

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
ROBERT MERRILL, TRUSTEE, et al.,

: Case No. 2009-1806
:

Appellees,

: On Appeal from the
: Lake County

and

: Court of Appeals,
: Eleventh Appellate District

HOMER S. TAFT,

:
: Court of Appeals Case

Appellee / Cross-Appellant,

: Nos. 2008-L-007, 2008-L-008
: Consolidated

and

L. SCOTT and DARLA J. DUNCAN,

Appellees,

v.

STATE OF OHIO, DEPARTMENT OF
NATURAL RESOURCES, et al.,

Appellants / Cross-Appellees,

and

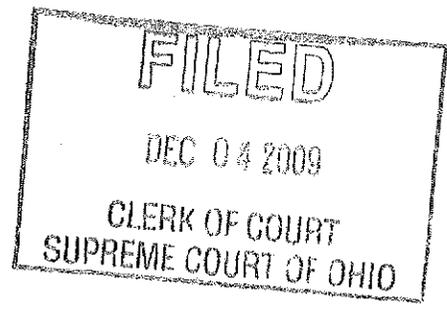
STATE OF OHIO,

Appellant / Cross-Appellee,

and

NATIONAL WILDLIFE FEDERATION, et
al.,

Appellants / Cross-Appellees.



MEMORANDUM OF APPELLANTS
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AND OHIO ENVIRONMENTAL COUNCIL
OPPOSING JURISDICTION TO CROSS-APPEAL

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INTRODUCTION

The court should deny jurisdiction over the cross-appeal filed by Appellee / Cross-Appellant Homer S. Taft (“Taft”). Neither of Taft’s two propositions of law warrants review. His first proposition – that the low water mark is the boundary of the State of Ohio’s public trust interest in Lake Erie – utterly lacks foundation. He has failed to muster a single authority that supports this unheard-of proposition. His second proposition – that the intervention of Appellants / Cross-Appellees National Wildlife Foundation and Ohio Environmental Council (“the conservation appellants”) was improperly allowed – involves the application of settled law to a particular set of facts. He has failed to establish that the trial court abused its discretion in allowing conservation appellants to intervene in a matter that directly threatens to extinguish their historic use of Lake Erie lands within the boundary of the public trust. Accordingly, Taft’s propositions do not deserve any consideration by this court.

STATEMENT OF THE CASE AND FACTS

Conservation appellants take this opportunity to correct a number of factual errors Taft committed. First, the National Wildlife Federation (“NWF”) and the Ohio Environmental Council (“OEC”) are nonprofit conservation groups organized to protect natural resources and wildlife on behalf of their members, as the court of appeals found based on affidavits in the record. *Merrill v. Ohio*, 11th Dist. Nos. 2008-L-007, 2008-L-008, 2009-Ohio-4256, at ¶112-113. Taft has produced no evidence in the record whatsoever that supports his bald assertion that NWF and OEC are “political action” groups. Memorandum of Cross-Appellant Homer S. Taft in Response to Appellants’ Memorandums and in Support of Jurisdiction for the Cross-Appeal (“Taft Memorandum”) at 4.

Second, this case is not a run-of-the-mill real estate boundary dispute solely between private parties and the State of Ohio, as Taft claims. Taft Memorandum at 3-4, 25. Rather, it is a dispute about the boundary of the public trust in Lake Erie, which necessarily affects the public's use of the lake. The location of that boundary is not governed by real estate law, but by the public trust doctrine, because Lake Erie is not a parcel of real property, but a navigable body of water.

Third, the conservation appellants sought relief in their own right; they did not merely copy the state's request for relief, a charge that Taft once again fails to substantiate in any way. Taft Memorandum at 25. Conservation appellants "sought to intervene since the relief requested by [the plaintiffs-appellees], if granted, would extinguish the rights of its [sic] members to make recreational use of the shore along Lake Erie below the ordinary high water mark and would have a direct and substantial adverse impact upon the recreational use and aesthetic enjoyments of such shorelands." *Merrill v. Ohio, supra*, 2009-Ohio-4256, at ¶114. In their counterclaim, conservation appellants sought declaratory relief that would preserve their access to and continued use and enjoyment of the lands below the ordinary high water mark of Lake Erie.

Fourth and finally, the conservation appellants did not inject new issues into this case or assert a right to unrestricted recreational activities, contrary to Taft's contention. Taft Memorandum at 2, 4, 25. Conservation appellants only addressed the three questions of law certified by the trial court before it granted their intervention. Those questions concerned the boundary of Lake Erie held in public trust by the State of Ohio; the method for locating that boundary, if it is the ordinary high water mark; and the respective rights and responsibilities of the plaintiff-appellee class members, the State, and the people of the state in Lake Erie. *See Merrill v. Ohio, supra*, 2009-Ohio-4256, at ¶11-14. The people's right to continue their

traditional recreational use of the shorelands below the ordinary high water mark of Lake Erie certainly comes within the ambit of those questions; conservation appellants explicitly gave their desire to protect that right as their reason for seeking intervention.

