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App. 2

In the
Indiana Supreme Court

No. 46S03-1706-PL-423

DON H. GUNDERSON AND BOBBIE J. GUNDERSON, CO-TRUSTEES OF THE DON H. GUNDERSON LIVING TRUST,

Appellants/Cross-Appellees (Plaintiffs below),

v.

STATE OF INDIANA, INDIANA DEPARTMENT OF NATURAL RESOURCES,

Appellees (Defendants below),

ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES,

Appellees/Cross-Appellants (Intervenors-Defendants below),

LONG BEACH COMMUNITY ALLIANCE, PATRICK CANNON, JOHN WALL, DORIA LEMAY, MICHAEL SALMON, AND THOMAS KING,

Appellees/Cross-Appellants (Intervenors-Defendants below).

Appeal from the LaPorte Superior Court,
No. 46D02-1404-PL-606 The Honorable
Richard R. Stalbrink, Jr., Judge

On Petition to Transfer from the Indiana
Court of Appeals, No. 46A03-1508-PL-1116

February 14, 2018

Massa, Justice.

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). But the question remains: What is the precise boundary at which the State's ownership interest ends and private property interests begin?

Today, we hold that the 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. We therefore affirm the trial court's ruling that the State holds title to the Lake

Michigan shores in trust for the public but reverse the court's decision that private property interests here overlap with those of the State.

Facts and Procedural History

Don H. Gunderson and Bobbie J. Gunderson, as trustees of the Don H. Gunderson Living Trust ("the Gundersons"), own lakefront property in Long Beach, Indiana, consisting of three lots in Section 15 of Michigan Township (the "Disputed Property"). The Gundersons' deed, the 1914 plat to which the deed refers, and the plat survey contain no reference to a boundary separating the Disputed Property from Lake Michigan to the north. A designated survey of Long Beach from 1984 contains a plat map showing the Disputed Property and contiguous lakefront lots extending to the "Lake Edge." App. 127–43. At the root of the Gundersons' deed is an 1837 federal land patent. This patent, in turn, originates from an 1829 federal survey showing Lake Michigan as the northern boundary of Section 15. The original survey notes indicate the northern boundary extends "to Lake Michigan and set post." App. 589.

In 2010, the Town of Long Beach passed an ordinance adopting the Indiana Department of Natural Resources' ("DNR") administrative boundary which separates state-owned beaches from private, upland portions of the shore. Long Beach, Ind., Code of Ordinances § 34.30 (amended 2012); 312 Ind. Admin. Code 1-1-26(2) (2017). The Gundersons, along with other

lakefront property owners in Long Beach, protested that the artificial boundary line infringed on their property rights.[1]

Following unsuccessful attempts at changing the rule at the administrative level, the Gundersons, in 2014, sued the State and the DNR (collectively, "the State") for a declaratory judgment on the extent of their littoral rights to the shore of Lake Michigan and to quiet title to the Disputed Property.[2] Alliance for the Great Lakes and Save the Dunes ("Alliance-Dunes") and Long Beach Community Alliance ("LBCA") (collectively, "Intervenors") successfully moved to intervene. All parties filed cross-motions for summary judgment. The Gundersons asked the trial court to rule that "there is no public trust right in any land abutting Lake Michigan." App. 83. The State, in turn, requested the trial court to declare that Indiana owns the disputed beach in trust for public use. Intervenors urged the trial court to find that the State owns the disputed shore of Lake Michigan below the ordinary high water mark ("OHWM") in trust for public recreational use.

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[1] In response, the Gundersons and others filed suit against the Town of Long Beach. That case is currently held in abeyance after the Court of Appeals ruled that the State was a necessary party. *LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077, 1091 (Ind. Ct. App. 2015).

[2] Owners of land abutting a lake or pond acquire "littoral" rights, whereas owners of land adjacent to a river or stream possess "riparian" rights. *Bass v. Salyer*, 923 N.E.2d 961, 970 n.11 (Ind. Ct. App. 2010); 78 Am. Jur. 2d Waters § 33 (2018). Because "riparian" is commonly used in reference to both classes of ownership, we will use that term here. *Bass*, 923 N.E.2d at 970 n.11.

In granting the State and Intervenors' cross-motions for summary judgment, the trial court ruled "that when Indiana became a State, it received, and held in trust for the public, all lands below the OHWM regardless of whether the land is temporarily not covered by the water." App. 25. The court further concluded that the Gundersons' property extends to the northern boundary of Section 15 while the State holds legal title, in public trust, to the land below the OHWM as defined by the DNR's administrative boundary. To the extent that these property interests overlap, the trial court declared that "the Gundersons cannot unduly impair the protected rights and uses of the public." App. 28. Finally, the trial court concluded that "Indiana's public trust protects the public's right to use the beach below the [OHWM] for commerce, navigation, fishing, recreation, and all other activities related thereto, including but not limited to boating, swimming, sunbathing, and other beach sport activities." App. 31.

The Gundersons appealed while Intervenors moved to correct the trial court's findings on the administrative OHWM and the overlapping titles. Alliance-Dunes moved for judicial notice of additional facts and to supplement the record, to which the State and the Gundersons objected. The court denied all pending motions and Alliance-Dunes and LBCA separately appealed.

The Court of Appeals affirmed in part and reversed in part. In a unanimous opinion, the panel held (1) that, absent an express legislative abrogation of public trust rights in the shores of Lake Michigan,

those rights are controlled by the common-law public trust doctrine; (2) that the DNR's administrative boundary is invalid and the OHWM remains that defined by the common law; and (3) that the northern boundary of the Gundersons' property extends to the ordinary low water mark, subject to public use rights up to the OHWM, such as walking along the beach and gaining access to the public waterway. *Gunderson v. State*, 67 N.E.3d 1050, 1060 (Ind. Ct. App. 2016).

All parties—the Gundersons, the State, and Intervenors—petitioned this Court for transfer, which we granted, thus vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).

Standard of Review

We review summary judgment applying the same standard as the trial court: "summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting Ind. Trial Rule 56(C)). On cross-motions for summary judgment, "we simply consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law." *In re Indiana State Fair Litig.*, 49 N.E.3d 545, 548 (Ind. 2016) (citation omitted). We limit our review to the materials designated at the trial level. *Fraternal Order of Police, Lodge No. 73 v. City of Evansville*, 829 N.E.2d 494, 496 (Ind. 2005).

Where the challenge to summary judgment raises pure questions of law, we review them de novo. *Ballard v. Lewis*, 8 N.E.3d 190, 193 (Ind. 2014).

Discussion and Decision

The basic controversy here is whether the State holds exclusive title to the exposed shore of Lake Michigan up to the OHWM, or whether the Gundersons, as riparian property owners, hold title to the water's edge, thus excluding public use of the beach.[3] All parties agree that land below Lake Michigan's OHWM is held in trust for public use. The legal dispute relates to the precise location of that OHWM: whereas the Gundersons argue that it lies wherever the water meets the land at any given moment, the State and Intervenors locate the boundary further landward to include the exposed shore.

Resolution of this case entails a two-part analysis: First, we must determine the boundary of the bed of

[3] The State contends that this case was rendered moot when, in March 2015, the Gundersons sold the Disputed Property to a real estate developer. Although the record reveals that the parties knew or should have been aware of the sale at the time, the Gundersons neglected to formally notify the court of the transfer in ownership until March 2017. For this reason, the State contends, the trial court had no opportunity to determine whether to allow the Gundersons to proceed after transferring their interest in the Disputed Property. *See* Ind. Trial Rule 25(C). Because this case involves "questions of great public interest," *Matter of Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991) (internal quotations omitted), we need not decide the question of mootness on these procedural grounds.

Lake Michigan that originally passed to Indiana at statehood in 1816. Second, we must decide whether the State has since relinquished title to land within that boundary. The former question is a matter of federal law; the latter inquiry, a matter of state law. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376-77 (1977) ("[D]etermination of the initial boundary between [the beds of navigable waters] acquired under the equal-footing doctrine, and riparian fast lands [is] a matter of federal law . . . [whereas] subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law.").

We begin our discussion by providing some background on the public trust and equal-footing doctrines. The rule that the states, in their sovereign capacity, possess title to the beds of navigable waters has ancient roots. Under the English common law, "both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king." *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). The public interest—or *jus publicum*—encumbers the Crown's title—the *jus privatum*—to the waters, the shore, and the submerged lands, as "their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects." *Id.*

American colonists enjoyed common rights to the navigable waters "'for the same purposes, and to the

same extent, that they had been used and enjoyed for centuries in England.'" *Id.* at 17 (quoting *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 414 (1842)). At the conclusion of the American Revolution, the people of the original thirteen states, as successors to the Crown, "became themselves sovereign" and acquired "the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Waddell's Lessee*, 41 U.S. (16 Pet.) at 410. Those states subsequently admitted to the Union, on an "equal footing" with the original thirteen, likewise acquired title to the lands underlying the waters within their boundaries that were navigable at the time of statehood. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845); *Utah v. United States*, 403 U.S. 9, 10 (1971) ("[T]he 'equal footing' principle has accorded newly admitted State the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown.") (citing *Pollard*, 44 U.S. (3 How.) at 222-23).

As the American public trust doctrine evolved, it assumed a character distinct from its English pedigree. In England, public rights attached only to those waters subject to the "ebb and flow of the tide." *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 455 (1851), *superseded by statute as stated in Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253 (1972). In abandoning this rule, the states recognized "the broad differences existing between the extent and

topography of the British island and that of the American continent." *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1876). The Treaty of 1783 with Great Britain after its surrender at Yorktown, and the Louisiana Purchase of 1803, had resulted in a massive acquisition of territory in the continental interior. And with this came vast stretches of navigable, non-tidal bodies of water, including the Great Lakes, recognized as "inland seas" by the U.S. Supreme Court. *The Genesee Chief*, 53 U.S. (12 How.) at 453; *Hardin v. Jordan*, 140 U.S. 371, 382 (1891) ("In this country the [right of the states to regulate and control the shores of tide-waters, and the land under them,] has been extended to our great navigable lakes, which are treated as inland seas."). The public trust doctrine thus migrated inland to embrace all navigable lakes and streams, not just the tidal waters along the eastern seaboard.

With this background in mind, we proceed with our analysis.

I. At statehood, Indiana acquired exclusive title to the bed of Lake Michigan up to the natural OHWM, including the temporarily-exposed shores.

The State of Indiana, upon admission to the Union in 1816, acquired title to the shores and submerged lands of all navigable waters within its borders. *Kivett*, 228 Ind. at 630, 95 N.E.2d at 148. The question here is where the boundary at which the State's ownership interest ends—and the Gundersons' property interest

begins—is located. This is a question of federal law. *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 22 (1935) ("[T]he boundary between the upland and the tideland, is necessarily a federal question.").

The Gundersons argue that, by deed, they own the Disputed Property in absolute fee to the water's edge of Lake Michigan—i.e., the point at which the water meets the exposed shore at any given moment. By their theory, the water's edge is the legal boundary—a "movable freehold"—separating public trust lands from private property. App. 696. In support of their argument, they cite the Northwest Ordinance of 1787, the Submerged Lands Act of 1953, U.S. Supreme Court precedent, and other case law. These authorities, they contend, confine the State's public trust lands to the submerged lakebed, thus limiting public use to the waters only.

The State and Intervenors, on the other hand, contend that Indiana holds exclusive title to the bed of Lake Michigan up to the OHWM, including the exposed shores as the water periodically recedes. Absent evidence of an express federal grant prior to 1816, they contend, this title passed to Indiana at statehood under the equal-footing doctrine to hold in trust for public use.

For the reasons set forth below, we agree with the State and Intervenors.

a. The Northwest Ordinance of 1787 had no bearing on the State's equal-footing title.

The Gundersons trace Indiana's equal-footing title to the Northwest Ordinance of 1787. That federal measure guaranteed the admission of new states to the Union "on an equal footing with the original States" and specified that "[t]he navigable waters leading into the Mississippi and St. Lawrence . . . shall be common highways, and forever free." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, arts. IV-V (readopting Ordinance of July 13, 1787), *reprinted in* 1 U.S.C. at LVII (2012). The Gundersons interpret this language as limiting the public trust to the waters only.

Alliance-Dunes reject this argument. While acknowledging that the term "equal footing" first appeared in the Northwest Ordinance, they contend that the equal-footing doctrine originates solely in the U.S. Constitution. We agree.

The equal-footing doctrine was first discussed and applied by the U.S. Supreme Court in *Pollard*. In holding that the State of Alabama acquired title to the lands underlying tidal waters within its borders, the *Pollard* Court cited both the Northwest Ordinance and the statehood clause of the U.S. Constitution. 44 U.S. (3 How.) 212, 222-23 (1845). Despite this early reference and reliance on the Ordinance, however, the Court's equal-footing jurisprudence later curtailed—and eventually abandoned—that source of authority. In *Illinois Central Railroad Co. v. Illinois*, the Court, while acknowledging the Ordinance's equal-footing clause,

concluded that "the equality prescribed would have existed if it had not been thus stipulated." 146 U.S. 387, 434 (1892). By the mid-twentieth century, the Court had put to rest any lingering theories over the effect of the Ordinance on determining equal-footing title, referring instead to statehood as triggering the acquisition of equal-footing lands. "In accordance with the constitutional principle of the equality of states," the Court declared in *United States v. Utah*, "the title to the beds of rivers within [the state] passed to that state when it was admitted to the Union, if the rivers were then navigable." 283 U.S. 64, 75 (1931).

