

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.	:	
ROBERT MERRILL, TRUSTEE, et al.,	:	CASE NO. 2009-1806
	:	
Plaintiff-Appellees,	:	
and	:	On Appeal from The Lake County
	:	Court of Appeals,
HOMER S. TAFT, et al.,	:	Eleventh Appellate District
	:	Case No. 2008-L-007, 2008-L-008
Intervening Plaintiffs	:	Consolidated
vs.	:	
	:	Discretionary Appeal (Non-Felony)
STATE OF OHIO, DEPARTMENT OF,	:	
NATURAL RESOURCES, et al.	:	
	:	
Defendant-Appellants,	:	
Cross-Appellees,	:	
and	:	
STATE OF OHIO,	:	
NATIONAL WILDLIFE FEDERATION,	:	
et al.,	:	
Intervening Defendants-	:	
Appellants-Cross Appellees.	:	

**BRIEF OF AMICUS CURIAE
NATIONAL FEDERAL OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PLAINTIFF'S-
APPELLEES**

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INTEREST OF THE AMICUS CURIAE

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. The NFIB membership is a reflection of American small business. Many of NFIB's members own retail and service establishments, including small resorts, hotels, restaurants and marinas, with many located in Ohio.

Amicus represents the interests and views of owners of property along the Great Lakes shorelines who use the property for private residential purposes, and commercial businesses such as motels, hotels and recreational resorts. NFIB, its members in Ohio, and the NFIB Small Business Legal Center are also interested in the stability of longstanding rules of private property law, protecting existing private property rights and values, and minimizing the potential for further litigation between owners of riparian lands along the Great Lakes shorelines and non-

owners who seek to use or claim an interest in the area of the Great Lakes shorelines landward of the water's edge.

STATEMENT OF FACTS

NFIB adopts and incorporates herein by reference the Statement of the Case and Facts set forth in Plaintiff-Appellee's Merit Brief.

ORDER APPEALED FROM AND RELIEF REQUESTED

Defendants-Appellants, the State of Ohio and the Ohio Department of Natural Resources (ODNR) gave notice of their claimed appeal of right and discretionary appeal to appeal the August 26, 2009 decision of the Lake County Court of Appeals, Eleventh Appellate District. NFIB urges this Court to affirm the appellate court's decision that Lake Erie property owners have the right to exclude the public down to the water's edge.

ARGUMENT

PROPOSITION OF LAW

Property owners enjoy a long-standing right to exclude others from their property and any effort to establish the Ohio High Water Mark (OHWM) as the proper boundary for the public trust contravenes that right and established precedent.

I. THE COURT OF APPEALS CORRECTLY REJECTED THE OHWM AS THE BOUNDARY OF THE PUBLIC TRUST

A. Ohio Law Compels Rejection of the OHWM as the Boundary of the Public Trust

When the United States Supreme Court has engaged the topic of public access to the waterfront, it has not discussed whether individuals have the right to walk along the shores of Lake Erie, but it has stated that individual states may define property rights on the shore on their

own. Indeed, in a case frequently cited by Ohio courts, the Supreme Court noted “the later judgments of this Court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local law of the several states.” *Shively v. Bowlby* (1891), 152 U.S. 1, 382, 14 S.Ct. 548, 38 L.Ed. 336. Similarly, the Supreme Court found that attempts to force a federal common law property boundary “may result in property law determinations anti-ethical to the desires of the state.” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 378, 97 S.Ct. 582, 50 L.Ed.2d 550. In its most recent decision interpreting littoral property rights, the Supreme Court ruled against the littoral property owners but stated “generally speaking, state law defines property interests, including property rights in navigable waters and the lands underneath them.” *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.* (2010), 130 S.Ct. 2592, 2597, 177 L.Ed.2d 184. There, in order to decide the case, the Supreme Court turned to Florida law. Similarly, in this case, this Court must turn to Ohio law. *Id.* at 2598.

Ohio courts have addressed public access to the shores of Lake Erie. And other sources also make clear that private landowners can exclude others from the shore of the lake. Ohio common law, ODNR rules, attorney general opinions, and traditional property rights all have rejected the Ohio High Water Mark (OHWM) as the proper boundary for the public trust. Consequently, this Court should reject the OHWM as the proper boundary for the public trust.

