case. PLF appears in this action to offer guidance to this Court on background principles of property law and on the proper application of the public trust doctrine. In furtherance of PLF's continuing mission to defend private property rights, PLF urges this Court to avoid expanding the scope of Indiana's public trust doctrine.

INTRODUCTION

The present case involves a territorial dispute over the strip of land between Lake Michigan's administratively-set "ordinary high watermark," and the water's edge. The State of Indiana, and Long Beach, have at times asserted that, under the public trust doctrine, the state owns the bed of the Lake, and the land beyond the water's edge, all the way up to the "ordinary high watermark" as fixed by 312 Indiana Administrative Code 1-1-26(2).¹ Yet Indiana law has never held the public trust to extend beyond the water line of the Lake for a simple reason: The administrative "ordinary high watermark" is not an *actual* high watermark, but only a legal fiction, because Lake Michigan is non-tidal.² Both statutory and common law hold that the public trust entails only the bed of the Lake, and extends no farther than the point at which the water meets the shore.

¹ 312 Indiana Administrative Code 1-1-26(2) provides in pertinent part:

Sec. 26. "Ordinary high watermark" means the following: . . .

(2) Notwithstanding subdivision (1), the shore of Lake Michigan at five hundred eighty-one and five-tenths (581.5) feet I.G.L.D., 1985 (five hundred eighty-two and two hundred fifty-two thousandths (582.252) feet N.G.V.D., 1929).

² See National Oceanic and Atmospheric Administration, *Do the Great Lakes Have Tides?*, available at <http://oceanservice.noaa.gov/facts/gltdes.html> (last visited Sept. 22, 2014) ("... the Great Lakes are considered to be non-tidal.").

Over the last several years, the State has changed its position as to where the public trust ends and unencumbered private property begins. As the trial court order recounts, the Indiana Department of Natural Resources (IDNR) “posted a discussion concerning navigable waterways and ordinary high watermarks on its website.” *See* Appellants’ App. 16. The discussion asserted that the State of Indiana “owned” property abutting Lake Michigan below the administratively-set “ordinary high watermark.” *Id.* Then, on October 10, 2012, the IDNR changed the posted discussion concerning navigable waterways and “ordinary high watermarks,” stating that: “The ordinary high watermark is the line on Lake Michigan and other navigable waterways used to designate where regulatory jurisdiction lies *and in certain instances to determine where public use and ownership begins and/or ends.*” *Id.* (emphasis added).

Based on the initial IDNR discussion that included a claim of state ownership of the land below the administratively-set, fictional “ordinary high watermark,” in July, 2010, Long Beach passed a resolution recognizing that, per the IDNR, the dividing line on Lake Michigan between state and non-state ownership was the administratively-set “ordinary high watermark.” *Id.* Further, the resolution stated that the town police department would only enforce private property restrictions above the administratively-set “ordinary high watermark.” *Id.* Although Long Beach modified these resolutions after the IDNR modified its position, Long Beach continues to leave enforcement of the law unclear to the property owners. *Id.* at 3.

The Appellants, property owners in the town of Long Beach who own property abutting Lake Michigan, and have deeds which show ownership to the Lake Michigan water line, challenged Long Beach’s refusal to enforce trespassing laws below the administratively-set “ordinary high watermark” to the actual water line, and contended that Long Beach’s failure to enforce the law

amounted to a taking of their property. The trial court rejected that challenge for failure to join the State of Indiana in the lawsuit. *Id.* It is that ruling before the Court in this appeal.

Contrary to the lower court’s conclusion, the courts do not need the State of Indiana before them to answer the question of ownership of the land between the “ordinary high watermark” and the Lake Michigan water line, a question that arises both in Long Beach and everywhere else in the State where land borders Lake Michigan. This Court can recognize the proper scope of the Lake Michigan public trust, and recognize where that trust ends and where unencumbered private property begins—at the water line of Lake Michigan, and not at a fictional, administratively-set “ordinary high watermark.”

Though courts have previously discussed the public trust’s application in the bed of Lake Michigan,³ no Indiana decision has ever seriously examined the question of where the boundary lies between public trust and unencumbered private property. Yet the historical public trust doctrine at common law provides ample guidance to this Court in determining the demarcation line, and the Court should use this case to recognize the correct application of the law to a question that vexed the State, the town of Long Beach, and the Appellants.