Once equal-footing title passed to the State, it was free to establish different rules regarding public use or conveyance. *See Corvallis Sand*, 429 U.S. at 376. We acknowledge that several early cases in our State's history cited article IV of the Ordinance as a source of public rights in water. *See, e.g.*, *Cox v. State*, 3 Blackf. 193, 196 (Ind. 1833) (concluding that the Ordinance prohibited Indiana from "converting [navigable streams] to any other use than public highways, and from obstructing them with any artificial obstruction, and from levying any tax, impost, or duty on any of those citizens who may navigate them"); *Depew v. Bd. Trs. of Wabash & E. Canal*, 5 Ind. 8, 10 (1854) (concluding that the Ordinance prevented the State from "materially obstruct[ing]" navigable waters). By the mid-nineteenth century, however, a shift in judicial thought rendered the Ordinance inoperative following a state's admission to the Union. *See* G. Graham Waite, *Public Rights in Indiana Waters*, 37 Ind. L.J. 467, 468 n.2

(1962) (citing cases). The U.S. Supreme Court came to the same conclusion: "To the extent that it pertained to internal affairs," rather than interstate commerce, "the Ordinance of 1787—notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the state . . . into the Union on an equal footing with the original states in all respects whatever." *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 120 (1921) (internal quotations omitted). *See also Huse v. Glover*, 119 U.S. 543, 546 (1886) (holding that provisions of the Ordinance "could not control the powers and authority of the State after her admission [and] that . . . it ceased to have any operative force, except as voluntarily adopted by her after she became a State of the Union").

We conclude that the Northwest Ordinance of 1787 had no effect on Indiana's title to the shores and submerged lands of Lake Michigan, either at the time of statehood or after. Stated simply, under the equal-footing doctrine, "the State's title . . . vests absolutely as of the time of its admission" to the Union. *Corvallis Sand*, 429 U.S. at 370-71. And while the Ordinance may have informed the states' understanding of public rights in water, those rights derive not from the Ordinance but from theories of sovereignty reaching back to our nation's founding.

b. As a matter of law, the Federal land patent at the root of the Gundersons' deed conveyed no land below the OHWM.

The Gundersons argue that their deed, the 1914 plat to which the deed refers, and the plat survey are *prima facie* evidence of title and fee simple ownership in the Disputed Property and that anyone claiming an ownership interest in their property must show superior title. The State and Intervenors deny this claim, contending instead that superior title to land below the OHWM vested in Indiana at statehood and that, as a matter of law, the federal land patent at the root of the Gundersons' deed conveyed no land below that boundary. We agree with the State and Intervenors.

The deed to the Disputed Property originates from an 1837 federal land patent, granting fractional section 15 to the Gundersons' predecessor-in-interest, William Wiggins Taylor. As a general policy and practice, the federal government did not survey or patent land below the OHWM of navigable water bodies. U.S. Dep't of the Interior, Bureau of Land Mgmt., *Manual of Surveying Instructions for the Survey of Public Lands of the United States* 5 (2009) ("Beds of navigable bodies of water are not public domain lands and are not subject to survey and disposal by the United States."). As the U.S. Supreme Court in *Shively v. Bowlby* held, "[g]rants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion

of the future state." 152 U.S. 1, 58 (1894). *See also Barney*, 94 U.S. at 338 (stating that the bed of a navigable water "properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water").

Shively acknowledged Congress's authority to make pre-statehood "grants of lands below high-water mark of navigable waters" as necessary "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states." 152 U.S. at 48. But such grants are extremely rare, *see Utah Div. of State Lands v. United States*, 482 U.S. 193, 198 (1987) (identifying "only a single case"), and have no effect on the State's equal-footing title here. *See also* Bureau of Land Mgmt., *Manual of Surveying Instructions* at 5 (stating that, while "the Federal Government continued . . . to hold title to and administer unappropriated lands" following the "admission of the public domain States into the Union," sovereign authority "over the lands beneath navigable waters lies within the individual States upon statehood").

Thus, absent evidence of an express federal grant before 1816, the shore lands below Lake Michigan's OHWM were not available for conveyance to private parties.

c. Indiana's equal-footing lands included the temporarily-exposed shores of Lake Michigan up to the natural OHWM.

The Gundersons cite various state and federal cases as well as the federal Submerged Lands Act in support of their argument that the water's edge is the legal boundary separating public trust lands from private property. In framing their argument, they rely on phrases such as "lands beneath navigable waters" and "up to the OHWM." The State and Intervenors reject this interpretation, likewise citing state and federal common law for the conclusion that State equal-footing lands need not be permanently submerged. We agree with the State and Intervenors.

A thorough examination of the authorities reveals that variations in characterizing equal-footing lands are simply alternative expressions of the same rule of law: lands on the waterbody side of the OHWM pass to new states as an incident of sovereignty, whereas lands on the upland side of the OHWM are available for federal patent and private ownership.[4] *See, e.g.*, *Gibson v. United States*, 166 U.S. 269, 272 (1897) (acknowledging that, while subject to the federal navigational servitude, "the title to the *shore and submerged soil* is in the

[4] Even the term "water's edge," as used in federal surveys, refers to the OHWM. *See* Bureau of Land Mgmt., *Manual of Surveying Instructions* at 81-82 ("[W]hen the Federal Government conveys title to a lot fronting on a navigable body of water, it conveys title to the water's edge, meaning the OHWM."). *See also Glass v. Goeckel*, 703 N.W.2d 58, 76 n.29 (Mich. 2005) (noting "water's edge" often means "high water mark").

various states"); *Shively*, 152 U.S. at 58 (concluding that congressional grants of public lands "*bordering on or bounded by navigable waters* . . . leave the question of the use of the shores by the owners of uplands to the sovereign control of each state")[5]; *Pollard*, 44 U.S. (3 How.) at 230 (referring to the "shores and the soils under the navigable waters"); *Barney*, 94 U.S. at 336 ("[T]itle of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that *the shore between high and low water mark, as well as the bed of the river, belongs to the State*."); *Corvallis Sand*, 429 U.S. at 379 (acknowledging that the "principle [that riparian lands did not pass under the equal-footing doctrine] applies to the banks and shores of waterways"); *Illinois Cent.*, 146 U.S. at 451 (referring to "lands adjacent to the shore of Lake Michigan"); *United States v. Carstens*, 982 F. Supp. 2d 874, 878 (N.D. Ind. 2013) ("The *land between the edge of the water of Lake Michigan and the ordinary high water mark* is held in public trust by the State of Indiana."); *Lake Sand*, 68 Ind. App. at 445, 120 N.E. at 716 ("Among the rights thus acquired by the [State] is the right to own and hold the lands under navigable waters within the state *including the shores or space between ordinary high and low water marks*. . . .") (quoting *Ex parte Powell*, 70 Fla. at 372, 70 So. at 395) (emphasis added in all citations).[6] Perhaps the

[5] As the *Shively* Court explained, "[t]he shore is that ground that is between the ordinary high-water and low-water mark." 152 U.S. at 12 (internal quotations omitted).

[6] Other Indiana sources of authority are consistent with the understanding that equal-footing lands need not be permanently

Michigan Supreme Court articulated it best: The term OHWM "attempts to encapsulate the fact that water levels in the Great Lakes fluctuate. This fluctuation results in temporary exposure of land that may then remain exposed above where water currently lies." *Glass v. Goeckel*, 703 N.W.2d 58, 71 (Mich. 2005). And "although not immediately and presently submerged," this land "falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point." *Id.*

Rather than positioning the OHWM at the water's edge, early American common law defined that boundary as the point "where the presence and action of water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself." *Howard v. Ingersoll*, 54 U.S. (12 How.) 381, 427 (1851) (Curtis, J., concurring). *See also* Louis Houck, *A Treatise on the Law of Navigable Rivers* § 10, at 6-7 (1868) (quoting *Ingersoll*); 2 Henry Philip Farnham, *The Law of Waters and Water Rights* § 417, at 1461 (1904) (citing case law and using

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submerged. *See, e.g.*, 1990 Ind. Op. Att'y Gen. No. 90-8 (Apr. 17, 1990) ("The State of Indiana owns the land lakewards of the ordinary high water mark on the Lake Michigan shore to the northern boundaries of the State in Lake Michigan."); 1978 Ind. Op. Att'y Gen. (Nov. 22, 1978) (concluding that "the State of Indiana owns the land lakewards of the ordinary high water mark on the Lake Michigan shore" and defining "lands beneath navigable waters" as "all lands covered by non-tidal waters up to the ordinary high water mark," indicated by "[p]hysical markings on the shore").

a definition similar to *Ingersoll* "which has in effect been adopted by the weight of authority").

The Gundersons similarly misconstrue the language of the Submerged Lands Act of 1953 ("SLA"), 43 U.S.C. §§ 1301-1356 (2012). The SLA recognizes "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." *Id.* § 1311(a). "Lands beneath navigable waters" refers to "all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable . . . at the time such State became a member of the Union . . . *up to the ordinary high water mark*." *Id.* § 1301(a)(1) (emphasis added). The SLA expressly includes the Great Lakes. *Id.* § 1301(b). The SLA "did not alter the scope or effect of the equal-footing doctrine." *Corvallis Sand*, 429 U.S. at 371 n.4. Rather, "[t]he effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government." *Id. See also* S.J. Rep. No. 133, at 7, 60-61 (1953) (confirming that the equal-footing doctrine applies to the "shores of navigable waters" of the Great Lake states) (quoting *Pollard*, 44 U.S. (3 How.) at 229).

We hold that, as articulated in the common law and confirmed by the SLA, Indiana at statehood acquired equal-footing lands inclusive of the temporarily-exposed shores of Lake Michigan up to the natural OHWM.

II. Indiana retains exclusive title up to the natural OHWM of Lake Michigan.

Having concluded that Indiana, at statehood, acquired exclusive title to the bed of Lake Michigan up to the natural OHWM, including the temporarily-exposed shores, we must now determine whether the State has since relinquished title to that land.

The Gundersons reiterate their argument that the Disputed Property extends to the water's edge because Indiana has surrendered its public trust rights in Lake Michigan. In support of their claim, they cite Indiana's Lake Preservation Act and precedent from this Court. Moreover, they contend that the DNR has no authority to establish or alter property boundaries or to acquire property rights by administrative definition of the OHWM.

The State and Intervenors argue that the State has not relinquished or transferred title to the Disputed Property. Such land below the OHWM, they contend, remains subject to state ownership and the public trust. Intervenors emphasize, and the State agrees, that Indiana may not alienate its trust property without specific legislative authorization and altogether lacks the power to "convey or curtail" public rights in Lake Michigan. *See Lake Sand*, 68 Ind. App. at 446, 120 N.E. at 716. The idea that riparian property owners and the State have overlapping title to the shore, they contend, is inconsistent with fundamental public trust doctrine and threatens public use. The State and Intervenors part ways, however, on whether

the DNR's administrative boundary may supersede the common-law OHWM.

Resolution of this issue is a question of state law. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) ("[I]t has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."); *see also Shively*, 152 U.S. 57-58 ("The title and rights of riparian or littoral proprietors in the soil below high-water mark . . . are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.").

We conclude that, with the exception of select parcels of land not in dispute here, Indiana has not relinquished its title to the shores and submerged lands of Lake Michigan.

a. Absent an authorized legislative conveyance, Indiana may not relinquish its public trust lands.

The Gundersons make several arguments that Indiana has surrendered its public trust rights in the shores of Lake Michigan.[7] We address those arguments in turn.

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[7] The Gundersons cite various cases from other Great Lakes states for their argument that private riparian ownership extends to the water's edge. *See Seaman v. Smith*, 24 Ill. 521 (Ill. 1860); *Brundage v. Knox*, 117 N.E. 123 (Ill. 1917); *State ex rel. Merrill v. Ohio Dep't. of Nat. Res.*, 955 N.E.2d 935 (Ohio 2011); *Doemel v. Jantz*, 193 N.W. 393 (Wis. 1923). However, each state has dealt

First, the Gundersons argue that Lake Michigan enjoys no public trust protections because lawmakers expressly excluded that body of water from Indiana's Lake Preservation Act. Ind. Code §§ 14-26-2-1, 3(b)(1) (2017). For this reason, they claim the right to exclude others from the shores above the water's edge. The State and Intervenors, on the other hand, argue that Indiana has not abrogated its common-law fiduciary responsibilities to Lake Michigan, either expressly or implicitly, through the Lake Preservation Act. We agree with the State and Intervenors.

When interpreting a statute, we "presume that the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication." *Clark v. Clark*, 971 N.E.2d 58, 62 (Ind. 2012) (internal quotations omitted). Indiana courts may imply an abrogation of the common law only if "a statute is enacted which undertakes to cover the entire subject treated and was clearly designed as a substitute for the common law" or "the two laws are so repugnant that both in reason may not stand." *Irvine v. Rare Feline Breeding Ctr., Inc.*, 685 N.E.2d 120, 123 (Ind. Ct. App. 1997).

