

## THREE KEY GUNDERSON HOLDINGS ON ORDINARY HIGH WATER MARK

### 1. For 100 years, Indiana Courts Have Held the State Owns the Shore Below the Ordinary High Water Mark and Holds It in Trust for the Public.

The Indiana Supreme Court in *Gunderson v. State*, 90 N. E. 3d 1171, 1173 (Ind. 2018) held that the **State of Indiana has owned the Lake Michigan beach since statehood in 1816**:

“A century ago, our Court of Appeals recognized that, among those rights acquired upon admission to the Union, **the State owns and holds “in trust” the lands under navigable waters within its borders, “including the shores or space between ordinary high and low water marks, for the benefit of *the people of the state.*”** *Lake Sand Co. v. State*, 68 Ind. App. 439, 445, 120 N.E. 714, 716 (1918) (quoting *Ex parte Powell*, 70 Fla. 363, 372, 70 So. 392, 395 (1915)). And Indiana “in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan.” *Id.* at 446, 120 N.E. at 716. This Court has since affirmed these principles. See *State ex rel. Indiana Department of Conservation v. Kivett*, 228 Ind. 623, 630, 95 N.E.2d 145, 148 (1950).”

“[T]he boundary separating public trust land from privately-owned riparian land along the shores of Lake Michigan is the **common-law ordinary high water mark** and that, **absent an authorized legislative conveyance, the State retains exclusive title up to that boundary.**” *Id.*

### 2. The Natural OHWM Is A Moveable Boundary and Is Consistent with the Law of Accretion and Erosion Which Are Fundamental to Property Rights on the Shore of Navigable Water

In *Gunderson* (at p. 1187), the Indiana Supreme Court explained the natural OHWM and that it is essential to maintaining the status quo for property rights on navigable waters:

“The **common-law OHWM is a moveable boundary subject to the natural variability of the shoreline.** Bureau of Land Mgmt., Manual of Surveying Instructions at 81 (“When by action of water the bed of the body of water changes, the OHWM changes, and the ownership of adjoining land progresses with it.”). **Riparian boundary law relies on the adaptive doctrines of accretion and erosion to account for these shoreline dynamics.**

“Under the accretion doctrine, the riparian landowner gains property as the OHWM shifts lakeward due to the gradual deposit of sand or other material. *13 Bath v. Courts*, 459 N.E.2d 72, 74 (Ind. Ct. App. 1984). The doctrine of erosion, by contrast, has the opposite

effect: the riparian landowner loses property as the boundary shifts landward due to the gradual loss of shoreline.<sup>14</sup> 93 C.J.S. Waters § 187 (2017).

**“These doctrines operate to maintain the status quo of relative rights to the shores of navigable waters. While the physical boundary shifts (e.g., shelving or terrestrial vegetation) the legal relationships—private riparian ownership and public trust title—remain the same.** In other words, while accretion or erosion may change the actual location of the OHWM, the legal boundary remains the OHWM. \*1187 State Land Bd. v. Corvallis Sand & Gravel Co., 283 Or. 147, 582 P.2d 1352, 1361 (1978). “

*Gunderson v. State*, 90 N. E. 3d 1171, 1187 (Ind. 2018)

### **3. In Contrast, the 581.5 Elevation Is a Static Boundary That Is Inconsistent with the Law of Accretion and Erosion and Would Disrupt Property Law**

The Indiana Supreme Court decision in *Gunderson* (at p.1187) expressly recognized that using the 581.5 ft elevation as the boundary between public and private property would create serious property law problems on the Lake Michigan shore – including diminishing the public trust shore and creating claims that erosion results in a “taking”:

“In contrast, **the administrative OHWM— as a static boundary—fails to account for these shoreline dynamics.** Thus, accretion may result in a diminution of public trust lands, in derogation of *Lake Sand*, 68 Ind. App. at 446, 120 N.E. at 716. Alternatively, erosion may result in the expansion of public trust lands at the expense of the riparian landowner, resulting in an uncompensated taking.<sup>15</sup> See U.S. Const. amend. V; Ind. Const. art. 1, sec. 21.”

*Gunderson v. State*, 90 N. E. 3d 1171, 1187 (Ind. 2018)