TAFT'S CROSS-APPEAL LACKS PUBLIC OR GREAT GENERAL INTEREST

- A. Taft's claim that the low water mark is the boundary of the State of Ohio's public trust interest in the waters of Lake Erie does not warrant review because it is baseless.

Taft did not cite a single Ohio case holding or suggesting that the low water mark is the boundary of the state's public trust interest in Lake Erie. He did not cite a single Ohio case containing the words "low water mark" or associating those words with the public trust in Lake Erie. This is because none exist.

Taft did not even claim that an Ohio case has held or suggested that the low water mark is the boundary of the public trust in Lake Erie. His claim that other jurisdictions have held that the low water mark is the boundary of the public trust in the Great Lakes is untrue.

Taft based his claim primarily on a case that did not even involve the public trust. In *Massachusetts v. New York* (1926), 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838, the State of Massachusetts claimed that it acquired title to certain upland and adjacent shoreland along Lake Ontario in the State of New York by treaty, and that it retained title to the shore, meaning the land lying between the ordinary high and low water marks, after Massachusetts later granted the adjacent upland bounded by the "shore" of the lake to private parties. *Id.* at 271 U.S. at 91-92.

The Court explicitly stated that the dispute did not involve an attempted conveyance of a state's interest as trustee for the public, but the conveyance of a state's proprietary interest. *Massachusetts v. New York*, 271 U.S. at 91-92 ("We are not dealing here with the disposition of the jus publicum, but with land held by Massachusetts in private ownership and granted by it to private persons."). Thus, the Court's ruling that Massachusetts conveyed to private parties *title*

to the low water mark of Lake Ontario was not a ruling that the *public trust* extends only to the low water mark. The Court expressly held that jus publicum was not at issue in the case.

The distinction between a state's public and private personas with respect to its trusteeship of the navigable waters of the Great Lakes is a distinction that Taft does not grasp. In a Great Lake state's capacity as sovereign, it holds the navigable waters of a Great Lake and the lands beneath such waters in trust for the public, so the people may use them for purposes including navigation, commerce, and fishing, unobstructed by private persons; this is the state's jus publicum interest. *Illinois Central R. Co. v. Illinois* (1892), 146 U.S. 387, 436-37, 452, 13 S.Ct. 110, 36 L.Ed. 1018; *State v. Cleveland & P. R. Co.* (1916), 94 Ohio St. 61, 77, 113 N.E. 677 (Lake Erie); 2000 Ohio Atty.Gen.Ops. No. 2000-047, at 4 (Lake Erie). In a Great Lake state's capacity as proprietor, it holds title to the navigable waters of a Great Lake and the lands beneath such waters; this is the state's jus privatum interest. *Illinois Central*, 146 U.S. at 452; 2000 Ohio Atty.Gen.Ops. No. 2000-047, at 4 (Lake Erie).

Although a Great Lake state may recognize private property rights or grant its jus privatum title in the lands beneath the navigable waters of a Great Lake after statehood under certain limited circumstances, it cannot dispose of its jus publicum interest in such lands under any circumstances. *Illinois Central*, 146 U.S. at 452-54; *State v. Cleveland & P. R. Co.*, 94 Ohio St. at 80 (Lake Erie); 2000 Ohio Atty.Gen.Ops. No. 2000-047, at 4 (Lake Erie). A disposition of the jus privatum in the lands beneath navigable waters of a Great Lake therefore has no effect on the state's remaining dominant jus publicum in such lakelands. *Id.* at 5.

Thus, even were Taft correct that the courts in some Great Lakes states have established the low water mark as the boundary of private title (jus privatum) adjoining a Great Lake, the courts did not also re-establish the boundary of the public trust down to the low water mark in

the process. To do would be to unlawfully abdicate the states' jus publicum to all lakelands from the ordinary high water mark down to the low water mark. This is evident in the only two cases Taft cited concerning the boundary of a Great Lake.

The first case was *Brundage v. Knox* (1917), 279 Ill. 450, 117 N.E. 123. There the Illinois Supreme Court did not establish the low water mark as the boundary of private lands adjoining Lake Michigan. It only held that a littoral owner acquired title to land along Lake Michigan formed by accretion,¹ and that to preserve his access to the water the boundary of his land was the edge of the lake “when free from disturbing causes.” *Id.* at 473. The court thus did not define the boundary as the low water mark, but rather followed its earlier decision in *Seaman v. Smith* (1860), 24 Ill. 521, 524-25, which defined “that line where the water usually stands when unaffected by any disturbing cause” as the “ordinary” or “usual high water mark.” *Id.* at 473. Moreover, the court adhered to its earlier rulings (1) that the state holds in trust the submerged lands of Lake Michigan, meaning the lands below the ordinary high water mark, and (2) that any title a private person might have below the ordinary high water mark is jus privatum and held subject to the public right or jus publicum. *Id.* at 467, 472 (citing *Cobb v. Commrs. of Lincoln Park* (1903), 202 Ill. 427, 431, 67 N.E. 5; *Revell v. People* (1898), 177 Ill. 468, 478, 52 N.E. 1052.)