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with its public trust lands "according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public." *Shively*, 152 U.S. at 26. Because of this, the *Shively* Court cautioned against "applying precedents in one state to cases arising in another." *Id.* We adhere to this sage advice in this section of our analysis.

In 1947, the Indiana General Assembly enacted legislation declaring the public's "vested right in the preservation, protection and enjoyment of all of the public fresh water lakes" in the State "and the use of such waters for recreational purposes." 1947 Ind. Acts 1223 (codified as amended at I.C. § 14-26-2-5). The Lake Preservation Act is "[p]ublic trust legislation" intended to recognize "the public's right to preserve the natural scenic beauty of our lakes and to recreational values upon the lakes." *Lake of the Woods v. Ralston*, 748 N.E.2d 396, 401 (Ind. Ct. App. 2001). The Act, however, specifically excludes Lake Michigan from its ambit. I.C. §§ 14-26-2-1, 3(b)(1).

Despite this omission, the Act does not expressly abrogate the common-law public trust doctrine; it merely states that the Act "does not apply" to Lake Michigan. I.C. § 14-26-2-1. Moreover, we find nothing in the Act that conflicts with the common-law public trust doctrine as it applies to Lake Michigan. *See* I.C. § 14-26-2-5 (describing public rights).

Even if the legislature had intended to extinguish public trust rights in the shores of Lake Michigan, it lacked the authority to *fully* abdicate its fiduciary responsibility over these lands. *Illinois Cent.*, 146 U.S. at 453 ("The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.").

Our conclusion that the legislature has not extinguished public trust rights in the shores of Lake Michigan finds further support in other provisions of the Indiana Code. Under the State's submerged property statute, an "interested person may acquire title to submerged real property adjacent to and within the width of the land bordering on Lake Michigan and between the shore and the dock or harbor line" by applying to the DNR for a "permit to fill in, reclaim, and own the real property." Ind. Code § 14-18-6-4(1)(A) (2017). The permit is subject to approval by the governor. *Id.* The statute further requires a permit under Indiana Code chapter 14-29-1. I.C. § 14-18-6-4(1)(B). A permit under this chapter must not "[u]nreasonably impair the navigability of the waterway" or "[c]ause significant harm to the environment." Ind. Code § 14-29-1-8(c) (2017). *See also* I.C. § 14-29-1-4(b) (prohibiting an owner of land bordering navigable waters from extending a pier, dock, or wharf "further than is necessary to accommodate shipping and navigation"). A patent issued by the governor vests in the person "fee simple title to the real property that has been filled in and improved." I.C. § 14-18-6-7(a). However, such land remains encumbered by the public trust. Before issuing a permit under Indiana Code chapter 14-29-1 (a requisite step under the submerged property statute), the DNR "shall consider [the] public trust" and the "likely impact upon the applicant and other affected persons, including the accretion or erosion of sand or sediments." 312 Ind. Admin. Code 6-1-1(f) (2017).

As further evidence that the State has relinquished its public trust lands, the Gundersons cite *Bainbridge v. Sherlock*, 29 Ind. 364 (1868). In that case, this Court considered "the rights of the navigator" to the use of the "banks and margins" along the Ohio River. *Id.* at 367. While acknowledging the public right to navigate these waters, this Court concluded that "there is no 'shore,' in the legal sense of that term; that is, a margin between high and low tide—the title to which is common." *Id.* Rather, the Court ruled, "[t]he banks belong to the riparian owner, and he owns an absolute fee down to low water mark." *Id.* Thus, "[i]f a navigator lands, without authority, on a barren bank, he is technically a trespasser for trampling over the pebbles." *Id.* at 371.

Alliance-Dunes counter that *Bainbridge* is historically unique to the Ohio River and has no application to Lake Michigan. For the reasons below, we agree with Alliance-Dunes.

First, the rule in *Bainbridge*—that the riparian owner possesses title to the low water mark of the Ohio River—originates from this Court's earlier decision in *Stinson v. Butler*, 4 Blackf. 285, 285 (1837) ("The proprietors of land situated in this State, and bounded on one side by the *Ohio* river, must be considered as owning the soil to the ordinary low-water mark."). *Stinson*, in turn, relied on *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374, 383 (1820), which ruled that, by virtue of

the 1784 Virginia Act of Cession,[8] Indiana's southern boundary extended only to the low water mark of the Ohio River. Thus, the Court in *Stinson* reasoned, "the same mark must be considered as the boundary" of any title conveyance along the Ohio River, whether by the United States "or any of her grantees." 4 Blackf. at 285. Whatever the merits of this premise,[9] this Court has consistently applied the rule to cases involving questions of riparian title along our State's aqueous southern boundary. *See, e.g.*, *Talbott v. Grace*, 30 Ind. 389, 389-90 (1868) (holding that the public cannot, by prescription or custom, acquire a right "to land boats, and load and unload freight, and thus encumber the land" on the banks of the Ohio River); *Martin v. City of Evansville*, 32 Ind. 85, 86 (1869) ("The title of the riparian owner on the Ohio river, extends to low-water mark. . . ."); *Irvin v. Crammond*, 58 Ind. App. 540, 108 N.E. 539, 541 (1915) ("[I]t is thoroughly settled that

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[8] Deed of Cession from Virginia, 1784 Va. Acts (11 Hen.) 571, 572 (ceding "territory *northwest of* the river Ohio" to the United States) (emphasis added). By the terms of this deed, Virginia retained the bed of the Ohio River, title to which vested in Kentucky upon statehood in 1792. *Handly's Lessee*, 18 U.S. (5 Wheat.) at 384; *Indiana v. Kentucky*, 136 U.S. 479, 508 (1890).

[9] The decision in *Bainbridge* received sharp criticism from contemporary legal commentators. "That the riparian owners on such a great navigable river as the Ohio, should have the absolute power to control the landing of vessels, and the right to charge, without legislative grant, for the use of the unimproved shores, is a position . . . that cannot be sustained," one treatise writer opined, "either on principle or authority. Such a doctrine, firmly established," he added, "would be subversive of the rights of free navigation." Louis Houck, *A Treatise on the Law of Navigable Rivers* 191 (1868).

where land is bounded by the Ohio river on the Indiana side, the title of the owner extends to low–water mark."). However, the rule has no application to other equal-footing lands within Indiana, including the shores of Lake Michigan. *See* 312 I.A.C. 6-1-1(b) ("In the absence of a contrary state boundary, the line of demarcation for a navigable waterway is the ordinary high watermark.").

Second, to the extent *Bainbridge* has generated reliance interests in land extending to the low water mark, decisions from this Court subsequent to that case have significantly narrowed its holding, adopting instead a more expansive view of public trust rights along the Ohio River. In *Martin v. City of Evansville*, this Court—while confirming riparian title to the low water mark of the Ohio River—ruled that the city "has the power, as a police regulation, to establish water lines and to make reasonable provisions for the protection of navigation, and for this purpose may undoubtedly prohibit the erection of buildings *below high-water mark* which would have a tendency to obstruct navigation." 32 Ind. at 86 (1869) (emphasis added). Similarly, in *Sherlock v. Bainbridge*, we determined that "riparian ownership does not carry with it the right to the exclusive and unrestricted use of the lands ordinarily covered by the water." 41 Ind. 35, 47 (1872) (quoting *Rice v. Ruddiman*, 10 Mich. 125, 140 (1862)). Such private use "must in all cases be subordinate to the paramount public right of navigation, and such other public rights as may be incident thereto." *Stinson*, 41 Ind. at 47. Without overturning the settled

"rule of property" under *Stinson* and its progeny, this Court concluded that "[t]he right to navigate the river as a public highway includes, necessarily, the right to stop where the purposes of such navigation require it, for a reasonable length of time." *Id.* at 41, 44.

In concluding that *Bainbridge* and its progeny have no application to Lake Michigan, we do "not declare that what had been private property under established law no longer is." *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 728 (2010). Rather, our decision serves to "clarif[y] property entitlements (or the lack thereof)" that may have been previously unclear. *Id.*

Finally, the Gundersons argue that the DNR has no authority to establish or alter property boundaries or to acquire property rights by administrative definition of the OHWM. *See* 312 I.A.C. 1-1-26(2). The Indiana Administrative Code contains two definitions of the OHWM. The first definition reflects the traditional common-law OWHM: "The line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics." 312 I.A.C. 1-1-26(1). These physical characteristics include a "clear and natural line impressed on the bank" or shore, shelving, changes in the soil's character, the absence of terrestrial vegetation, or the "presence of litter or debris." *Id.* The second definition adopts a fixed elevation—581.5 feet above sea level—as the OHWM.[10] *Id.* 1-1-26(2).

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[10] This fixed elevation is based on the International Great Lakes Datum, 1985 (commonly known as IGLD 1985), a reference

This definition applies exclusively to the shores of Lake Michigan. *Id.*

The State defends the administrative boundary by emphasizing its statutory authority over navigable waters and contiguous lands.[11] *See* Ind. Code § 14-19-1-1(9) (2017) (assigning to the DNR the "general charge of the navigable water of Indiana"); Ind. Code § 14-18-5-2 (2017) (specifying that state lands abutting a lake or stream are under "the charge, management, control, and supervision of the [DNR]"). As a practical matter, the State adds, the administrative boundary "provides notice to the State, the public, and private land owners of their zone of rights." App. 223. The common-law physical characteristics test, by contrast, "would lead to uncertainty regarding the boundary of riparian landowners and the extent of the DNR's regulatory jurisdiction." State's Pet. for Reh'g at 13.

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system used to define water levels in the Great Lakes. *International Great Lakes Datum Update*, Coordinating Committee on Great Lakes Basic Hydraulic and Hydrologic Data (Oct. 6, 2015), http://www.greatlakescc.org/wp36/international-great-lakes-datum-update. *See also Burleson v. Dep't of Envtl. Quality*, 808 N.W.2d 792, 801 (Mich. App. 2011) (discussing same).

[11] In its Petition to Transfer, the State argues that, because no party formally requested such relief, "the propriety of establishing OHWM via administrative rule has never been properly before the courts" and thus should not have been addressed by the Court of Appeals. State's Pet. to Trans. at 19. As the State acknowledges, however, LBCA, in its memorandum on summary judgment, urged the trial court to use the common-law standard. Moreover, Alliance-Dunes explicitly challenged the validity of the regulation in its motion to correct error.

Intervenors, for their part, contend that the legal boundary separating equal-footing lands from privately-owned riparian lands remains the natural OHWM. Absent a clear legislative directive, Alliance-Dunes argue, *Lake Sand* prohibits the DNR from changing this boundary as it threatens to alienate public trust lands.

On this issue, we side with both the Gundersons and Intervenors.

First, "the legislature cannot delegate the power to make a law." *City of Carmel v. Martin Marietta Materials, Inc.*, 883 N.E.2d 781, 788 (Ind. 2008) (construing article IV, section 1 of the Indiana Constitution). It can only "make a law delegating power to an agency to determine the existence of some fact or situation upon which the law is intended to operate." *Id.* (internal quotations omitted). Moreover, the legislature may only "delegate rule-making powers to an administrative agency if that delegation is accompanied by sufficient standards to guide the agency in the exercise of its statutory authority." *Healthscript, Inc. v. State*, 770 N.E.2d 810, 814 (Ind. 2002). The statutory authority cited by the State merely assigns to the DNR general managerial responsibility over "the navigable water of Indiana" and State lands "adjacent to a lake or stream." I.C. §§ 14-19-1-1(9), 14-18-5-1, 2. Neither statutory provision contains legislative guidelines on regulating public trust lands, let alone "sufficient

standards to guide the agency."[12] *Healthscript*, 770 N.E.2d at 814.

Second, the absence of a clear legislative directive prohibits the DNR from changing the OHWM, as it threatens to alienate public trust lands. *Lake Sand*, 68 Ind. App. at 445, 120 N.E. at 716 ("The state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan."); *accord Kivett*, 228 Ind. at 630, 95 N.E.2d at 148.

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

[12] Designated evidence reveals the DNR's conceded lack of authority in defining these boundaries. In executive meeting minutes from 2012, the DNR's Chief Legal Counsel, in discussing the "ongoing debate . . . as to who owns the lakeshore," suggested that "it's a public access issue that I believe should be addressed by the General Assembly[, which has] addressed public trust and public access in other respects in the law." App. 189. Counsel further expressed reluctance over whether the DNR "should decide what the public trust area is for all of Lake Michigan or for Long Beach, in particular." *Id.*

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.[14] 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. *State Land Bd. v. Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1361 (Or. 1978). 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.[15] *See* U.S. Const. amend. V; Ind. Const. art. 1, sec. 21.

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[13] The corollary to this doctrine is the doctrine of reliction, which refers to the gradual receding of water from the shore. 93 C.J.S. Waters § 234 (2017).

[14] The corollary doctrine here is submergence, which refers to the gradual disappearance of land due to rising water levels. 93 C.J.S. Waters § 187 (2017).

