



## **White Paper on Ohio House Bill 218**

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## ***Introduction***

A controversial bill pending before the Ohio State Legislature, if passed, would shift the boundary between private and public land along Lake Erie. The introduction of H.B. 218 has raised numerous questions regarding the application of the public trust doctrine in Ohio and the rights of littoral property owners. After publication of some cursory research on this issue in our quarterly legal newsletter, *The SandBar*, additional information came to light which altered portions of our original analysis.

This white paper was commissioned by Ohio Sea Grant in order to inform the debate over H.B. 218, clarify the Law Center's original position, and disseminate this information to interested parties. This is not, nor is it intended to be, a work of advocacy. The paper presents the Sea Grant Law Center's interpretation of relevant case law and regulations. The information presented below should not be relied on in litigation or cited as established fact. In such a contentious and unsettled area of law there are often many potential interpretations of the same doctrines.

## ***The Public Trust Doctrine***

The public trust doctrine is a common law doctrine. The common law "consists of those principles, usage, and rules of action applicable to government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature."<sup>1</sup> In its simplest terms, common law is judge-made law.

Under the common law, the public trust doctrine provides that "public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of public uses."<sup>2</sup> Public trust waters are the state's navigable waters and public trust lands are the lands beneath those navigable waters, up to the ordinary high water mark.<sup>3</sup> Public trust lands include tidelands, shorelands, and the land beneath oceans, lakes, and rivers.

Public trust lands are unique in that two separate titles exist to the same piece of land. The state holds the public title, often referred to as *jus publicum*, ensuring the right of the public to use and enjoy the public trust waters and lands for commerce, navigation, fishing, bathing, and other related uses. The *jus publicum* interest is reserved by the state regardless of the deed. "A state cannot convey the *jus publicum* interest into private ownership, nor can it abdicate its trust responsibilities."<sup>4</sup> The private title, the *jus privitum*, can be held by a private individual or the state. The holder of the private title has the right of use and possession. The private right to use the public trust lands, however, is subservient to the dominant public right of access.

To some extent, states can supercede the common law with legislation. Although the public trust lands extend to the high water mark under the common law, a state is free to establish different boundaries through legislation. For example, Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, Virginia, and Wisconsin have all granted private property owners rights seaward of the high-water mark. These states are low-water states, meaning the boundary between public and private land is the low-water mark.<sup>5</sup> However, even in these states a coastal property owner's rights in the intertidal zone are subservient to the public's

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<sup>1</sup> Black's Law Dictionary, 276 (6th Ed. 1990).

<sup>2</sup> COASTAL STATES ORGANIZATION, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, 1 (1997).

<sup>3</sup> See *Shively v. Bowlby*, 152 U.S. 1, 58 (1894).

<sup>4</sup> CSO at 8.

<sup>5</sup> JACK ARCHER, *et.al.*, THE PUBLIC TRUST DOCTRINE & THE MANAGEMENT OF AMERICA'S COASTS 16 n.2 (1994).

right of access for fishing, fowling, and navigation, which is in turn subservient to the private owner's right to wharf out, by means of docks, etc.

The ability of states to grant private property owners rights in public trust lands below the high-water mark is somewhat restricted. While states may convey public trust lands to private parties, they may do so only in limited circumstances. The United States Supreme Court, in *Illinois Central Railroad Co. v. Illinois*, described a state's title in public trust lands as

a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants... The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. 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... 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. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.<sup>6</sup>

The United States Supreme Court has ruled that the public trust doctrine applies to the Great Lakes.<sup>7</sup> Ohio courts generally adhere to the common law principles of the public trust doctrine. "The title to land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted."<sup>8</sup> The problem with the public trust doctrine in Ohio is that neither the state legislature nor the courts have clearly established its upper boundary.<sup>9</sup>

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<sup>6</sup> *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-454 (1892).

<sup>7</sup> *See id.*

<sup>8</sup> *Beach Cliff Board of Trustees v. Ferchill*, 2003 Ohio 2300, 2003 Ohio App. LEXIS 2132 at \*7 (Ohio App. 2003).

<sup>9</sup> With respect to rivers, the Court of Common Pleas ruled early on that the rule in Ohio is different from the majority of states, because the Ohio courts fix the boundary of private land at low water mark, not the high water mark. *See Willey v. Lewis*, 1892 Ohio Misc. LEXIS 171 (Ohio Misc. 1892).