**1. Ohio Supreme Court Precedent Rejects the OHWM
as the Public Trust Boundary**

This Court has previously ruled that littoral property owners have the right to exclude the public from the shore. *Sloan v. Biemiller* (1878), 34 Ohio St. 492, 516 (affirming the rights of

property owners in Cedar Point to exclude the public from the shore).¹

This Court has also rejected the OHWM as the boundary for the public trust when it affirmed private title to land under the waters of the East Harbor, a harbor connected to Lake Erie. *Hogg v. Beerman* (1884), 41 Ohio St. 81. Although the disputed land fell far below the OHWM, this Court still characterized the property as private land.

Six years later, this Court again affirmed the right of private property owners to exclude the public from the shore in *Bodi v. The Winous Point Shooting Club*, which upheld the right of landowners to exclude the public from the east end of Sandusky Bay. *Bodi v. The Winous Point Shooting Club* (1897), 57 Ohio St. 629, 630. The Court affirmed an injunction “from entering upon any of said lands, shores, or marshes, and islands” which were privately owned by the Winous Point Shooting Club for fishing and hunting. *Id.*

In *State v. The Cleveland-Pittsburgh Ry. Co.* (1919), 94 Ohio St. 61 113 N.E. 677, a case that the state, misguidedly focuses on for its emphasis on protecting the public trust, this Court asked the legislature to “in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners.” *Id.* at 84. The case affirmed a decision establishing the right of private property owners to keep the public from coming on their land without their consent. *State v. The Cleveland-Pittsburgh Ry. Co.* (Dec. 7, 1914), Cuyahoga App. [no number in original], unreported, 1914 Ohio Misc. LEXIS 163, *35-36, 21 Ohio C.A. 1.

Similarly, this Court held that a littoral property owner held title to accreted land despite the fact that the land lay several feet below the OHWM. *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 27 N.E.2d 485. Additionally, in *State ex rel.*

¹ The state cites to *Sloan* as well, claiming that *Sloan* sets the boundary of Lake Erie at the OHWM. *Sloan*, however, concerned a private contract dispute between two parties and did not discuss the boundary between where the public trust begins and the private landowner’s rights end.

Squire v. Cleveland, this Court held that the natural shoreline of artificial fill, owned by a private owner, placed in the shallow waters of Lake Erie fell several feet below the OHWM. *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 82 N.E. 2d 709. In sum, throughout Ohio common law, the enforcement of littoral property rights has not depended on the location of the OHWM. Thus, the state's argument that the OHWM is the clear boundary between the public trust and private lands in every instance fails.

2. Additional Ohio Legal Sources Reject the OHWM Boundary

The ODNR, Ohio Attorney General Opinions, and traditional property rights reject the OHWM boundary. While none of these sources constitute binding law on this Court, they are all persuasive authorities.

The ODNR has not issued a rule defining "shoreline" as the OHWM. In fact, the ODNR does not take a position on the location of the public trust boundary. The rules that do define the "shoreline" in the Ohio Administrative Code, 1501-6-10 (T) and (U), define "shore" as "the land bordering the lake" and "shoreline" as "the line of intersection of Lake Erie with the beach or shore"; showing that the "shoreline" cannot be the OHWM. Ohio Admin. Code 1501-6-10 (T) & (U).

Ohio Attorney General opinions also counsel against adopting the OHWM as the public trust boundary. The Attorney General has specified that "the land that lies above the natural shoreline of Lake Erie belongs to the littoral property owner" and "the shoreline is the line marking the edge of a body of water." 1993 Ohio Atty.Gen.Ops. No. 93-025, 1993 Ohio AG LEXIS 27, 11, 15. According to the Attorney General, the "shoreline" is not the same as the OHWM but lies below it. Therefore, according to the Attorney General lands below the OHWM belong to private owners and the OHWM does not serve as the public trust boundary.

Traditional property rights also counsel against adopting the OHWM as the public trust boundary. The right to own the shore and right of direct access to the waters are central rights in property law. The right to exclude others from one's property is the most central stick in the bundle of property rights. For the State of Ohio to intervene and declare that it suddenly owns property, which private property owners have owned and which has been described in their deeds for years, is a direct contravention of property rights of the highest order.