[15] Lake Michigan is especially prone to these shoreline dynamics. *See* Richard K. Norton et al., *The Deceptively Complicated "Elevation Ordinary High Water Mark" and the Problem with*

Generally, if administrative rules and regulations "are in conflict with the state's organic law, or antagonistic to the general law of the state[, then] they are invalid." *Potts v. Review Bd. of Indiana Emp't Sec. Div.*, 438 N.E.2d 1012, 1015-16 (Ind. Ct. App. 1982). However, we recognize that the administrative OHWM serves other valid purposes, namely as a jurisdictional benchmark for administering regulatory programs by the DNR and U.S. Army Corps of Engineers. *See International Great Lakes Datum*, Ind. Dep't of Natural Resources, https://www.in.gov/dnr/water/3659.htm (last visited Feb. 12, 2018); *Ordinary High Water Mark and Low Water Datum—Description*, U.S. Army Corps of Engineers, http://www.lre.usace.army.mil/Missions/Great-Lakes-Information/Links/Ordinary-High-Water-Mark-and-Low-Water-Datum (last visited Feb. 12, 2018).

For these reasons, we hold that the natural OHWM is the legal boundary separating State-owned public trust land from privately-owned riparian land.[16]

Using It on a Laurentian Great Lakes Shore, 39 J. Great Lakes Research 527, 534 (Dec. 2013) (discussing historical and seasonal variations in water levels and concluding that "[the natural OHWM is] a much better mark of the past incidence of true ordinary high water, one that is much more stable over time (to the benefit of shoreland property owners) and much more likely to protect both privately owned structures and the state's public trust shorelands").

[16] We acknowledge that the character of the shore at a particular site may present difficulties in determining the precise location of the OHWM. In such cases, "recourse may be had to other sites along the same stream to determine the line." *Borough of Ford City v. United States*, 345 F.2d 645, 648 (3d Cir. 1965).

However, because the administrative OHWM serves other valid purposes, we stop short of declaring it void.

III. At a minimum, walking along the Lake Michigan shore is a protected activity inherent in the exercise of traditional public trust rights.

The Gundersons reject the theory that the State has an overlapping interest in the Disputed Property. Any recognition of public rights in the shores abutting their property, they contend, must comport with the precedent that private property cannot be taken without just compensation. The State, in turn, suggests that the public has a right to stationary activities such as fishing and picnicking, rather than mere ambulatory recreation.

LBCA urges this Court to recognize reasonable and limited recreational public uses including fishing, boating, swimming, sunbathing, and other beach sports. These activities, they contend, are compatible with the Lake Preservation Act, the nature of Indiana's Lake Michigan shore, and documented historical uses of the beach. Alliance-Dunes, for their part, argue that Indiana should protect the rights of its residents to reasonable recreational activities—including fishing, boating, hunting, and nature tourism—to accommodate evolving public priorities. Such uses, they contend, have important economic and social functions in the Great Lakes region.

Finally, Amicus Curiae Pacific Legal Foundation argue that Indiana should limit its public trust doctrine to three public uses recognized at common law at the time of the federal constitution's ratification: fishing, commerce, and navigation. Anything more, they contend, is an unconstitutional taking. Alliance-Dunes refute the argument that federal law imposes such a limit on public use, arguing instead that, upon admission to the Union, states are free to determine the scope of public uses as they see fit.

The waters and public trust lands of Lake Michigan are subject to a multitude of competing public and private interests: commercial transportation, riparian use, onshore industrial operations, and a vibrant tourism industry. "Indiana courts have tried to balance the[se] interests." Waite, *Public Rights in Indiana Waters*, 37 Ind. L.J. at 468. "Where the law tips too far in favor of the littoral landowners, important public resources effectively are monopolized by a few. Where the law tilts too far in favor of the public, valuable private property rights get trampled by the many." Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 16 (2010).

Absent a statutory framework of public trust rights in the shores of Lake Michigan, this Court retains its common law powers to articulate—and even expand—the scope of protected uses. Indeed, a broad interpretation of protected uses accords with the view among courts that the "trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing

conditions and needs of the public it was created to benefit." *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1976) (quoting *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972)).

To the extent that we are asked to limit public use to the waters only, as the Gundersons suggest, such a restriction is impractical. There must necessarily be some degree of temporary, transitory occupation of the shore for the public to access the waters, whether for navigation, commerce, or fishing—the traditional triad of protected uses under the common-law public trust doctrine. *See Illinois Cent.*, 146 U.S. at 452. Thus, we hold that, *at a minimum*, walking below the natural OHWM along the shores of Lake Michigan is a protected public use in Indiana. This public right of passage, inherent in the exercise of the traditional protected uses we recognize today, would not infringe on the property rights of adjacent riparian landowners.

Beyond these protected uses, separation of powers compels us to exercise judicial restraint in this case. *See Fraley v. Minger*, 829 N.E.2d 476, 492 (Ind. 2005) ("The judiciary must respect the fact that the General Assembly is likewise a co-equal and independent branch."). Refraining from exercising our common law authority more expansively here is particularly prudent and appropriate where the legislature has codified, in part, our State's public trust doctrine. *See* I.C. §§ 14-26-2-1 to -25. Thus, we conclude that any enlargement of public rights on the beaches of Lake Michigan beyond those recognized today is better left

to the more representative lawmaking procedures of the other branches of government.

Conclusion

For the reasons above, we affirm in part and reverse in part the trial court's grant of summary judgment for the State and Intervenors.

Rush, C.J., and David and Goff, JJ., concur.

Slaughter, J., not participating.

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IN THE
COURT OF APPEALS OF INDIANA

Don H. Gunderson and Bobbie J. Gunderson, Co-Trustees of the Don H. Gunderson Living Trust Dated November 14, 2006, *Appellants/Cross-Appellees/ Plaintiffs*, v. State of Indiana, Indiana Department of Natural Resources, *Appellees/Defendants*, Alliance for the Great Lakes and Save the Dunes, *Appellee/Cross-Appellant/ Intervenor-Defendant,* Long Beach Community Alliance, Patrick Cannon, John Wall, Doria Lemay, Michael Salmon, and Thomas King, *Appellees/Cross-Appellants/ Intervenor-Defendants*	December 7, 2016 Court of Appeals Case No. 46A03-1508-PL-1116 Appeal from the LaPorte Superior Court The Honorable Richard R. Stalbrink, Jr., Judge Trial Court Cause No. 46D02-1404-PL-606

May, Judge.

"The shores of the Great Lakes may look serene, but they are a battleground. Members of the public enjoy

using the shores for fishing, boating, birding, or simply strolling along and taking in the scenic vistas." Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 2 (2010). "Repeatedly, however, owners of land bordering the Great Lakes (*i.e.*, littoral owners), armed with deeds indicating they own the shore to the water's edge or even lower, have tried to stop members of the public from using their property above the water's edge." *Id.* (internal footnotes omitted). Today we are called on to decide one such case.

Don H. Gunderson and Bobbie J. Gunderson, as trustees of the Don H. Gunderson Living Trust (collectively, "Gunderson"), sought a declaratory judgment that their Lake Michigan property extends to the water's edge, wherever the water's edge is at any given moment. The State of Indiana and the Indiana Department of Natural Resources ("DNR") (collectively, "State"), Alliance for the Great Lakes and Save the Dunes ("Alliance-Dunes"), and Long Beach Community Alliance ("LBCA"),[1] argued the State holds in trust for the public all land up to the ordinary high water mark ("OHWM"), regardless whether that land is covered by water.

The trial court granted summary judgment for the State and the Intervenors. We affirm in part and reverse in part.

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[1] We will refer to Alliance-Dunes and LBCA collectively as "the Intervenors."

Facts and Procedural History[2]

Gunderson owns three lots in Long Beach, Indiana ("Gunderson Property"). The trial court found, "The Gunderson's deed, the plat to which the deed refers, and the survey of the plats reference no northern dimension other than that the lots are within Section 15." (Appellants' App. at 26.) The deed[3] for the property incorporates by reference a 1914 plat map of Long Beach, which shows the Gunderson Property is located in Section 15 of the township. The Gunderson Property is shown on the plat as a series of rectangular boxes with a northern boundary. A 1984 survey identifies the northern boundary of the Gunderson Property as "lake edge." (*Id.* at 127.) A survey from 1829 indicates an irregular property line on the northern border of Section 15, beyond which is labeled, "Lake Michigan." (*Id.* at 585-7.)

On April 4, 2014, Gunderson brought a motion for a declaratory judgment and to quiet title against the State, claiming he owns all land to the water's edge and the public has no rights to any land not covered by water, as that land is his.[4] On June 2, 2014, Alliance-Dunes filed a motion to intervene, which was granted.

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[2] We heard oral argument at the Indiana Statehouse on September 8, 2016. We commend counsel on the quality of their oral advocacy.

[3] The legal description provided in the deed indicates the Gunderson Property encompasses "Lot 240, 242, and 244," (App. at 110), which correspond to the location of Section 15 on the 1914 plat map.

[4] Gunderson filed an amended complaint on April 7, 2014.

On July 1, 2014, LBCA filed a motion to intervene; that motion was granted on October 20, 2014.

On October 31, 2014, Gunderson moved for summary judgment. Subsequently, the State filed a cross-motion, as did the Intervenors (collectively "Defendants"). On April 22, 2015, the trial court held a hearing on all motions. On July 24, 2015, the trial court denied Gunderson's summary judgment motion and granted the cross-motions filed by the Defendants.[5] It found and concluded:

> Therefore, as to ownership, this Court finds that the Gundersons own legal title, *jus privatum*, in their lots to the northern boundary of Section 15. Further, this Court finds that the State holds *jus publicum*, in public trust, the land below the OHWM, as defined by 312 Ind. Admin. Code 1-1-26(2). Moreover this Court finds that the Gundersons cannot unduly impair the protected rights and uses of the public when the titles to the land overlap.

(*Id.* at 28.)

Gunderson filed his notice of appeal on August 10, 2015 ("Gunderson Appeal"). On August 11, 2015, Alliance-Dunes filed a combined motion for clarification and to correct error. On August 13, 2015, LBCA also filed a motion to correct error. On August 20, 2015, the State filed its responses to the Intervenors' respective

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[5] The trial court issued an Amended Order on August 3, 2015, as "the first two lines of Paragraph 46 were inadvertently cut from page 15 during printing." (App. at 34.)

motions. On October 15, 2015, the trial court scheduled a hearing on the Intervenors' motions for December 18, 2015. On October 23, 2015, this court granted a joint motion for temporary stay of appellate proceedings due to the pending motions from the Intervenors.

On November 9, 2015, Alliance-Dunes filed "Combined Motions to Take Judicial Notice of Facts, to Supplement the Record, and for Leave to Amend Alliance-Dunes' Motion for Clarification and Motion to Correct Error." ("Judicial Notice Motion") (Alliance-Dunes App. at 25.) On November 23, 2015, the trial court issued an order granting Alliance-Dunes Judicial Notice Motion "unless an objection is filed within 10 days from the date of this Order." (Id. at 90.) On November 30, 2015, Gunderson filed an objection, and on December 7, 2015, the State filed its objection to the Alliance-Dunes Judicial Notice Motion. The trial court held a hearing on all pending matters on December 18, 2015, and denied all pending motions on December 21, 2015. Alliance-Dunes appealed the trial court's denial of its Judicial Notice Motion and we consolidated that appeal and the Gunderson Appeal into the current case.

Discussion and Decision

When reviewing summary judgment, we stand in the shoes of the trial court and apply the same standards in deciding whether to affirm the ruling. *Allen Gray Ltd. P'ship IV v. Mumford*, 44 N.E.3d 1255, 1256 (Ind. Ct. App. 2015). Thus, on appeal, we must determine whether there is a genuine issue of material fact and

whether the moving party is entitled to judgment as a matter of law. *Id.* That standard requires us to construe all factual inferences in favor of the non-moving party, and to resolve all doubts as to the existence of an issue of material fact against the moving party. *Id.*

A ruling on a motion for summary judgment comes before this court clothed with a presumption of validity. *Id.* Accordingly, the party appealing a summary judgment bears the burden of persuading us that the trial court's ruling was improper. *Id.* Nevertheless, we carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. *Id.* Where, as here, the trial court makes findings and conclusions in support of its entry of summary judgment, we are not bound by such findings and conclusions, but they aid our review by providing reasons for the decision. *Id.* We will affirm a summary judgment on any theory or basis found in the record. *Id.*

Public Trust Rights

Under English law, all navigable waters and the land beneath them were held in trust by the sovereign for the benefit of the public. *Murphy v. Dep't of Nat. Res.*, 837 F. Supp. 1217, 1219 (S.D. Fla. 1993), *aff'd*, 56 F.3d 1389 (11th Cir. 1995). This arrangement has become known as the public trust doctrine, *id.*, and was adopted by the United States Supreme Court, such that "shores" were public trust land:

> For it was expressly enjoined upon [the Duke of York], as a duty in the government he was

> about to establish, to make it, as near as might be, agreeable, in their new circumstances, to the laws and statutes of England; and how could this be done, if in the charter itself, this high prerogative trust was severed from the regal authority? If the shores, and rivers and bays and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the duke, for his own individual emolument? There is nothing, we think, in the terms of the letters-patent, nor in the purposes for which it was granted, that would justify this construction.