### ***Demarcation between Private and Public Property***

The establishment of the line separating private property and public trust land is never easy and rarely satisfactory. With respect to tidelands, the mean high tide line is firmly established as the demarcation line between public and private land. The mean high tide line is determined by averaging the high water marks observed over an 18.6 year cycle.<sup>10</sup> Unfortunately, a similar ruling has yet to be made which establishes the proper method for determining the ordinary high-water mark of lake shorelines. However, “the property boundaries of lands adjacent to navigable lakes, the beds of which are owned by the states, is, in most cases, the ordinary high water mark.”<sup>11</sup>

It is important to note that the ordinary high-water mark as used in this context is a legal term of art. It does not necessarily refer to a particular geographic or physical location on the beach. To determine the ordinary high-water mark of lakes, courts usually rely on either the vegetation line or erosion line test. These tests are generally expressed in the following terms:

the ordinary high-water mark is the margin of the land over which the waters have visibly asserted their dominion or the mark impressed on the soil by the effect of water covering it for a sufficient period to deprive the land of vegetation and to destroy its value for agricultural purposes.<sup>12</sup>

For jurisdictional purposes, the U.S. Army Corps of Engineers defines the ordinary high-water mark as

that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.<sup>13</sup>

### ***The Boundary of Lake Erie***

The Ohio Legislature has established the boundary of Lake Erie through legislation. Section 1506.10 of the Ohio Code states that

the waters of Lake Erie . . . extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state.<sup>14</sup>

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<sup>10</sup> *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 27 (1936).

<sup>11</sup> BRUCE S. FLUSHMAN, *WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS* 295 (2001).

<sup>12</sup> *Id.* at 301.

<sup>13</sup> 33 C.F.R. § 328.3(e) (2003). Although the Army Corps of Engineers’ definition is used only to determine jurisdiction and does not affect property rights, the definition is illustrative of one method used by a government agency to determine the exact location of the ordinary high water mark.

<sup>14</sup> OH. REV. CODE § 1506.10 (2003).

The demarcation line between public and private land and, therefore, the upper boundary of the public trust lands in Ohio is the “southerly shore” of Lake Erie. Unfortunately, “southerly shore” is not defined by the Legislature and it is unclear, under existing law, whether Ohio uses the high-water mark or the low-water mark to set boundaries along Lake Erie.

Because the term is not defined in the act, the responsibility falls to the state agencies to define “southern boundary” through regulations, policies, and actions. According to a footnote in “Putting the Public Trust Doctrine to Work,” a report prepared by the Coastal States Organization, application of the term “southerly shore” in Ohio “varies from the lake level on any particular day, to high water datum, to the long-term average, to historical shorelines, to low water datum, to low water line, depending on the project.” This inconsistency is troublesome and weakens ODNR claims of adherence to the high water standard, but until this inconsistent application is challenged in court or corrected by the Ohio Legislature, the ODNR and other state agencies are free to define “southerly shore” as they wish.

Over the years shorefront owners have challenged ODNR’s actions in court, but the Ohio courts have failed to either expressly or clearly define the term “southerly shore.” In cases not involving boundary disputes, both the Ohio Court of Appeals and the Ohio Supreme Court have ruled that the territory of a shorefront city extends to the low water mark. In the *City of Avon Lake*, hunters were convicted of illegally hunting within the city’s corporate limits. The Ohio Court of Appeals overturned the convictions because where the men were hunting was not within the city limits or in an area where the city’s extraterritorial jurisdiction would apply. The court ruled that “the northern geographical boundary of Avon Lake is the low water mark of Lake Erie.”<sup>15</sup> No reference was made to §1506.10. It is, therefore, unknown whether the court’s decision was based on an interpretation of § 1506.10 or general practice.

In 1987, the Ohio Supreme Court in an action for wrongful death, again stated “the waters of Lake Erie belong to the state of Ohio, and it is undisputed that Avon Lake’s territorial limits extend only to the low water line of Lake Erie.”<sup>16</sup> A father and son had drowned in Lake Erie and the administrator of the estate claimed the City of Avon Lake was negligent because the city was aware of the dangerous undertow, but placed no fences or signs. The court ruled that Avon Lake could not be held responsible because the drowning occurred outside the city.

The above cases notwithstanding, Ohio courts have generally avoided the issue of whether the boundary between public and private land is the low water mark or the high water mark. During testimony by proponents of H.B. 218 before the Ohio House assertions were made that the Ohio Supreme Court has ruled that the low water datum is the appropriate demarcation line for Lake Erie. Supporters of this position cite the *Rheinfrank* line of cases. After reviewing these cases, it is clear that no such ruling has been issued by the Ohio Supreme Court.