SUMMARY OF ARGUMENT

This case involves a territorial dispute over the strip of land between Lake Michigan’s administratively-set “ordinary high watermark,” and the water’s edge. The State of Indiana, and the Appellee Town of Long Beach (“Long Beach”), have at times asserted that, under the public trust

³ See, e.g., *United States v. Carstens*, 982 F. Supp. 2d 874, 878 (N.D. Ind. 2013) (asserting that “the beach area” between the “ordinary high watermark” and the water’s edge is held by the state pursuant to the public trust doctrine, without citation to authority for the assertion); *Garner v. Michigan City*, 453 F. Supp. 33, 35 (N.D. Ind. 1978) (stating in dicta that Indiana holds title up to “ordinary high watermark” based on federal law).

doctrine, the state owns the bed of the Lake, and the land beyond the water's edge, all the way up to the "ordinary high watermark" as fixed by 312 Indiana Administrative Code 1-1-26(2). Those assertions of ownership are incorrect.

In fact, recognition of a public trust up to the administratively-set "ordinary high watermark," along the shores of Lake Michigan, would represent an expansion of the public trust beyond its original scope as recognized by the original thirteen states at the time of the ratification of the U.S. Constitution in 1787. Moreover, expansion of the public trust doctrine up to the administratively-set "ordinary high watermark," along the shores of Lake Michigan, would unconstitutionally take the Appellants' private property in violation of the Fifth Amendment, since this expansion of the public trust would take the private property of those whose Indiana property borders Lake Michigan—like the Appellants in this case. This Court should determine the scope of the Lake Michigan public trust in a manner consistent with the historical common law doctrine, so as to avoid negating previously recognized property rights in contravention of the Fifth Amendment.

ARGUMENT

I

EXPANDING PUBLIC TRUST BEYOND ITS EXTENT AT THE TIME THE U.S. CONSTITUTION WAS RATIFIED WOULD ABROGATE CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY RIGHTS

The scope of Indiana's public trust is a question of the state's property law; however, this Court is not free to define the scope of the public trust in any manner it should choose. The Fifth Amendment places a constraint upon all branches of state government through the Fourteenth Amendment. Indiana's public trust should be defined no more expansively than the public trust was

understood to be historically at common law when Indiana attained its sovereign powers, because any expansion would effect a compensable taking.

A. The Fifth Amendment Prohibits the Uncompensated Taking of Private Property Rights Through Expansion of the Public Trust

The question of where the Lake Michigan public trust ends and where unencumbered private property begins must be resolved in a manner consistent with the Fifth Amendment of the United States Constitution, which provides that government may not take private property without just compensation. Although as a general matter property rights are determined by state law, the background principles of property law cannot be changed in such a way as to negate previously recognized rights without the state incurring liability for a constitutional taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 (1992) (“We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.”).

The U.S. Supreme Court recently underscored that point in *Stop the Beach Renourishment*, as a majority of the Justices agreed that judicial redefinition of the background principles of a state’s property law would raise federal constitutional problems. *See Stop the Beach Renourishment v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (Justice Scalia, writing on behalf of Chief Justice Roberts, Justice Thomas, and Justice Alito, stated that the Fifth Amendment prohibits state courts from redefining property rights out of existence unless compensation is paid); *see also id.* at 2614 (Justice Kennedy and Justice Sotomayor stating that “a judicial decision . . . [eliminating] an established property right, [may be] set aside as a deprivation of property without due process of law.” (internal quotations and citations omitted)).

Here, Long Beach argues, or has argued at times,⁴ that the public trust extends all the way to the administratively-created “ordinary high-water mark;” however, that demarcation line encroaches upon property previously recognized as private and unencumbered, and thereby takes property without compensation, in violation of the Fifth Amendment. Though Long Beach previously contended that the public trust extended to this “ordinary high watermark” due to no action on its part, but rather the State’s action via the IDNR,⁵ that contention is irrelevant. The public trust was established as of the time of Indiana’s admission to the Union, and neither the state nor any local government has authority to alter it.

B. Indiana’s Public Trust Is Constrained by the Historical Common Law Origins of the Doctrine

Under English common law, the land beneath the seabed was held by the sovereign in trust for public navigation and fishing. Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 Alb. L. Rev. 623, 628 (1998). The public trust was limited to the land beneath the waters since the doctrine was first set forth in Roman law out of recognition that the land beneath the sea was unsuitable for private use. David C. Slade, *Putting the Public Trust Doctrine to Work* xvii (National Public Trust Study, 1990); *see also* George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. Env’tl. Aff. L. Rev. 307, 310 (2006) (In 530 A.D. the Institutes of Justinian pronounced that watercourses should be protected from private acquisition.). This common law tradition passed to the original thirteen states at the time they attained sovereignty over the beds of the sea following the revolution. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842) (United

⁴ See Appellants’ App. 16.

⁵ See Appellants’ App. 16.

States Supreme Court held that the crown's interest in tidelands passed to New Jersey upon the American Revolution).