Martin v. Waddell's Lessee, 41 U.S. 367, 413 (1842). This remained true after independence:

> This right of eminent domain over *the shores* and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title *to the shores* and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.

Pollard v. Hagan, 44 U.S. 212, 230 (1845) (emphasis added). Thus, States that joined the Union after the original thirteen acquired from the federal government rights in the lands within the state, "including the lands between the high and low tide marks and the water that periodically covers it." *Murphy*, 837 F. Supp. at 1219.

When Indiana became a state in 1816 it acquired ownership of the beds of its navigable waters. *State ex rel. Ind. Dep't of Conservation v. Kivett*, 228 Ind. 623, 629-30, 95 N.E.2d 145, 148 (1950). That title, sometimes called "equal footing"[6] title, is "different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state." *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892). After equal footing lands are passed at statehood, the land is governed by state, and not federal, law. *See PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S. Ct. 1215, 1235 (2012) (states retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine).

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[6] In 1842, the United States Supreme Court declared that, for the thirteen original states, the people of each state, based on principles of sovereignty, "hold the absolute right to all their navigable waters and the soils under them," subject only to rights surrendered and powers granted by the Constitution to the Federal Government. *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S. Ct. 1215, 1227 (2012). In a series of 19th-century cases, the Court "determined that the same principle applied to States later admitted to the Union, because the States are coequal sovereigns under the Constitution." *Id.*

A private landowner cannot impair the protected rights of the public. *Lake Sand Co. et al. v. State ex rel. Attorney General*, 68 Ind. App. 439, 444, 120 N.E. 714, 716 (1918).

In 1995, our legislature adopted Ind. Code ch. 14-26-2, which provides the Indiana public has a vested right in the preservation, protection, and enjoyment of all the public freshwater lakes of Indiana and the use of the public freshwater lakes for recreational purposes. Ind. Code § 14-26-2-5. It provides the State has full power and control of all of the public freshwater lakes in Indiana, and holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes. *Id.* A person owning land bordering a public freshwater lake does not have the exclusive right to the use of the waters of the lake or any part of the lake. *Id.* But that section expressly excludes Lake Michigan: "This chapter does not apply to . . . Lake Michigan[, l]and under the waters of Lake Michigan[, and a]ny part of the land in Indiana that borders on Lake Michigan."[7] *Id.*

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[7] Gunderson says "Three times crowed the General Assembly; there is no recreational right to any part of the land abutting Lake Michigan." (Amended Br. of Appellants at 28.) Therefore, "Gunderson paid for his property and as such has the right to exclude others." (*Id.* at 30.) That is not what the General Assembly "crowed." It said only that Ind. Code ch. 14-26-2 does not apply to Lake Michigan. The trial court correctly determined the exclusion of Lake Michigan does not mean there are no public trust rights. Rather, it reflects there was no intent to change the common law with regard to Lake Michigan. *See, e.g.*, *Shively v. Bowlby*, 152 U.S.

Gunderson characterizes that chapter as a codification of the public trust doctrine and argues there is no public trust doctrine applicable to his land because "Indiana expressly excluded Lake Michigan from its public trust doctrine." (Amended Br. of Appellants at 28.) Therefore, Gunderson contends he "paid for his property and as such has the right to exclude others." (*Id.* at 30.)

The trial court found:

> Indiana did not surrender the public trust encumbering Lake Michigan's shores by partially codifying the public trust doctrine as it applied to the smaller freshwater lakes in Indiana. That [ ] land below the OHWM has not been excluded from Indiana's common law public trust doctrine. Furthermore, this Court notes that Indiana has the least amount of shoreline along Lake Michigan. Moreover, this Court finds the idea that Indiana, with such a limited amount of shoreline, would restrict and in effect deny its citizens' [sic] access to such an amazing resource. [sic] Granting near exclusive rights to a vast portion of the shoreline to a select few homeowners, to be a far stretch of reason and common sense. [sic]

(Appellants' App. at 20.)

We decline to hold the exclusion of Lake Michigan from that statute represents the legislature's statement there are no public trust rights in the shore of Lake

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1, 41 (1894) (when there was no administratively-set OHWM, there existed a common-law OHWM).

Michigan. Gunderson relies primarily on *Bainbridge v. Sherlock*, 29 Ind. 364, 367 (1868), in which our Indiana Supreme Court held:

> The Ohio [R]iver is a great navigable highway between states and the public have all the rights that by law appertain to public rivers as against the riparian owner. But there is not "shore," in the legal sense of that term; that is, a margin between high and low tide – the title to which is common. The banks belong to the riparian owner, and he owns an absolute fee down to low water mark.

However, it seems, based on the language specifically applying the holding regarding the riparian rights to the "navigable highway between states . . . [where there] is not 'shore,' " *id.*, the holding in *Bainbridge* applied to rivers, not lakes as we have here. *Compare Kivett*, 95 N.E.2d 145 (regarding the use of resources protected by public trust on a river), and *Lake Sand*, 120 N.E. 714 (regarding the use of resources protected by public trust on a lake); *and compare* Ind. Code art. 14-29 (regulating navigable rivers, streams, and waterways) with Ind. Code art. 14-26 (regulating lakes and reservoirs).

We do not believe the exclusion of Lake Michigan from Indiana Code ch. 14-26-2 demonstrates legislative intent that there be no public trust rights to the shore. We presume the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication. *Clark v. Clark*, 971 N.E.2d 58, 62 (Ind.

2012). There was no such express declaration here, nor do we characterize the statutory language as leaving an "unmistakable implication." Thus, the rights to the shore of Lake Michigan are controlled by the common law public trust doctrine.

Scope of Public Trust Rights

As we have concluded public trust rights exist, we must now consider their scope. Regarding the nature of the public trust rights relative to Lake Michigan, the trial court found:

> The Gundersons have provided no evidence and no persuasive argument for finding that the recreational activities, such as swimming and walking on the beach, should not also be permissible public uses protected by the public trust doctrine. This Court notes that several other states, including some of our sister Great-Lake States, have recognized the public trust's protection for recreational enjoyment of the beach.

(Appellants' App. at 20.)

The states retain residual power to determine the scope of the public trust over waters within their borders. *PPL Montana*, ___ U.S. at ___, 132 S. Ct. at 1235. Some Great Lakes states have determined the public trust rights include recreational uses such as swimming, walking along the shore, and preservation of scenic beauty. *E.g.*, *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1976) (public trust

doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit); *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 787-88 (Wis. 2001) (public trust doctrine originally existed to protect commercial navigation, but has been expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty), *cert. denied sub nom.* (*R.W. Docks & Slips v. Wisconsin*, 534 U.S. 1041 (2001)). The scope of public trust rights in Indiana is an issue of first impression.[8]

Granting lakeshore owners the right to exclude the public from land between the low and high water marks would be inconsistent with the public trust doctrine because, under that doctrine, a state holds the title to the beds of navigable lakes and streams below the natural high-water mark for the use and benefit of the whole people. *In re Sanders Beach*, 147 P.3d 75, 79 (Idaho 2006), *reh'g denied.* In *Sanders Beach*, lakefront property owners sought a ruling that their littoral rights gave them authority to exclude the public from that portion of the abutting lakebed not covered by

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[8] In *United States v. Carstens*, 982 F. Supp. 2d 874, 878 (N.D. Ind. 2013), the district court said: "The land between the edge of the water of Lake Michigan and the ordinary high water mark is held in public trust by the State of Indiana." It cited *Ill. Cent. R. Co. v. State of Illinois*, 146 U.S. 387 (1892), and *Lake Sand*, 68 Ind. App. 439, 120 N.E. 714 (1918), but neither of those decisions directly supports the *Carstens* language about the "ordinary high water mark."

water. The Court determined that creating the littoral right they wanted "would give them the exclusive right to occupy this portion of state land, even though the state holds such land in trust" for the public:

> Such littoral right would be contrary to the central substantive thought in public trust litigation, which we have stated is as follows: [w]hen a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.

Id. at 86 (quoting J. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 490 (1970)). The Court therefore declined to create the littoral right requested by the lakeshore owners. "Their littoral rights do not include the right to exclude the public from that portion of the exposed lake bed lying below the OHWM." *Id.*

Gunderson argues that land is either submerged or it is not, and asserts he owns whatever is not under water at any given moment.[9] We find persuasive the

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[9] Gunderson also relies on *Bainbridge* as limiting the public right in navigable waters, asserting the public right is "for passage, navigation, and commerce. . . . No more, no less." (Amended Br. of Appellants at 26.) However, as noted *supra*, *Bainbridge* is inapplicable here, as its holding governs riparian rights along a river for which there was no "shore," not lake-based riparian rights. *Compare Kivett*, 95 N.E.2d 145 (regarding the use of resources protected by public trust on a river) with *Lake Sand*, 120

Michigan Supreme Court's analysis in *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005), *reh'g denied, cert. denied sub nom Goeckel v. Glass*, 546 U.S. 1174 (2006). It addressed a dispute similar to that before us – *i.e.*, whether the public trust land extends up to the ordinary high water mark or whether, as Gunderson argues, it applies only to land that is actually under water at any particular moment.

The *Glass* Court addressed "the established distinction" in public trust jurisprudence between public rights (*jus publicum*) and private title (*jus privatum*). *Id.* at 69. It noted:

> Cases that seem to suggest, at first blush, that the public trust ends at the low water mark actually considered the boundary of the littoral owner's private property (*jus privatum*) rather than the boundary of the public trust (*jus publicum*). Because the public trust doctrine preserves public rights separate from a landowner's fee title, the boundary of the public trust need not equate with the boundary of a landowner's littoral title. Rather, a landowner's littoral title might extend past the boundary of the public trust. Our case law nowhere suggests that private title necessarily ends where public rights begin. To the contrary, the distinction we have drawn between private title and public rights demonstrates

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N.E. 714 (regarding the use of resources protected by public trust on a lake); *and compare* Ind. Code art. 14-29 (regulating navigable rivers, streams, and waterways) with Ind. Code art. 14-26 (regulating lakes and reservoirs).

> that the *jus privatum* and the *jus publicum* may overlap.

Id. at 69-70. *See also State v. Korrer*, 148 N.W. 617, 623 (Minn. 1914) (even if a riparian owner holds title to the ordinary low water mark, his title is absolute only to the ordinary high water mark; the intervening shore space between high and low water mark remains subject to the rights of the public); *Shaffer v. Baylor's Lake Ass'n, Inc.*, 141 A.2d 583, 585 (Pa. 1958) (subjecting private title held to low water mark to public rights up to high water mark); *Bess v. Humboldt Co.*, 5 Cal. Rptr. 2d 399, 401 (Cal. Ct. App. 1992) (noting that it is "well settled" that riparian title to the low water mark remained subject to the public trust between high and low water marks).

Establishing property rights based on the OHWM attempts to account for the fact that water levels in the Great Lakes fluctuate. *Glass*, 703 N.W.2d at 71. This fluctuation results in temporary exposure of land that may then remain exposed above where water currently lies. *Id.* This land, although not immediately and presently submerged, falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point. *Id.* The *Glass* Court noted "the precise location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact[.]" *Id.* at 73.

As to the scope of the public trust rights, the *Glass* Court held that "walking along the shore, subject to

regulation (as is any exercise of public rights in the public trust) falls within the scope of the public trust." *Id.* As trustee, the state must preserve and protect specific public rights below the ordinary high water mark and may permit only those private uses that do not interfere with these traditional notions of the public trust. *Id.* Yet its status as trustee does not permit the state to secure to itself property rights held by littoral owners. *Id.*

The *Glass* Court determined

> walking along the lakeshore is inherent in the exercise of traditionally protected public rights. Our courts have traditionally articulated rights protected by the public trust doctrine as fishing, hunting, and navigation for commerce or pleasure. In order to engage in these activities specifically protected by the public trust doctrine, the public must have a right of passage over land below the ordinary high water mark. Indeed, other courts have recognized a "right of passage" as protected with their public trust. We can protect traditional public rights under our public trust doctrine only by simultaneously safeguarding activities inherent in the exercise of those rights. Walking the lakeshore below the ordinary high water mark is just such an activity, because gaining access to the Great Lakes to hunt, fish, or boat required walking to reach the water.

Id. at 73-75 (citations omitted). The *Glass* Court concluded with two *caveats*:

> By no means does our public trust doctrine permit every use of the trust lands and waters. Rather, this doctrine protects only limited public rights, and it does not create an unlimited public right to access private land below the ordinary high water mark. The public trust doctrine cannot serve to justify trespass on private property. Finally, any exercise of these traditional public rights remains subject to criminal or civil regulation by the Legislature.