*Rheinfrank v. Gienow* involved a dispute between the owners of lands abutting the Maumee River and the Director of Public Works. Arguing that the Rheinfranks’ property abutted Lake Erie, the Director of Public Works issued permits to companies to dredge sand from the bed of the water abutting the property. The Rheinfranks challenged the issuance of these permits claiming their land abutted the Maumee River and that they, not the state, were the rightful owners out to the center of the River. The case originated in the Ohio Supreme Court. The Supreme Court framed the issue as follows:

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<sup>15</sup> *City of Avon Lake v. Bird*, 1974 Ohio App. LEXIS 3129 (Ohio App. 1974).

<sup>16</sup> *Mitchell v. Cleveland Electric Illuminating Co.*, 30 Ohio St. 3d 92, 94 (Ohio 1987).

The realtors claim ownership in the bed of the waters on which their properties abut. The state, by issuing dredging permits, has assumed ownership over the same land. Thus, a question of disputed title to property is presented.<sup>17</sup>

The Ohio Supreme Court required the Director of Public Works to hold a hearing to determine which party, the Rheinfranks or the State of Ohio, held title to the land.

The Director of Public Works held a hearing and determined that the land belonged to the state. The Director issued the following order.

1. The waters and bed abutting [the Rheinfranks'] property are part of Lake Erie, and as such, belong to the State of Ohio in trust for its citizens.
2. The boundary line between [the Rheinfranks'] property and the waters and bed of Lake Erie adjacent to [their] property is coincident with the shoreline of Lake Erie, established at 568.6 feet above sea level at Father's Point, Quebec (Low Water Datum, or low water level of Lake Erie).<sup>18</sup>

The Rheinfranks appealed the Director's order to the Franklin County Court of Common Pleas. The Court of Common Pleas reversed the order of the Director and entered "judgment finding that the waters and bed adjoining the property . . . are a part of the Maumee River and not part of Lake Erie."<sup>19</sup> For reasons not discernable from the Court of Appeals opinion, the attorney general "elected no longer to assert that 'Low Water Datum' is an appropriate standard for purposes of establishing the boundary or limits of the waters, shoreline and bed of Lake Erie."<sup>20</sup> Because the stipulations eliminated the Low Water Datum as the appropriate standard for determining the boundary, the order of the Director was no longer based on reliable and substantial evidence.

The State of Ohio appealed the ruling of the Court of Common Pleas to the Ohio Court of Appeals. The Court of Appeals affirmed the ruling of the Court of Common Pleas. The Court of Appeals was unable to reach the merits of the case due to the stipulations of the Attorney General. Although the Court of Appeals stated that "a review of the original record tends to indicate that when made the order of the director was supported by reliable, probative, and substantial evidence in the record," the stipulations of the Attorney General during the trial destroyed the probative value of the evidence.<sup>21</sup> The Court of Appeals held that the trial court did not err by determining that the Director's order was not supported by the evidence.

The State filed a motion for reconsideration claiming that the Court of Appeals found the order of the Director of Public Works to be supported by "reliable, probative, and substantial evidence." The court quickly dismissed the State's claim.

This contention borders on the frivolous since we made no such finding. What we did state was that the record "tends to indicate" that the order was so supported prior to the aforementioned stipulation and that the stipulation "effectively eliminated all probative value" that the evidence so tending to support the order

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<sup>17</sup> *The State, ex rel. Rheinfrank v. Gienow*, 252 N.E. 2d 163, 164 (Ohio 1969).

<sup>18</sup> *Rheinfrank v. Gienow*, 1973 Ohio App. LEXIS 1671 at \* 13 (Ohio App. March 27, 1973).

<sup>19</sup> *Id.* at \* 1.

<sup>20</sup> *Id.* at \* 5.

<sup>21</sup> *Id.* at \*4-5.

“otherwise would have had.” There is doubt, however, as to whether the order would have been properly supported by evidence even in the absence of this stipulation.<sup>22</sup>

The Court of Appeals overruled the State’s motion for reconsideration. This line of cases does not establish the Low Water Datum as the appropriate boundary for Lake Erie.