As had long been the rule at common law, the public trust acquired by the original thirteen states encompassed only the bed of tidal lands, and the boundary of the public trust was demarcated at the mean high-tide mark, as measured over an 18.6 year period in order to account for the full lunar cycle effecting the ebb and flow of the tides. See Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 23 (2010). Likewise, the Supreme Court has recognized that the public trust doctrine applies in the Great Lakes by the same terms as it applied historically at common law when the thirteen original states ratified the Constitution, because newly admitted states entered the Union upon equal footing with the others. *Ill. Cent. R.R. v. Ill.*, 146 U.S. 387, 434 (1892) (holding that there was no rationale for differentiating between traditional tidal water bodies and the Great Lakes given the fact that they served the same historical public purposes of fishing and commerce-driven navigation). For navigable waters not impacted by tides, like the Great Lakes, early American common law generally defined the ordinary mean high watermark as the point on the shore "where the presence and action of the water are so common and usual as to leave a distinct mark." Kilbert, 58 Clev. St. L. Rev. at 23.

Accordingly, Indiana attained a public trust in the land beneath Lake Michigan upon its admission into the Union, and the scope of that trust was no greater than the scope of the public trust recognized at common law at the time the Constitution was ratified in 1787. *Ill. Cent. R.R.*, 146 U.S. at 436-37 (public trust in the Great Lakes is subject to the same limitations as the public trust had always been at common law). As such, this Court should reject any demarcation line which expands the public trust beyond its historical common law scope, because Indiana's sovereign powers can be no greater than those of the original states. Any expansion of the public trust, beyond the scope

of the powers originally acquired on equal footing, would redefine the public trust and annihilate private property rights along the Lake's shore in violation of the Fifth Amendment.

II

THE DEMARCATION LINE BETWEEN PUBLIC TRUST AND PRIVATE PROPERTY IS CONSTANT, REGARDLESS OF MODERN USES

Long Beach cannot justify an expansion of the public trust to accommodate modern uses of the Lake, such as recreational uses or environmental protection. As set forth above, Indiana's public trust in the waters of Lake Michigan is based upon the Equal Footing Doctrine, which allowed Indiana to enter the Union in 1816 with the same sovereign powers that the original thirteen states held at common law when the Constitution was ratified. *Ill. Cent. R.R.*, 146 U.S. at 436-37. Therefore, the rules for demarcation of the public trust stand as they did historically. No reading of the law can justify moving the demarcation line between private and public land landward in consideration of modern uses of the Lake, because those activities were not recognized as public trust uses historically at common law. Kilbert, *supra*, at 22.

Under English common law, the public trust existed only for two limited public purposes: (a) fishing and (b) navigation. Smith & Sweeney, *supra*, at 312 (“[T]he public trust doctrine officially emerged as an instrument of federal common law to preserve the public’s interest in free navigation and fishing.”). As the public trust doctrine was applied in the original thirteen states, a third use was understood as bound up with the doctrine as well: commerce. Janice Lawrence, Lyon and Fogerty: *Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138, 1140 (1982) (“Traditionally, the doctrine allowed the public to use trust lands, even if privately owned, for navigation, commerce, and fisheries.”). Commerce was vital to the development of our young nation, and was conducted largely through navigation over the waters of the United States, which

served as natural public highways connecting the states and foreign nations. As such, commerce was naturally associated with the already recognized public use of navigation in public trust waters.

Those were the three recognized uses of the public trust at the time the Constitution was ratified, and thus the only three public uses upon which the Lake Michigan public trust may be based. Kilbert, *supra*, at 6. Though the public may now choose to use the Lake for recreational purposes, or restrict its use to further environmental goals, these modern concerns simply have no bearing upon the rules for demarcation, which were established long ago.

III

TO MOVE PUBLIC TRUST DOCTRINE TO AN ADMINISTRATIVELY-CREATED “ORDINARY HIGH WATERMARK” WOULD EFFECT A TAKING WITHOUT COMPENSATION

While the State may confine its public trust to the land presently submerged by water, or to any point below where the water line makes a mark, it may not expand the public trust upland of that mark without effecting a taking in violation of the Fifth Amendment. *Barney v. Keokuk*, 94 U.S. 324, 338 (1876) (The states determine the rights and title in the soil below the ordinary high watermark of navigable waters.). Because the State attained its sovereign powers under the Equal Footing Doctrine, it can assert dominion over submerged lands only to the extent that the original states could historically at common law. Since Lake Michigan is a non-tidal waterway, the State and Long Beach are confined to a high watermark “where the presence and action of the water are so common and usual as to leave a distinct mark.” Kilbert, *supra*, at 23.

Lake Michigan, like the other Great Lakes, is distinct from traditional public trust waters because it is only marginally affected by lunar tides—it is, in fact, considered to be non-tidal. Unlike traditional tidal waters, Lake Michigan does not fluctuate drastically throughout the day, absent

extreme events. *See* footnote 2, *supra*. As a result of these differences in character, the shores of the Lake, unlike the shores of traditional tidal waters, can be put to productive private uses, which do not interfere with the historically recognized public uses of the trust. *See* Lawrence, *supra*, at 1148.