This Court has adhered to traditional property rights, recognizing the title of private persons to their shores in several cases, including *Sloan* where this Court affirmed the right of those owning property in Cedar Point to exclude others from the shore and *Bodi* where this Court affirmed the right of private property owners to exclude others from the shore of lands in the west end of Sandusky Bay. *Sloan*, 34 Ohio St. at 516; *Bodi*, 57 Ohio St. at 630. This Court has also affirmed the importance of the right of direct access to water, noting that grants to the lake must mean the right to exclude others from the shore because ownership of the shore itself is necessary to grant property owners direct access to the water. *Lamb v. Ricketts* (1842), 11 Ohio 311, 314, 1842 WL 21.

B. Practical Considerations Compel Rejection of the OHWM Boundary

The application of an OHWM boundary to a non-tidal body of water such as Lake Erie is inappropriate. An OHWM has little practical application to a body of water such as Lake Erie. Ordinary high or low water originally referred to the daily range of water levels during ordinary tides when the sun and moon are on opposite sides of the earth. See *Borax Consol., Ltd. v. Los Angeles* (1953), 296 U.S. 10, 27, 56 S.Ct. 23, 80 L.Ed. 9. The great lakes are not affected by the tide but rise and fall seasonally over the course of the year. *Glass v. Goeckel* (Mich. 2005), 473 Mich. 667, 703 N.W.2d 58, 98-99 (Markman, J., dissenting).

Lake Erie's levels do fluctuate with the seasons. The fluctuations, however, are not reliable enough to serve as an accurate predictor of water levels during the next season. As a result, for a non-tidal body of water such as Lake Erie, the OHWM fails to serve as an accurate measure of the shoreline. As the Ohio Attorney General remarked "naturally, the shoreline of a body of water is in a constant state of change." 1993 Ohio Atty.Gen.Ops. No. 93-025, at 15.

Secondly, affirming the Court of Appeals ruling, that the boundary between public and private interests is divided at the water's edge, will minimize the chances of fomenting needless litigation. The water's edge is an easily identifiable line that anyone, whether a child or a trained scientist can perceive. Ascertaining the location of the water's edge does not require nearly the amount of resources that ascertaining the location of the OHWM requires. One does not need the expertise to analyze land forms to know where private rights end and public rights begin; one only need to look and see where the water is to become aware of the clear delineation of these rights. Disputes are considerably less likely to arise when the distinction between public and private rights is clear to any eye, no matter how untrained.

Allowing public access to land that goes beyond the water's edge would lead to conflicts and litigation over the appropriate extent of public use allowed. The public trust doctrine would not help to resolve such conflicts as the doctrine simply refers to an interest the state holds in submerged lands. Land extending beyond the water's edge, of course, is not submerged and thus not covered by the public trust doctrine.

II. DEPRIVING LITTORAL RIGHTS OWNERS OF THE RIGHT TO EXCLUDE WILL DIMINISH THE VALUE OF THE LAND

Allowing public use of land, that was previously not available for public use diminishes the value and enjoyment of waterfront property. Many small business owners own and operate hotels and other tourist destinations on Lake Erie. These small businesses offer a uniquely

peaceful retreat to guests. They attract visitors by making shore available to guests that will be unoccupied by the public and thus particularly suitable to a calm, peaceful vacation. Opening the shore to the public could render it unsuitable as a calm retreat for guests. This will reduce the amenities that small business owners can offer to guests, reducing the value of the property.

A. Many Small Businesses Will Be Harmed if Deprived of their Right to Exclude

Deprivation of the right to exclude will lead to financial loss and diminished property values. Businesses such as Bay Club Cottages in Put-In-Bay will be directly affected by a rule declaring the OHWM as the boundary between public and private rights. Bay Club Cottages operates three waterfront cottages on the Southeast Side of Put-in-Bay. The resort offers its guests a unique experience, the privacy of a waterfront cottage with all of the entertainment opportunities of Lake Erie. Guests can rent jet skis at the beach during the day and come home to their quiet, peaceful cottage in the evening.

Guests are attracted to Bay Club Cottages because of the combination of a serene cottage experience and the opportunity to take advantage of thrilling waterfront adventures. The jet skis that Bay Club Cottages rents sit on the beach between the OHWM and the low water mark. If this Court sets the boundary at the OHWM, Bay Club Cottages will be unable to operate the jet ski component of their business as the jet skis would suddenly lie on public land. Jet ski rentals remain a primary attraction to Bay Club's guests. Without the jet ski component of their business, Bay Club Cottages no longer can offer its guests the full enjoyment of Lake Erie and will necessarily lose business.