More recently, the Court of Appeals had the chance to rule on the ODNR’s use of the Ordinary High Water mark. Shorefront property owners had challenged the issuance of a submerged land lease for Lake Erie. Beach Cliff, an adjacent property owner, contended that “there is no support for ODNR’s arbitrary assignment of 573.4’ or the ordinary high water (“OHW”) mark as the elevation from which a determination is made whether land is submerged.”<sup>23</sup> The Ohio Court of Common Pleas had avoided ruling on whether the OHW was the appropriate boundary by finding the elevation level not to be the determinative factor. The trial court “found that the definition of submerged land is based upon the location of the natural shoreline.”<sup>24</sup>

The Court of Appeals likewise sidestepped the issue. “Even if we were to assume that the OHW elevation of 573.4’ is the demarcation point for submerged lands, the record before us supports that the parties’ evidence is in dispute as to whether the property at issue is below this elevation mark.”<sup>25</sup> The Court did recognize that “ODNR uses the OHW in determining whether land is submerged and whether a submerged land lease must be issued,” but made no ruling on whether the actions of the ODNR were appropriate.<sup>26</sup> The Court of Appeals affirmed the judgment of the trial court, but on different grounds, stating “that there is no genuine issue of material fact regarding the issue of the presence of historic fill on the site of the beachfront property. This finding [by ODNR of the presence of historic fill] satisfies the definition of ‘territory’ contained in R.C. 1506.11 and likewise satisfies the requirements for the issuance of a submerged land lease on land subject to the state’s public trust.”<sup>27</sup>

The issuance of the submerged land lease was upheld by the trial court and affirmed by the Court of Appeals, without a determination regarding the appropriateness of the OHW. No mention was made of *City of Avon Lake* or *Mitchell*. ODNR’s reliance on the OHW appears to have been upheld on a technicality – the ability of the courts to find another, acceptable ground for issuance of the leases.

### **H.B. 218**

H.B. 218 appears to be an attempt to rectify the inconsistent application of the public trust doctrine in Ohio. When introduced, House Bill 218 contained language that would have established the upper boundary of public land along Lake Erie at the low water mark. The drafters of the bill sought to alter § 1506.10 by placing the words “natural low water mark of the” before “southerly shore” and adding a paragraph restricting the state’s property interest to below the natural low water mark.<sup>28</sup> This language was viewed by some as an improper diversion of public trust property from public to private use. As mentioned above, a state may not transfer

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<sup>22</sup> *Rheinfrank v. Gienow*, 1973 Ohio App. LEXIS 1543 at \* 2-3 (Ohio App. May 8, 1973).

<sup>23</sup> *Beach Cliff Board of Trustees v. Ferchill*, 2003 Ohio 2300 at \*10 (Ohio App. 2003).

<sup>24</sup> *Id.* at \*11.

<sup>25</sup> *Id.* at \*12-13.

<sup>26</sup> *Id.* at \*13.

<sup>27</sup> *Id.* at \*16-17.

<sup>28</sup> H.B. 218, as introduced, 125<sup>th</sup> Gen. Assem., Reg. Sess. (Ohio 2003).

all rights to public trust property to private owners. The Ohio Supreme Court, following the U.S. Supreme Court's ruling in *Illinois Central*, has stated that "the state as trustee for the public cannot by acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created."<sup>29</sup> There must be safeguards in place to protect the public access to the water and public resources.

It appears other members of the Ohio House realized the problems with the bill's original language as the low water mark language is missing from the version passed by the House. Unfortunately, the new language still fails to establish a clear boundary. The bill now reads "the waters of Lake Erie . . . extending from *where the waters of Lake Erie make contact with the land* to the international boundary . . . belong to the State."<sup>30</sup> This language is no more descriptive than "southerly shore." Questions of interpretation would remain at the agency level, seemingly maintaining the confusing and unsatisfactory status quo.

### ***Conclusion***

For over a century, Ohio courts have recognized that certain waters and lands are held by the state in trust for the public. The public has a right to access these "public trust" areas to fish, for navigation, and sometimes for recreational purposes. Private littoral and riparian owners, however, have rights as well. Every state struggles to find a way to balance the public right of access with the rights of private owners. Currently under Ohio law, the boundary between public and private land on Lake Erie is the "southerly shore," which is usually defined as the "natural shoreline." H.B. 218 attempts to shift that line, among other things. Due to the potentially significant implications of H.B. 218, the Law Center will continue to track this legislation as it moves through the Ohio Legislature.

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<sup>29</sup> *State v. Cleveland & Pittsburgh RR Co.*, 113 N.E. 677, 682 (Ohio 1916).

<sup>30</sup> H.B. 218, as passed by the House, 125<sup>th</sup> Gen. Assem., Reg. Sess. (Ohio 2003).