The second case Taft cited concerning a Great Lake – Lake Michigan – was *Hilt v. Weber* (1930), 252 Mich. 198, 233 N.W. 159. The Michigan Supreme Court recently explained that its “concern in *Hilt* was the boundary of a littoral landowner’s *private* title, rather than the

¹ Accretion is the “increase of real estate by the addition of portions of the soil, by gradual disposition through the operation of natural causes to that already in the possession of the owner.” *Lake Front-East Fifty-Fifth St. Corp. v. Cleveland* (1939), 21 Ohio Op. 1, 8, 7 Ohio Supp. 17 (citation omitted), affirmed 36 N.E.2d 196, appeal dismissed 139 Ohio St. 138, 38 N.E.2d 410, 22 O.O. 127.

boundary of the public trust.” *Glass v. Goeckel* (2005), 473 Mich. 667, 689-90, 703 N.W.2d 58 (emphasis in original).

In *Glass* itself, which involved Lake Huron but applied to all Michigan’s Great Lakes, the court deliberately did not rule on the extent of the private littoral title. *Id.* at 675 n.5. It did, however, rule that “although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property [the *jus privatum*] *subject to the public trust* [the *jus publicum*].” *Id.* at 679 (emphasis in original), and at 690 (“[L]ittoral property remains subject to the public trust.”), 694 (“[T]he private title of littoral landowners remains subject to the public trust beneath the ordinary high water mark.”). Furthermore, the Michigan Supreme Court held that the public trust extends to the ordinary high water mark of the Great Lakes. *Id.* at 687, 691 (“[T]he ordinary high water mark . . . has meaning as applied to the Great Lakes and marks the boundary of land, even if not instantaneously submerged, included within the public trust.”).

In addition to Illinois, Michigan, and Ohio,² Wisconsin has expressly held that the boundary of the public trust in the Great Lakes is the ordinary high water mark, not the low water mark. *R.W. Docks & Slips v. State of Wisconsin* (2001), 244 Wis.2d 497, 509, 628 N.W.2d 781; *State v. Trudeau* (1987), 139 Wis. 2d 91, 101, 408 N.W.2d 337. Indiana, Minnesota, New York, and Pennsylvania have also held or provided that the boundary of the public trust in navigable waters is the ordinary high water mark, not the low water mark. *State v. Korner* (1914), 127 Minn. 60, 76, 148 N.W. 617; *Marba Sea Bay Corporation v. Clinton Street Realty Corp.* (1936), 272 N.Y. 292, , 5 N.E.2d 824; *Freeland v. Pa. R. Co.* (1901), 197 Pa. 529, 539, 47 A. 745; 312 Ind. Admin. Code 6-1-1(1)(b).

² See Memorandum in Support of Jurisdiction of Appellants National Wildlife Federation and Ohio Environmental Council at 5-8.

In addition to *Brundage v. Knox* and *Hilt v. Weber*, Taft cited a number of other cases purported to support his claim that the low water mark is the boundary of the public trust in the Great Lakes. Not one of them involved a Great Lake or concerned the boundary of the public trust in a Great Lake. See *Mitchell v. St. Paul* (1948), 225 Minn. 390, 31 N.W.2d 46 (Lake Vadnais and Twin Lake); *Lamprey v. Metcalf* (1893), 52 Minn. 181, 191, 53 N.W. 1139 (unnamed inland lake; court did not rule whether public trust or private title runs to the low or high water mark); *Stewart v. Turney* (1923), 237 N.Y. 117, 121, 142 N.E.437 (Cayuga Lake); *City of Erie v. R.D. McAllister & Son* (1964), 416 Pa. 54, 59 & n.4, 204 A.2d 650 (contract dispute; court neither mentioned the low water mark nor addressed whether it is the boundary of private or public trust lands); *Jansky v. Two Rivers* (1938), 227 Wis. 228, 230, 241-42, 278 N.W. 527 (apportionment of land accreted and relicited³ from Lake Michigan; court neither mentioned the low water mark nor addressed whether it is the boundary of private or public trust lands); *Doemel v. Jantz* (1923), 180 Wis. 225, 227, 193 N.W. 393 (Lake Winnebago).