B. Depriving Business Owners of Their Right to Exclude Amounts to a “Taking” of Private Property

Negation of the littoral property owner’s right to exclude the public from land beyond the water’s edge destroys a fundamental element of property and will result in an unconstitutional taking of property. Setting the public trust boundary at the OHWM would deny littoral owners the right to exclude others, a right inherent in the concept of private property. This Court has held that a littoral owner is entitled to compensation for “the loss or interference with his right of access to navigable water.” *State ex rel. Squire*, 150 Ohio St. at 338. As such, when the state destroys riparian rights “the owners of such rights are entitled to compensation for the loss they have suffered.” *McNamara v. Rittman*, 107 Ohio St.3d 243, 248, 2005-Ohio-6433, 838 N.E.2d 640; see also *City of Mansfield v. Balliett* (1902), 65 Ohio St. 451, 63 N.E. 86; *Smith v. Summit Cty.* (1988), 131 Ohio App.3d 35, 721 N.E.2d 482; *State ex rel. Andersons v. Masheter* (1964), 1 Ohio St.2d 11, 203 N.E.2d 325. For the state to claim land for the public trust when that land has been described in private property owners’ deeds for years is a destruction of riparian rights, entitling the private property owners to just compensation pursuant to the Ohio Constitution and U.S. Constitution. Section 19, Article I, Ohio Constitution; Fifth Amendment, United States Constitution.

III. OHIO’S ASSERTION OF TRUST OWNERSHIP UPSETS LONGSTANDING PROPERTY RULES AND UNDERMINES THE CONFIDENCE OF BUSINESS OWNERS

Business owners rely on established property rules in building their businesses. Setting the boundary at the OHWM would upset longstanding property rules. As early as 1884, property owners have relied on the fact that the OHWM is not a strict boundary between private and public lands. This Court rejected the OHWM as the boundary several times, affirming private

title to lands well below the OHWM. See *Hogg, supra*; *State ex rel. Duffy, supra*; *State ex rel. Squire, supra*.

In the 1970s, the State through the Department of Public Works declared that “the boundary line between Claimants’ property and the waters and bed of Lake Erie adjacent to Claimants’ property is coincident with the shoreline of Lake Erie.” *Rheinfrank v. Gienow* (Mar. 27, 1973), Franklin App. No. 72AP-298, unreported, 1973 Ohio App. LEXIS 1671, * 2. While on appeal, the Director and the Ohio Attorney General submitted a court stipulation and sworn affidavit stating that the boundary of Lake Erie could be determined using “mean low water” as the boundary. *Rheinfrank v. Gienow* (May 8, 1973), Franklin App. No. 72AP-298, unreported, 1973 Ohio App. LEXIS 1543, *3.

In the late 1970s, ODNR described the boundary as the line where “land and water meet.” This boundary, ODNR stated, was “normally used to determine where the state’s rights over the bed of Lake Erie begin.” ODNR later asked the Ohio Attorney General for clarification on the proper boundary and he stated that a “littoral owner along Lake Erie holds title to the extent of the natural shoreline,” which he defined as “the edge of a body of water.” 1993 Ohio Atty.Gen.Ops. No. 93-025, at 11, 16.

Then, in an about face, in the mid 1990s, ODNR claimed land for the state of Ohio that was listed in private property owners’ deeds as belonging to them. ODNR began requiring littoral property owners to enter into submerged land leases with the state of Ohio in order to use land located below the OHWM. ODNR stepped in and took this action despite many decisions by this Court affirming private title to land under the OHWM and despite a history of declining to claim the OHWM as the boundary.

Maintaining the boundary between public and private interests on the water's edge allows the public to engage in activities that are consistent with the public trust while allowing littoral property owners to fully exercise rights inherent in the ownership of property along Lake Erie. This approach strikes the best balance between two critical objectives: maintaining the public trust so that the public may enjoy the water while affirming littoral property owners' rights.