Id. at 75 (citation omitted).[10]

Following the holding and reasoning in *Glass*, we conclude Gunderson's private rights are able to co-exist with those rights of the public trust. Therefore, the land at issue below the OHWM is open to limited

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[10] We acknowledge some other Great Lakes courts have been more protective of private property rights. *See e.g.*, *State ex rel. Merrill v. Ohio Dep't of Nat. Res.*, 955 N.E.2d 935 (Ohio 2011), where Lake Erie property owners sought a declaration that they held title to the land between the ordinary high-water mark and the actual legal boundary of their properties as defined by their deeds, and that the public trust did not include nonsubmerged lands. The Ohio Supreme Court determined the territory of Lake Erie held in trust by the state for the people extends to the "natural shoreline," which is "the line at which the water usually stands when free from disturbing causes." *Id.* at 950. "This court has a history of protecting property rights, and our decision today continues that long-standing precedent." *Id.* at 949. However, *Merrill* is distinguishable because the holding relied upon long-established Ohio precedent and Ohio state law which specifically stated the location of the property line in relation to Lake Erie, neither of which we have in this case.

public use, such as gaining access to the public waterway or walking along the beach, as described in *Glass*.

Location of the OHWM

The trial court determined the State holds in public trust "the land below the OHWM, as defined by 312 Ind. Admin. Code § 1-1-26(2) [sic]," and that Gunderson "cannot unduly impair the protected rights and uses of the public when the titles to the land overlap." (Appellants' App. at 28.) Gunderson argues at length that the State cannot, by regulation, take property or determine boundaries because its statutory authority does not permit it. The State argues it has authority to determine the scope of the public trust.

In *Shively v. Bowlby*, 152 U.S. 1, 41 (1894), the United States Supreme Court decided when there was no administratively-set OHWM, there existed a common-law OHWM. In 1995, the DNR enacted 312 IAC 1-1-26(2), which reads: " 'Ordinary high watermark' means . . . the shore of Lake Michigan at five hundred eighty-one and five-tenths (581.5) feet I.G.L.D.,[11] 1985 (five hundred eighty-two and two hundred fifty-two thousandths (582.252) feet N.G.V.D.,[12] 1929)." (footnotes added)

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[11] "International Great Lakes Datum (IGLD) is a reference system by which Great Lakes water levels are measured." Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. at 58 n.43.

[12] NGVD stands for National Geodetic Vertical Datum. http://www.acronymfinder.com/National-Geodetic-Vertical-Datum-(NGVD).html (last visited July 27, 2016).

Alliance-Dunes argues the DNR is without authority to set the OHWM as it did in 312 IAC 1-1-26(2). Regulations set forth by administrative boards "must be reasonable and reasonably adapted to carry out the purpose or object for which these boards were created." *Potts v. Review Bd. of Indiana Emp't Sec. Div.*, 438 N.E.2d 1012, 1015 (Ind. Ct. App. 1982). "If the rules are in conflict with the state's organic law . . . they are invalid." *Id.* We hold 312 IAC 1-1-26(2) is in conflict with well-established case law regarding the state's ability to regulate the shores of Lake Michigan.

In *Lake Sand* we held: "The state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan." 120 N.E. at 716. As the OHWM prior to 1995 was the common law OHWM as held in *Shively*, 152 U.S. at 41, the DNR's staking the OHWM at the measurements set forth in 312 IAC 1-1-26(2) most certainly conveyed or curtailed the rights of the people of Indiana in Lake Michigan. Therefore, that portion of the Indiana Administrative Code is invalid, and the OHWM remains that defined by commonlaw.[13]

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[13] The factors used to define OHWM under the common law are also found in 312 IAC 1-1-26(1). *Compare Glass*, 703 N.W.2d at 72:

> [The ordinary high water mark is] the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that is impossible or difficult to ascertain where

Gunderson's Northern Boundary

Gunderson asserts the deed establishes Lake Michigan as the northern boundary of the Gunderson Property. The trial court found the Gunderson deed,[14] the plat to which it refers, and a survey

> reference no northern dimension other than that the lots are within Section 15. As a matter of interpretation, and common sense, if a lot is carved from within a section, the boundaries of that lot can be no greater than those of the section from which it was carved. Therefore, this Court finds that the Gundersons' deed conveyed no title north of Section 15's

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> the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

(quoting *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 14 N.W. 816 (1914)) *with* 312 IAC 1-1-26(1):

> "Ordinary high watermark" means the following:
>
> (1) The line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics. Examples of these physical characteristics include the following:
>
> (A) A clear and natural line impressed on the bank.
>
> (B) Shelving.
>
> (C) Changes in character of the soil.
>
> (D) The destruction of terrestrial vegetation.
>
> (E) The presence of litter or debris.

[14] The deed Gunderson designated is the deed from Don and Bobbie Gunderson to the "Don H. Gunderson Living Trust," (App. at 109), not the deed originally conveying the land to the Gundersons.

> northern boundary. However, this Court notes that it is without evidence showing where the northern boundary of Section 15 currently lies in relation to the Gundersons' lots and the OHWM.

(*Id.* at 26.) We acknowledge evidence that notes an 1829 survey says the lots run "to Lake Michigan and set post.[15]" (Appellants' App. at 589) (footnote added). A 1984 survey indicates the northern boundary of the lots in the plat is "LAKE EDGE." (*Id.* at 127.) While we agree with the logic, we diverge slightly from the trial court's finding based on the evidence in the record before us.

The designated evidence indicates the boundary of Section 15 is Lake Michigan. We held above, based on *Glass*, Gunderson's property rights overlap with those of the public trust. Therefore, the northern boundary of Gunderson's property is the ordinary low water mark, subject to the public's rights under the public trust doctrine up to the OHWM. *See Glass*, 703 N.E.2d at 69-70 (regarding overlap of jus privatum and jus publicum); *see also Korrer*, 148 N.E. at 623 (intervening shore space between ordinary low and ordinary high water marks are property of land owner, subject to the public's rights thereto); *Shaffer*, 141 A.2d at 585 (private title subject to public rights between ordinary low and ordinary high water marks); *and Bess*, 5

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[15] The meaning of "set post" is unclear from the record but, based on the context, it would seem the term indicates the demarcation of the property line. Based on the 1984 survey, no physical post exists.

Cal. Rptr. 2d at 401 (private title subject to public rights between ordinary low and ordinary high water marks).

Conclusion

We affirm the trial court's findings regarding the nature and scope of the public trust as it relates to Lake Michigan. However, we reverse the trial court's determination of the OHWM's location.

Gunderson owns legal title up to the northern boundary of Section 15, and the State holds the land below the OHWM as defined at common law. The designated evidence consistently indicates the northern boundary of Section 15 is Lake Michigan. Therefore, we reverse the trial court's finding northern boundary of Section 15 is unknown, and hold the northern boundary of Section 15 is the ordinary low water mark, subject to the public's rights as part of the public trust.

Affirmed in part and reversed in part.

Baker, J., and Brown, J., concur.

2015 WL 11145128 (Ind.Super.) (Trial Order)
Superior Court of Indiana.
Michigan City
Laporte County

Don H. GUNDERSON and Bobbie J. Gunderson, Co-Trustees of the Don H. Gunderson Living Trust, Dated November 14, 2006, Plaintiffs,

v.

STATE of Indiana and Indiana Department of Natural Resources, Defendants,

and

ALLIANCE FOR THE GREAT LAKES, Save the Dunes, Long Beach Community Alliance, Patrick Cannon, John Wall, Doria Lemay, Michael Salmon and Thomas King, Intervenor Defendants.

No. 46D02-1404-PL-606.
July 24, 2015.

Order Denying Plaintiffs' Motion for Declaratory Summary Judgment; Granting Defendants' and Intervener Defendants' Cross-Motions for Summary Judgment

Mark L Phillips.

Michael V. Knight.

Kurt R Earnst.

Jeffery B. Hyman.

Patricia F. Sharkey.

Richard R. Starbrink, Jr., Judge.

This matter came before this Court on Plaintiffs, Don Gunderson and Bobbie Gunderson's, ("the Gundersons")

Motion for Declaratory Summary Judgment filed on October 31, 2014. Defendants, Indiana Department of Natural Resources ("IDNR") and State of Indiana ("the State") filed their Response in Opposition to Plaintiffs Motion for Summary Judgment and Cross Motion for Summary Judgment on January 29, 2015. Intervenor Defendants, Alliance for the Great Lakes and Save the Dunes ("Alliance-Dunes"), filed their Combined Cross Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment on February 2, 2015. The remaining Intervenor Defendants, Long Beach Community Alliance, Patrick Cannon, John Wall, Doria Lemay, Michael Salmon, and Thomas King (collectively "LBCA"), filed their Response in Opposition to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment on February 3, 2015. On March 4, 2015, the Gundersons filed their Reply Memorandum in Support of Motion for Declaratory Summary Judgment as well as their Response to Counter and Cross Motions Seeking Judgment Regarding Ownership and Any Public Trust Encumbrance on the Trust Property. On March 20, 2015, the State and IDNR filed their Reply in Support of Defendants' Cross-Motion for Summary Judgment. Alliance-Dunes filed their Reply Brief on Cross-Motion for Summary Judgment on March 31, 2015. Also on March 31, LBCA Filed their Reply Brief. A hearing on all of these motions took place on April 22, 2015, This Court, having had this matter under advisement and being duly advised in the premises, now issues and files its findings of fact and conclusions of law;

1. This Court has subject matter jurisdiction over that general class of proceedings to which this cause of action belongs.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

2. On April 4, 2014, the Gundersons filed a complaint seeking a declaratory judgement claiming that they own the beach on their property to the water's edge of Lake Michigan and asking this Court to quiet title to the property and award the Gundersons exclusive and peaceful possession of the entire property they claim.

3. On April 7, 2014, the Gundersons filed an Amended Complaint.

4. On May 23, 2014, IDNR and the State (collectively "Defendants") filed their Answer and Affirmative Defenses to Plaintiffs' Amended Complaint.

5. On June 2, 2014, Alliance-Dunes filed a Motion to Intervene, which was, granted.

6. On June 6, 2014, Alliance-Dunes filed their Joint Answer to Plaintiffs Amended Complaint.

7. On July 1, 2014, LBCA filed a Motion to Intervene, which was granted on October 20, 2014.

8. On October 31, 2014, the Gundersons filed a Motion for Summary Judgment.

9. On January 29, 2015, Defendants IDNR and the State filed their Response in Opposition to Plaintiffs Motion for Summary Judgment and Cross Motion for Summary Judgment.

10. On February 2, 2015, Alliance-Dunes filed their Combined Cross Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment.

11. On February 3, 2015, LBCA filed their Response in Opposition to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment.

12. On March 4, 2015, the Gundersons filed their Objections and Motion to Strike Designated Summary Judgment Evidence of the Intervenor Defendants and also filed their Motion to Force the Election of a Remedy.

13. On March 12, 2015, LBCA filed their Response to Plaintiffs' Motion to Force the Election of a Remedy and filed their Response to Plaintiffs' Objections and Motion to Strike Evidence on March 31, 2015.

14. On March 31, 2015, Alliance-Dunes filed their Response to Plaintiffs' Motion to Strike Designated Evidence.

15. Also on March 31, 2015, the Gundersons and Intervener Defendants stipulated to Stay Issues of Entitlement to Prescriptive Easements.

16. A hearing on the Motion to Force *the Election* of Remedy, Motion to Strike Designated Summary Judgment Evidence, and all Motions, or Cross Motions, for Summary Judgment was held on April 22, 2015.

ANALYSIS

17. The Gundersons claim that their deed conveyed complete and exclusive ownership in their lot to the water's edge of Lake Michigan and that the members of the public have no rights to the land not covered by water. The Defendants and Intervenor-Defendants argue that the State owns the land up to the ordinary high water mark ("OHWM") regardless of whether it is covered by water. The Defendants and Intervernor-Defendants further argue that the State holds this land in trust for the benefit of the public. The parties' arguments draw from and rely on the doctrines of Equal Footing and Public Trust, two very old doctrines with an entwined history. This is a case of first impression in Indiana and as such, this Court looks to Indiana Law, our sister Great Lake States, and other States for guidance.

18. This Court proceeds by first reviewing the Equal Footing and Public Trust Doctrines and then analyzing the Motions for Summary Judgment, When considering the Motions for Summary Judgment, this Court considers first the arguments about ownership and the geographic location of any public trust. Second, this Court considers the scope of the public trust's protected public uses.

A) The Equal Footing and Public Trust Doctrines

19. The equal footing doctrine's history dates back to the founding of our country, and the doctrine of public trust goes back even farther. The theory behind the equal footing doctrine is that new states joining the union should enter on footing equal to that of the original thirteen. *See United States v. Alaska*, 521 U.S. 1, 5 (1997) (citing *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987)).

20. In the mid-1800s, the United States Supreme Court declared that, based on principles of sovereignty, the people of each of the thirteen original States "hold the absolute right to all their navigable waters and the soils under them," and that this right is subject only to the rights surrendered and powers granted by the Constitution to the Federal Government, *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (quoting *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842)) (internal quotation marks omitted).