Thus, Taft's claim that the low water mark is the boundary of the public trust in Lake Erie within Ohio's territorial boundaries is contradicted by all the relevant authorities and completely devoid of merit. No consideration of his claim is justified, much less review by this court.

³ The doctrine of reliction recognizes title to uplands exposed by permanent recession of a body of water.

- B. Taft's claim that conservation appellants should not have been allowed to intervene on behalf of their members, who claim an interest in continuing their longstanding use of lands below the ordinary high water mark of Lake Erie, does not warrant review. The trial court did not abuse its discretion, but properly applied settled law to a particular set of facts.

To convince the court to review the trial court's ruling on intervention for abuse of discretion,⁴ Taft misstates the subject of this case. The subject of this case is the extent of the public trust, and therefore the extent of public rights, in Lake Erie in the State of Ohio, not a real estate boundary dispute between private parties and the state, as Taft claims. This is plain from the plaintiffs-appellees' amended complaint and motion for summary judgment, which sought a declaratory judgment regarding the propriety of the ordinary high water mark of Lake Erie as the boundary of the public trust. *See Merrill v. Ohio*, *supra*, 2009-Ohio-4256, at ¶2, 24. It is also plain from the first question of law certified by the trial court, which concerns the proper interpretation of R.C. 1506.10, which has long declared that the "waters of Lake Erie ... together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted." *Id.* at ¶12. Taft's vague claim of havoc in future litigation involving private property disputes if this court does not grant review of his cross-appeal is therefore off the mark.

⁴ A trial court's ruling on a motion for intervention is reviewed for abuse of discretion. *Myers v. Basobas* (1998), 129 Ohio App.3d 692, 696-97, 718 N.E.2d 1001; *Peterman v. Vill. of Pataskala* (1997), 122 Ohio App.3d 758, 761, 702 N.E.2d 965; *Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 836, 591 N.E.2d 1312. "Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Peterman*, 122 Ohio App.3d at 761. In applying the abuse-of-discretion standard, the court should presume that the trial court was correct, rather than substitute its judgment for the trial court's judgment. *State ex rel. Strategic Capital Investors, Ltd. v. McCarthy* (1998), 126 Ohio App.3d 237, 247, 710 N.E.2d 290.

In moving for intervention, conservation appellants claimed an interest in the lands under the navigable waters of Lake Erie, meaning the lands below the ordinary high water mark of the lake, as beneficiaries of the public trust. *See Merrill v. Ohio, supra, 2009-Ohio-4256, at ¶16.* They claimed that their members have the right to use the shore by virtue of the public trust for recreation and aesthetic enjoyment, and that they have an interest in preserving that right so their members may continue to use the shore for those purposes, as they have in the past. *See id.* They sought intervention because a ruling that Ohio's Lake Erie shore is not held by the State of Ohio as proprietor in trust for the people of the state, but rather is the exclusive private property of the individuals who own the upland property bordering it, would extinguish the longstanding public rights of members of NWF and OEC to use and enjoy the shore for recreational and aesthetic purposes. *See id.* at ¶114.

Thus, the conservation appellants claimed a direct, substantial, and legally protectable interest in the subject of the litigation. Their claim of that interest was sufficient. Contrary to Taft's suggestion, they did not have to demonstrate or prove, and the trial court did not have to conclusively determine, that they *in fact* have a direct, substantial, legally protectable interest. *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 354, 29 OBR 479, 505 N.E.2d 1010 (neither proof nor a conclusive determination of a claimed interest is required to grant intervention).

In granting intervention, then, the trial court merely applied settled law to a particular set of facts. *Peterman v. Vill. of Pataskala* (1997), 122 Ohio App.3d 758, 761, 702 N.E.2d 965 (intervention of right is appropriate where, among other things, the applicant for intervention demonstrates claims an interest in the subject of the action).⁵ This court's review of that decision

⁵ Even if the trial court's grant of intervention was permissive, the trial court did not abuse its discretion, because conservation appellants' counterclaim, in common with plaintiffs-appellees' claim, concerned whether the boundary of the public trust in Lake Erie extended to the ordinary high water mark. *See Ohio Civ. R. 24(B)(2).*

is not warranted, especially in light of the principle that the right to intervene must be liberally construed, and in the absence of any indication that the trial court abused its discretion.

Peterman, 122 Ohio App.3d 758, 761, 702 N.E.2d 965 (citing *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 353, 29 OBR 479, 505 N.E.2d 1010).

CONCLUSION

For the reasons discussed above, Taft's cross-appeal does not involve matters of public or great general interest. Conservation appellants request that this court reject jurisdiction of the cross-appeal.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction of Appellants National Wildlife Federation and Ohio Environmental Council was sent by ordinary U.S. mail to the following counsel of record and parties not represented by counsel on December 4, 2009:

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