Historically, the rationale supporting demarcation at the mean high-tide mark for tidal waters was based upon the fact that the land below that mark was submerged multiple times throughout the day by saltwater. *Id.* (“[B]ecause of their high salt content, tidelands cannot be used for many purposes other than those incident to navigation . . .”). As such, the land below the mean high-tide mark was viewed as unsuitable for private use, but the land below Lake Michigan’s administratively-created “high-water mark” is perfectly suitable for private use to the point where the water meets the land because the water does not rise and fall drastically, absent extreme events. *Id.*

As such, the shores of the Lake have historically been used for such productive private purposes down to the water’s edge, in a way that the beaches of traditional tidal waters could not have been used. *See, e.g., Hogg v. Beerman*, 41 Ohio St. 81, 98-99 (1884) (discussing historical private uses along the water’s edge of Lake Erie including the construction of structures and agricultural uses). Thus the historical rationale for the establishment of the demarcation line as a constant at the mean high-tide mark *in traditional tidal waters* does not apply logically to non-tidal bodies like Lake Michigan; rather, the rationale cuts in favor of confining the public trust to the water’s edge since the lake is non-tidal.

Moreover, public policy has historically encouraged the productive use of land in the State, as demonstrated by the Northwest Ordinance, which authorized and encouraged the settlement of Indiana. *See* James H. Madison, *Land and Liberty: The Ordinances of the 1780s* 8 (1987), available at <http://www.jstor.org/pss/25162560> (last visited Sept. 22, 2014) (“The commitments made in the

Northwest Ordinance encouraged westward movement and ensured that pioneering would take place within the political and psychological boundaries of the American nation.”). As such, the demarcation line should be interpreted consistent with that historic land use policy, so as to allow individuals to put the land to its most productive use.

IV

THE PUBLIC TRUST DOCTRINE DOES NOT APPLY TO PROPERTIES PRIVATELY OWNED BEFORE INDIANA’S ADMISSION TO THE UNION

There is a carve-out exception to the public trust doctrine for property privately owned before the State joined the Union. *See Hughes v. State of Wash.*, 389 U.S. 290, 291 (1967) (holding that property owner in Washington who traces title to federal grant that pre-dated statehood is entitled to accretions on her land along the ocean as per federal law, and the state does not own accretions as per Washington state law). Thus, wherever the demarcation line stands as a general matter of state law, the public trust doctrine cannot be applied to divest lakeshore landowners of property privately held before Indiana entered the Union in 1816.

Indeed, Indiana’s public trust doctrine could not have divested private landowners of their property, because Indiana only acquired its sovereign powers over the public trust through a federal act—its entrance into the Union by virtue of the Equal Footing Doctrine—which, necessarily, had to comport with the Fifth Amendment’s prohibition against government actions effecting the uncompensated taking of private property. *See Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987) (an established federal conveyance prior to statehood will defeat state’s claim of title to submerged land).

Moreover, the Northwest Ordinance, which governed Indiana at the time it attained statehood, provided for the protection of private property against such governmental takings as well.

Northwest Ordinance of 1787, art. 2 (“[S]hould the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.”).⁶ Accordingly, the public trust cannot encumber or divest any property in the State if the landowner can demonstrate a chain of title dating back before the State’s admission into the Union, unless the owner is fully compensated.

CONCLUSION

Pacific Legal Foundation respectfully urges this Court to determine the scope of the Lake Michigan public trust in a manner consistent with the historical common law doctrine, as recognized by the original thirteen states at the time they entered the union, so as to avoid negating previously recognized property rights in contravention of the Fifth Amendment.

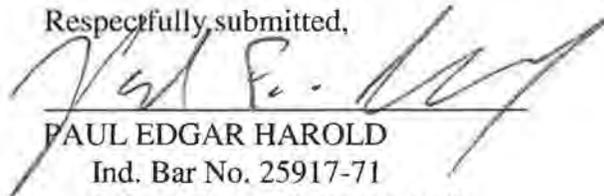
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⁶ Available at http://avalon.law.yale.edu/18th_century/nworder.asp, last visited Sept. 22, 2014.

WORD COUNT CERTIFICATE

I verify that this brief contains 3,925 words.

A handwritten signature in black ink, appearing to read 'Mark Miller', written over a horizontal line.

MARK MILLER

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was filed with the Clerk this ^{17th} day of October, 2014, via Federal Express. I further certify that a true and correct copy of the foregoing brief has been served this day via first-class mail, postage prepaid, upon each of the following:

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