21. Through a series of 19th-century cases, the United States Supreme Court declared that the same principle applied to States subsequently admitted to the Union, because under the Constitution, every State in the Union is a coequal sovereign. *See, e.g., Shively v. Bowlby*, 152 U.S. 1,26-31 (1894); *Knight v. United Slates Land Assn.*, 142 U.S. 161, 183 (1891); *Pollard v. Hagan*, 44 U.S. 212, 228-229 (1845); *see also United States v. Texas, 339* U.S. 707, 716 (1950). Shively, *Knight*, and *Pollard*, among other cases, established

the basis for the equal footing doctrine, under which a State's tide to the lands beneath its navigable waters was granted by the Constitution itself. *PPL Montana*, 132 S. Ct. at 1227 (2012) (citing *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

22. The Indiana Supreme Court recognized the application of the equal fooling doctrine in Indiana and explained that Indiana "acquired title to the beds of the navigable waters of the State when Indiana, in fact became a Slate" by virtue of the Northwest Ordinance of 1787. *State ex rel. Ind. Dep't of Conservation v. Kivett*, 95 N.E.2d 145, 148 (Ind. 1950).[1]

23. The United States Supreme Court's cases recognizing the equal footing doctrine also served as

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[1] Congress has provided that the term "lands beneath navigable waters" means:

> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such Slate became a member of the Union, or acquired sovereignty over such lands and waters thereafter, *up to the ordinary high water mark* as heretofore or hereafter modified by accretion, erosion, and relietion; (2) all lands permanently or periodically covered by tidal *waters up to but not above the line of mean high tide* and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in *any* each such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles[.]

43 U.S.C.A. § 1301(a) (emphasis added).

the foundation for our Country's public trust doctrine. *See Shively*, 152 U.S. at 11-13; III. *Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Pollard*, 44 U.S. at 226-30; *Waddell's Lessee*, 41 U.S. at 368.

24. In *Waddell's Lessee*, the United States Supreme Court held that the original thirteen states had acquired the lands beneath tidal waters from the crown; which had, according to the English common law, been held in trust by the crown for use by the public for protected purposes like navigation and fishing. *Waddell's Lessee*, 41 U.S. at 410 ("For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.") Thus, the land gained by each State was held in trust by that State for its public. The States could gain no more or less than what England had held.

25. In *Shively*, the United States Supreme Court explained that the common law public trust doctrine recognizes both *a jus privatum*, or legal title, and *jus publicum*, or public interest, title to the shores and lands beneath navigable waters.[2] *See Shively*, 152 U.S. at 11-13, The United States Supreme Court further explained that "it has been treated as settled that the

[2] The *Shively* court defined the shore as the ground "between the ordinary high-water and low-water mark." *Shively*, 152 U.S. at 12 (citations omitted).

title . . . below ordinary high-water mark . . . is held subject to the public right, jus publicum" for protected uses such as navigation and fishing. *Id.* at 13. The *Shively* Court considered it "well settled that a grant from the sovereign of land bounded by [navigable water], does not pass any title below [the] high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention." *Id.* Thus, the title in fee, *or jus privatum*, of the sovereign or his grantee, is "clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade, and intercourse." *Id.* at 48 (citations omitted) (quoting Lord Hale) (internal quotation marks omitted).

26. Similarly, Indiana has recognized that

> [a]lthough the dominion over and the right of property in the waters of the sea and its inland waters were, at common law, in the crown, yet they were of common public right for every subject to navigate upon and to fish in, without interruption. . . . They were regarded as the inherent privileges of the subject, and classed among those public rights denominated jura publica or jura communia, and thus contradistinguished from jura coronae, or private rights of the crown. . . . The sovereign was the proprietor of these waters, as the representative or trustee of the public. In this country the title is vested in the states upon a like trust, subject to the power vested in Congress to regulate commerce.

Lake Sand Co. v. State, 120 N.E. 714, 715-16 (Ind. Ct. App. 1918) (quoting *Sloan v. Biemiller*, 34 Ohio St. 492, 513-34 (1878)) (internal quotation marks omitted).

27. Equally well established is that "the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit," *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (citing *Shively*, 152 U.S. at 26).

28. Indiana, in its sovereign capacity, is without power to convey or curtail the jus *publicum*, or right of its people, to the lands beneath the navigable waters of Lake Michigan. *See Lake Sand*, 120 N.E. at 716; *see also Illinois Cent.*, 146 U.S. at 453 ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of" without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.").

B) Motions for Summary Judgment

29. In their Motion for Declaratory Summary Judgment, the Gundersons argue that they own their property to the water's edge and that there is no public trust right for the public to occupy or use the land not

covered by water. The Gundersons also argue that Indiana has excluded Lake Michigan from its public trust doctrine.

30. Defendants, in their Cross-Motion for Summary Judgment, argue that Indiana's public trust doctrine includes all land below the OHWM, that the State is charged with determining the OHWM, and that the State has not relinquished any title to the land below the OHWM.

31. Alliance-Dunes, in their Combined Cross Motion for Summary Judgment, similarly argue that the State owns the lands below the OHWM in trust for its citizens and further argues that the scope of Indiana's public trust protects its citizens' right to recreate on the beach below the OHWM.

32. In their Cross-Motion for Summary Judgment, LBCA argue that the Gundersons have failed to make a *prima facia* case that they own the land below the OHWM, that the Gundersons have admitted to owning no more than a 150 foot depth on the property by not paying property taxes beyond that point, that Indiana owns the lakebed of Lake Michigan up to the OHWM in trust for the public, and that the scope of the trust includes recreational purposes.

33. The arguments in all of the summary judgment motions can be separated into two categories, ownership and the scope of Indiana's public trust doctrine. As such, this Court will proceed by reviewing the standard for summary judgment and determining whether declaratory judgment is appropriate before

analyzing the arguments as they relate to ownership and the scope of the public trust doctrine in Indiana.

i.) Summary Judgment Standard

34. Indiana Trial Rule 56(c) provides that summary judgment is to be granted only if the evidence "shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," The purpose of summary judgment is to terminate litigation for which there can be no factual dispute and which can be determined as a matter of law, *KCP Printing Co., Inc. v. Confer*, 657 N.E.2d 129, 130 (Ind. Ct. App. 1995).

35. "A fact is 'material' for summary judgment if it helps to prove or disprove an essential element of Plaintiff's cause of action," *Schrum v. Moskaluk*, 655 N.E.2d 561, 564 (Ind. Ct. App. 1995). A factual issue is "genuine" when, "it cannot be foreclosed by reference to undisputed facts, but rather requires a trier of fact to resolve the opposing parties differing versions." *Perry v. Northern Ind. Pub. Serv. Co.*, 433 N.E.2d 44, 46 (Ind. Ct. App, 1982).

36. "On motion for summary judgment, contents of all pleadings, affidavits, and testimony are liberally construed in light most favorable to nonmoving party." *66 Cowe v. Forum Group, Inc.*, 575 N.E.2d 630,633 (Ind. 1991), When reviewing a motion for summary judgment, the court accepts as true the facts alleged by the nonmoving party. *LeMaster v. Methodist Hosp. of Indiana, Inc.*, 601 N.E.2d 373, 374 (Ind. Ct. App, 1992).

ii.) Declaratory Judgment

37. The purpose of the Declaratory Judgment Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered." Ind. Code § 34-14-1-12. Therefore, the purpose of a declaratory judgment action is to stabilize legal relations and provide a remedy when there is still an opportunity for peaceable judicial settlement in a case or controversy, *Ferrell v. Dunescape Beach Club Condominiums Phase J, Inc.*, 751 N.E.2d 702, 707 (Ind. Ct App. 2001) (citing *Volkswagenwerk, A.G. v. Watson*, 390 N.E.2d 1082, 1085 (Ind. ct, App, 1979)).

38. The declaratory judgment statute was intended to provide an adequate and complete remedy where none had previously existed, and it should not be used where there is no necessity for such a judgment, *Id.* (citing *Ember v. Ember*, 720 N.E.2d 436, 439 (Ind. Ct, App. 1999). Furthermore, this statute was not intended to eliminate well-known causes of action when the issues are ripe for litigation through the usual processes. *Id.* Moreover, the use of declaratory judgment is within the trial court's discretion and is usually unnecessary if a full and adequate remedy is already provided by another form of action, *Voltewagmwerk*, 390 N.E.2d at 1085. However, according to Indiana Trial Rule 57, the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. *Ferrell*, 751 N.E.2d at 708.

39. The test for when declaratory relief is appropriate has three factors: (1) whether the issuance of a declaratory judgment will effectively, and efficiently, solve the problem involved; (2) whether it will serve a useful purpose; and (3) whether another remedy is more effective or efficient. *Ember*, 720 N.E.2d at 439. The determinative consideration is whether declaratory judgment will produce a just, swift, and economically efficient determination of the entire controversy, *id.*

40. Here, a declaration will stabilize the relations between the Gundersons, the State, and LBCA. Moreover, a declaratory judgment would serve the useful purpose of settling the budding controversies involving the location and scope of the public trust encumbering Lake Michigan. Therefore, this Court finds that declaratory judgment is appropriate in this case and proceeds by considering the parties' arguments regarding ownership and the scope of any public trust.

iii) Ownership

41. The Gundersons contend that deeds *are prima facla* proof of ownership. The Gundersons further contend that, because their deed cites to the Plat, and the Plat stales no northerly dimension, their lots run to the water's edge of Lake Michigan. In support, the Gundersons cite to their deed (Pl.'s Ex. 1 (A)), the Plat cited by the deed (Pl.'s Ex. 1 (B): a 1914 Map of

Long Beach), and a Plat of Survey from 1982 (Pl.'s Ex. 3; hereinafter "Hendricks Survey").

42. LBCA makes several arguments that deal with the ownership of the land between the OHWM and the instant water's edge, LBCA contends that the Gundersons' deed does not, on its face, convey ownership to the water's edge and that the Hendricks Survey is not evidence that the lots extend to the water's edge, LBCA further contends that the Gundersons have admitted to the lots having no more than a 150 foot depth because they have not paid property taxes on any land past 150 feet.[3] Moreover, LBCA contends that the Federal Land Patent, from which Patent, from which the Gundersons' deed flows, could not have conveyed land below the OHWM, LBCA cite, in support of these contentions, the same 1914 Map of Long Beach that the Gundersons cited (LBCA Exhibit 1), a copy of an 1829 Federal Survey of Sections 14, 15, and 22 (LBCA Exhibit 2), a copy of the Surveyor's Notes for the 1829 Federal Survey (LBCA Exhibit 3), a copy of the 1837 United State Land Patent (LBCA Exhibit 4), and a

[3] This Court notes an absence of evidence before it regarding where the 150 footmark lies in relation to the water's edge, and the OHWM. This Court also notes that there is no evidence before it to specifically showing where Indiana's administrative definition of the OHWM lies and that it is entirely possible that his OHWM might very well go up someone's back porch or even into their house or garage. It would be a ridiculous stretch of reason to say that a public right would extend into the owner's home, but without evidence or issue before it, this Court cannot, and does not, make any findings with respect to where the OHWM lies on the Gundersons' lot other than that Indiana has established the OHWM at an elevation of 581.5 feel.

copy of the LaPorte County Tax Assessor's records for the Gundersons' lots (LBCA Exhibit 7).

43. LBCA further argues that the State of Indiana owns and holds the lakebed to the OHWM in trust for the public. LBCA contends that the State has not alienated any part of its ownership to the Gundersons and that the Gundersons have not gained any title through the law of accretion and reliction. In support of this argument and these contentions, LBCA cite a copy of the 1993 revised Indiana Tax Assessor's map depicting various Lakeshore Drive Lots in Section 15, including the Gundersons' lots (LBCA Exhibit 13) and a copy of the United Slates Army Engineer District Corps of Engineers' "Long Beach, Indiana-Emergency Bank Protection" plan from September 10, 1973 (LBCA Exhibit 14).

44. Alliance-Dunes also argues that the State received all of the lakebed below the OHWM regardless of where the instant water's edge may be located, and that the State has neither relinquished nor abrogated its public trust rights and duties to Lake Michigan. Moreover, Alliance-Dunes argues that the Gundersons have failed to designate any evidence that they own the land below the OHWM. In support of these arguments, Alliance-Dunes cites an excerpt from the United States Department of Interior's *Manual of Surveying Instructions* (Alliance-Dunes Exhibit 3); an excerpt *of the Indiana Lake Michigan Shoreline: Coastal Hazards Model Ordinances*, published by IDNR's Lake Michigan Costal Program (Alliance-Dunes Exhibit 4); a copy of *An Inventory of Man-Made Land Along the*

Indiana Shoreline a/Lake Michigan, Tech. Report No, 304 (Alliance-Dunes Exhibit 5); a copy of the Indiana Attorney General's Opinion from November 22, 1978 (Alliance-Dunes Exhibit 6); an excerpt from the *Lake Michigan and Navigable Tributaries: Misconceptions and Issues of Navigability*, posted by the Indiana "Natural Resources Commission and IDNR on Indiana's government website (Alliance-Dunes Exhibit 7); and *LBLHA, LLC v, Town of Long Beach*, No. 46C01-12*l*2-PL-0019I4, slip op, (LaPorte Cnty. Cir. Ct. Dec. 26, 2013) (Alliance-Dunes Exhibit 8).

45. Finally, Defendants appear to argue that all parties agree that the State owns below the OHWM. The Defendants view the Gundersons' claims as arguing that the OHWM, which serves as the boundary between the public and private lands, is the water's edge and constantly shifts as the water levels change with the breeze. Defendants further argue that the State is the entity charged with determining the OHWM, that Indiana has determined the OHWM. Through administrative regulation, and that the Gundersons have failed to designate evidence showing that the State has relinquished title to the lands beneath the OHWM.