Businesses rely on longstanding property rules to operate their businesses. Knowing that courts have affirmed private title below the OHWM, businesses have operated with confidence that they own land up to the water's edge, as stated in their deeds. Businesses such as NFIB member Bay Club Cottages relied on these rules when making commercial investments. Crucial to Bay Club Cottages business is the placement of jet skis on the beach. If the boundary is the OHWM, because the OHWM is difficult to discern, businesses owners like Bay Club Cottages will be unaware which land is theirs and which belongs to the public. A boundary located at the water's edge allows Bay Club Cottages to place their jet skis on the beach without concern that the jet skis sit on land that belongs to the public. Numerous waterfront businesses, like Bay Club Cottages, depend on these long-established property rules.

IV. THIS COURT'S DECISION COULD INFLUENCE PROPERTY RIGHTS IN OTHER STATES

All over the country, waterfront property owners' rights are being called into question. Decisions on cases like this one could influence other courts and help mold the legal landscape of property on the coasts and shorelines. If this Court refuses to depart from the descriptions in the property owner's deeds, the decision will bolster waterfront property owners' confidence that their property rights will be upheld, encouraging them to maintain and expand their businesses. This decision could serve as permissive authority in other Courts that address similar questions.

In Texas, several beachfront property owners purchased vacation homes that were once 200 feet away from the Gulf of Mexico. *Brannan v. State* (Texas App. 2010), ___ S.W. 3d ___, 2010 WL 375921 at * 2. Because of Tropical Storm Frances in 1998, Texas beaches began to erode, moving the vegetation land landward. *Id.* The Texas Open Beaches Act provides that the public has the right to access the beach, meaning that any structure seaward of the vegetation line encroaches on the public's land and may be removed. *Id.*, at 6. The boundary established by this Court between public and private rights lies could influence a decision in *Brannan*, which is currently on petition for review in the Supreme Court of Texas.

Another shoreline property dispute is before the U.S. Supreme Court. The Northwest Washington property owner, Mary Sharp, lives on a lot with lawfully constructed bulkhead to protect the upland property. *U.S. v. Milner* (C.A. 9, 2009), 583 F.3d 1174, 1180. As in *Brannan*, the shoreline has eroded, leading the water to intersect with the bulkhead from time to time. *Id.*, at 1181. The Lummi Indian Nation has a treaty right to tidelands located waterward of Sharp's property and is arguing that the bulkhead trespasses on their land. *Id.*, at 1183. As in this case, the debate is over the boundary between public and private land. If the Lummi Indian Nation prevails, Sharp will have to remove the bulkhead that protects her property, decreasing the value of her land.

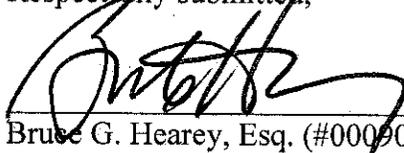
Additionally, litigation is brewing in Florida where a Naples Condominium in Moraya Bay placed rubber cones on the beach to delineate the boundary between private and public property. *Moraya Bay Beach Open to the Public-For Now*, <http://www.naplesnews.com/news/>

2010/mar/10/moraya-bay-beach-open-public/. The condo has title up to the erosion control line, where it placed the rubber cones. Id. The Collier County Commission has directed staff to remove the cones, and encouraged the public to protest on condo property. *Fight Over Beach Access Could Go to Supreme Court*, <http://www.abc-7.com/Global/story.asp?S=12111548>. The condo would like to build a beach club on the property but has backed down and removed the cones due to public criticism. Id. That the County Commission believes that it is acceptable to encourage residents to protest on private property indicates that title to waterfront property in Collier County is not taken seriously. A decision from this Court upholding title to the water's edge might dissuade other state and local governments from trampling on the rights of waterfront property owners.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals reached the correct result when it held that Lake Erie property owners have the right to exclude the public down to the water's edge as stated in their deeds. Amicus Curiae requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of September, 2010, a copy of the foregoing *Brief of Amicus Curiae National Federation of Independent Business Small Business Legal Center In Support of Plaintiff-Appellees* was served via regular U.S. Mail to:

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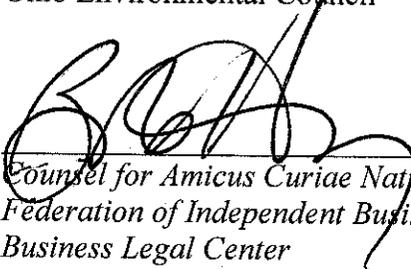
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