

Legislator Briefing on Public Trust Doctrine (JBH/PFS 2-22-2019)

In 2018 the Indiana Supreme Court in *Gunderson v. State* unanimously held that the shore of Lake Michigan has been public land since Indiana's statehood and that Indiana holds that shoreland "in trust" for the people of the state. On February 19 of this year, the U.S. Supreme Court declined to hear the *Gunderson* petition for a writ of certiorari, thus ending any further appeals of the case and solidifying the decision as Indiana law.

The *Gunderson* decision contains five major rulings:

1. The Court ruled that the boundary separating public shoreland from private property is the "natural" ordinary high water mark. All shore below this water mark is state-owned public trust land regardless of whether the shore is covered by water or temporarily exposed. The location of the natural ordinary high water mark in any place is determined by a delineation expert, using standard techniques that refer to significant changes in soil and vegetation and other physical characteristics. It is often the vegetation line and thus readily observable by landowners and the public.
2. The Court *rejected* the Gundersons' argument that their deed and plat established their property boundary at the instant edge of the water. The Gunderson deed and plat are rooted in an 1837 federal land patent based on an 1829 federal public land survey. Under settled federal law, reaffirmed by *Gunderson*, federal surveys did not include public trust shoreland below the natural ordinary high water mark, and the federal government simply could not have conveyed such shoreland to private parties. Any language in a deed or plat attempting to convey public trust shoreland is void and akin to a deed purporting to convey the Brooklyn Bridge.
3. The Court also *rejected* the State's argument that it could replace the natural ordinary high water mark boundary of the public trust with an "administrative" mark defined exclusively by a fixed elevation of 581.5 feet irrespective of physical factors.
4. The Court ruled that, minimally, the Lake Michigan shore can be used for fishing, navigation, commerce, and walking. The Court also recognized that the shore has traditionally been used for recreation, but expressly left it to the Indiana General Assembly to define the scope of permissible recreational activities.
5. The Court ruled, based on long-standing Indiana precedent, that "Indiana in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan." That is, no one—not the governor, nor an agency, nor the legislature—can issue an order, make a rule, or pass legislation that conveys or curtails the rights of Indiana citizens in the public trust shores of Lake Michigan. And no one may permanently occupy or monopolize the shore to the exclusion of others.

The Court's recognition that the shore is public land has several benefits: it protects our heritage; it fosters recreational tourism and the economic value it generates; it facilitates protection of the dynamic shore ecosystem; and it is true to the law. Any legislation that attempts to convey or curtail public trust rights on the shore—by allowing private activities to interfere with public uses, by allowing private construction that permanently occupies the public beach, or by defining the public trust boundary at a different location than the natural ordinary high water mark—is invalid under Indiana law.