([illegible text])what [and has been conveyed to the Gundersons through their deed? These issues are related because the Gundersons' deed flows from the Federal Land Patent from 1837 (*see* LBCA Ex, 4) and the Federal Government could not have conveyed any title to lands that rightfully belonged to the State. *See Pollard*, 44 U.S. at 230 ("The right of the United States to the public lands, and the power of Congress to make

all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs [land below the high-water mark]").

47. According to the equal footing doctrine discussed above, Indiana received the lands beneath the OHWM upon becoming a slate. *See Shively*, 152 U.S. at 26 ("The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, *and in the lands below the high-water mark*, within their respective jurisdicuons (sic)." (emphasis added)).

48. Thus, this Court finds that when Indiana became a State, it received, and held in trust for the public, all lands below the OHWM regardless of whether the land is temporarily not covered by water. This Court also notes that this finding is not a completely new conclusion for Indiana. *See United States v. Carstens*, 982 F. Supp. 2d 874, 878 (N.D. Ind. 2013) ("The land between the edge of the wafer of Lake Michigan and the ordinary high water mark is held in public trust by (he State of Indiana.").

49. There has been no evidence designated showing that the State has relinquished its title to the lands below the OHWM, therefore, this Court finds that the State holds the lands below the OHWM in trust for the public's protected uses.

50. Next, this Court must determine what the Gundersons' deed conveyed, or more specifically, what is the northern boundary for the land that their deed conveyed.

51. Because the State owned the lands below the OHWM, the Federal Land Patent of 1837, from which the Gundersons' deed flows, could not and did not convey any title to the Gundersons below the OHWM.

52. The Gundersons' deed, the plat to which the deed refers, and a survey of the plats reference no northern dimension other than that the lots are within Section 15. As a matter of interpretation, and common sense, if a lot is carved from within a section, the boundaries of that lot can be no greater than those of the section from which it was carved.[4]

53. Therefore, this Court finds that the Gundersons' deed conveyed no title north of Section 15's northern boundary. However, this Court notes that it is without evidence showing where the northern boundary of Section 15 currently lies in relation to the Gundersons' lots and the OHWM.

54. Because the common law OHWM can move, it is completely plausible that the OHWM could have moved into what was measured out as Section 15. In fact, LBCA Exhibit 13 shows that as recent as 1993 the water's edge intruded on as much as half of the Gundersons' lot. The Gundersons have asked for a declaration of their rights as landowners, and a complete

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[4] Although LBCA offered evidence, LBCA Ex. 7, that the Gundersons have only paid properly taxes on their lots to a depth of 150 feet, there has been no evidence provided to show where the 150 fool mark lies in relation to (he OHWM and the water's edge. Therefore, this Court is unable to consider whether the Gundersons, as LBCA argues, own somewhere shy of the OHWM.

declaration of their rights must include their rights when the OHWM intrudes onto the land their deed conveyed.

55. This Court finds it beneficial to repeat that the Gundersons' deed conveyed the legal title, *the jus privatum*, to their lot within section 15 and that the State holds *jus publicum* title, in public trust, to the land below the OHWM. These titles convey different rights to their holders and these rights may, at times, overlap geographically. The public trust only protects some public rights, the scope of Indiana's Public Trust Doctrine is considered in the next section, but it is important to note that a private landowner cannot impair the protected rights of the public. *See e.g., III. Cent. R.R.*, 146 U.S. at 452-53; *lake Sand*, 120 N.E. at 716.

56. This Court notes that the OHWM has been the subject of both statutory and *common* law interpretation. Indiana has adopted an Administrative definition of OHWM for the shore of Lake Michigan, currently set at an elevation of five hundred eighty-one and five-tenths (581.5) feet. *See*312 Ind. Admin, Code 1-1-26(2). This regulation also provides a codification of the common law interpretation of the OHWM and defines the OHWM elsewhere as "[t]he line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics." 312 Ind. Admin. Code 1-1-26(1). The regulation continues by providing a few examples of the physical characteristics, such as a clear and natural line impressed on the bank; shelving; changes in the character of the soil; the destruction of terrestrial vegetation; or the presence of

litter or debris, *Id.* This Court finds that defining the OHWM as a set elevation will, as Defendants argue, provide clearer notice to both the land owners and the public.[5]

57. Therefore, as to ownership, this Court finds that the Gundersons own legal title, *jus privatum*, in their lots to the northern boundary of Section 15. Further, this Court finds that the State *holds jus publicum*, in public trust, the land below the OHWM, as defined by 312 Ind. Admin. Code 1-1-26(2). Moreover, this Court finds that the Gundersons cannot unduly impair the protected rights and uses of the public when the titles to the land overlap.

iv.) The Public Trust's Scope

58. Finally, this Court must determine the scope of Indiana's public trust doctrine.

59. The Gundersons argue that Indiana has codified its public trust doctrine as Indiana Code Section 14-26-2. Moreover, the Gundersons argue that Indiana excluded Lake Michigan from Indiana Code Section 14-26-2, and therefore, from its public trust doctrine

[5] Again this Court notes that it is without evidence showing where this elevation and the common law OHWM line lay in relation to the Gundersons' lot. Although this Court can imagine that the OHWM's elevation may run up to or even through a landowner's house or back patio if their lot is especially shallow and low-lying, no evidence or arguments have been given on this issue and it is not directly before this Court. Therefore, this Court makes no findings or conclusions on how the rights of the hypothetical landowner would be balanced.

and that there are no recreational public activities protected by the public trust doctrine on the shores of Lake Michigan.[6]

60. LBCA, Alliance-Dunes, and Defendants all argue that the public trust remains and includes the traditionally protected triad (commerce, navigation, fishing and all activities incident thereto), as well as recreational activities such as swimming or walking, and the actions and activities incident to them.

61. The State, as the trustee and owner, has the authority and power to determine the scope of the public trust and to define what public uses are protected. *See PPL Montana*, 132 S. Ct. at 1235 (stating that the States retain the residual power to determine the scope of the public trust within their borders).

62. Indiana has partially codified the scope of its public trust in an effort to *preserve* its inland freshwater lakes. *See* Ind. Code § 14-26-2. Indiana excluded Lake Michigan from its regulations on the freshwater

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[6] In support of this argument the Gundersons rely on *Bainbridge v. Sherlock*, 29 Ind. 364, 367 (1869). This is fallacious because Indiana treats navigable rivers, such as the Ohio River at issue in *Bainbridge*, differently than lakes. *Compare Bainbridge*, 29 Ind. at 366-67 (holding that the public trust in the Ohio River did not go above the low water mark and the riparian landowner owned down to the low water mark) and Ind. Code § 14-29 (regulating navigable rivers, streams, and waterways), *with* Ind. Code § 14-26 (regulating lakes and reservoirs), *Kivett*, 95 N.E.2d 145 (preventing a private landowner from monopolizing river resources protected by the public trust), *and Lake Sand*, 120 N.E.2d 714 (preventing a company from monopolizing lake resources protected by the public trust).

lakes, and incidentally excluded Lake Michigan from the regulation's partial codification of the public trust doctrine and the trust's scope. *See*Ind. Code § 14-26-2-1; *see also*Ind. Code § 14-26-2-5.

63. The exclusion of Lake Michigan from The Lake Preservation Act, Ind. Code § 14-26-2, did not surrender the public's rights, the *jus publicum*, to Lake Michigan, which the State holds because there is no intent to change any common law rights. *See Clark v. Clark*, 971 N.E.2d 58, 62 (Ind. 2012) (noting that for statutory interpretation, the court "presume that the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication." (quoting *Hinshaw v. Bd. Of Comm'rs*, 611 N.E.2d 637, 639 (Ind. 1993) (internal quotation marks omitted))). It is reasonable that the General Assembly would want to regulate the shores of Lake Michigan differently than the markedly smaller lakes that dot the Indiana countryside.

64. This Court finds that Indiana did not surrender the public trust encumbering Lake Michigan's shores by partially codifying the public trust doctrine as it applied to the smaller freshwater lakes in Indiana. That the land below the OHWM has not been excluded from Indiana's common law public trust doctrine. Furthermore, this Court notes that Indiana has the least amount of shoreline on a Great Lake out the eight Great Lake States; a mere forty-five miles of

shoreline along Lake Michigan.[7] Moreover, this Court finds the idea that Indiana, with such a limited amount of shoreline, would restrict and in effect deny its citizens' access to such an amazing natural resource. Granting near exclusive rights to a vast portion of the shoreline to a select few homeowners, to be a far stretch of reason and common sense.

65. The Gundersons have provided no evidence and no persuasive argument for finding that the recreational activities, such as swimming and walking on the beach, should not also be permissible public uses protected by the public trust doctrine. This Court notes that several other states, include some of our sister Great-Lake States, have recognized the public trust's protection for recreational enjoyment of the beach. *See People ex rel. Scott v, Chicago Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1976) (explaining that the public trust doctrine, like all other common law principles, "should not be considered fixed or static, but *should be molded and extended to meet changing conditions and needs of the public it was created to benefit*." (emphasis added)); *Glass v. Goeckel*, 703 N.W.2d 58, 78 (Mich. 2005) (holding that a member of the public "may walk the shores of the Great Lakes below the ordinary high water mark."); *Nelson v. De Long*, 7 N. W.2d 342, 346 (Minn. 1942) ("Public use comprehends not only navigation by

[7] The eight Great Lake states, in order from most to least miles of Great Lake Shoreline are: (1) Michigan (3,288 miles), (2) Michigan (3,288 miles), (3) New York (473 miles), (4) Ohio (312 miles), (5) Minnesota (189 miles), (6) Illinois (63 miles), (7) Pennsylvania (51 miles), (8) Indiana (45 miles).

watercraft for commercial purposes, but the use also for the ordinary purposes of life such as boating, fowling, skating, bathing . . . "); *R. W. Docks & Slips v. State*, 628 N.W.2d 781, 787-88 (Wis. 2001) (recognizing that the public trust doctrine has been "expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty.").[8]

CONCLUSION

66. For the reasons more thoroughly explained above, this Court has found that upon its admission to statehood, Indiana received the bed of Lake Michigan, up to the OHWM regardless of whether it is momentarily not covered by water and holds this land in trust for its citizens to use for certain protected purposes. Indiana's public trust protects the public's right to use the beach below the ordinary high water mark for commerce, navigation, fishing, recreation, and all other activities related thereto, including but not limited to

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[8] *See also Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) ("Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state[.]"); *White v. Hughes*, 59, 190 So. 446, 449 (Fla. 1939) ("The State holds the fore-shore in trust for its people for the purposes of navigation, fishing and bathing. It is difficult indeed to imagine a general and public right of fishing in the sea, and from the shore, unaccompanied by a general right to bathe there, and of access thereto over the foreshore for that purpose.").

boating, swimming, sunbathing, and other beach sport activities. Private landowners cannot impair the public's right to use the beach below the OHWM for these protected purposes. To hold otherwise would invite the creation of a beach landscape dotted with small, private, fenced and fortified compounds designed to deny the public from enjoying Indiana's limited access to one of the greatest natural resources in this State.

THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that the Gundersons' Motion for Declaratory Summary Judgment is hereby, DENIED; and Defendants' Cross Motion for Summary Judgment, Alliance-Dunes' Combined Cross Motion for Summary Judgment, and LBCA's Cross-Motion for Summary Judgment are each GRANTED.

IT IS ADJUDGED and DECREED that the Gundersons' deed conveyed to them the legal title *Jus privatum*, to Lots 240, 242, and 244. The northern boundary of Lots 240, 242, and 244 is the same as the northern boundary of Section 15, from which the Lots were carved.

IT IS ADJUDGED and DECREED that the State holds the shores of Lake Michigan below the ordinary high water mark, as defined by 312 Indiana Administrative Code 1-1-26(2), in trust for the public, regardless of whether the land is currently covered by water.

IT IS ADJUDGED and DECREED that the scope of Indiana's public trust doctrine includes and protects recreational activities, such as swimming,

picnicking, sunbathing, or walking, and all other activities incident thereto, along the shores of Lake Michigan.

SO ORDERED this *24* day of *July*, 2015.

<<signature>>

RICHARD R. STALBRINK, JR., JUDGE

LAPORTE SUPERIOR COURT 2

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In the
Indiana Supreme Court

Bobbie Gunderson; Don Gunderson, Appellant(s), v. Alliance For The Great Lakes, Inc.; Patrick Cannon; Indiana Department Of Natural Resources; Thomas King; Doria Lemay; Long Beach Community Alliance; Michael Salmon; Save The Dunes, Inc.; State Of Indiana; John Wall, Appellee(s).	Supreme Court Case No. 46S03-1706-PL-00423 Court of Appeals Case No. 46A03-1508-PL-01116 Trial Court Case No. 46D02-1404-PL-00606

Order

Appellants' Limited Petition for Rehearing is hereby DENIED.

Done at Indianapolis, Indiana, on 5/9/2018

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.
Slaughter, J., did not participate.