

The Public Trust Doctrine and Submerged Lake Erie Lands in Ohio

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Lake Erie is arguably Ohio's greatest natural resource and is vitally important to Ohio's economy. Lake Erie provides water for drinking, commercial shipping, fishing, transportation and recreational activities. In addition, Lake Erie is the boundary line for more than 8,000 lakefront property owners in Ohio.

Rights in and to the waters of Lake Erie and the underlying lake bed are restricted by the common law principle known as the "Public Trust Doctrine." Essentially, the Public Trust Doctrine reserves rights in submerged lands for public use and enjoyment such as navigation, commerce, fishing and recreation, and use by *littoral owners* (the rights of owners of land abutting the Great Lakes are called "littoral rights" and the owners enjoying those littoral rights are "littoral owners").

Pursuant to the Submerged Land Act in 1953, 43 U.S.C.A. Ch. 29, title to submerged lands is owned by the federal government, which subsequently transfers the right to lease the submerged lands to the states that border the body of water. In Ohio, these rights are protected, determined, and enforced under Chapter 15 of the Ohio Revised Code, and in accordance with the tenets of the Public Trust Doctrine. Under the Public Trust Doctrine, the littoral owners have rights to reasonable use of the waters of Lake Erie in front of or flowing past their lands for any purpose incidental to the use and enjoyment of the waterfront land,

so long as it does not materially infringe on the rights of others.

The specific rights of a littoral owners in Ohio are derived through submerged land leases entered into between the littoral owner and the State of Ohio, under which the State grants public or private littoral owners the special use of a portion of the public trust lands — the Lake Erie submerged lands — for the use, development or improvement of Lake Erie. These submerged land leases are administered through the Ohio Department of Natural Resources, Office of Coastal Management. The Public Trust Doctrine is the benchmark for the administration of submerged land leases. Chapter 1501 of the Ohio Administrative Code provides a five-part test to assist the Ohio Department of Natural Resources in determining if a proposed use is compatible with the Public Trust Doctrine. The elements are:

1. Whether the project prejudices the littoral rights of any owner of land fronting on Lake Erie without permission of that owner.
2. Whether the project conforms to the permitted uses as regulated by the local government, where applicable.
3. Whether public uses such as navigation, water commerce, and fishing in the affected area would be destroyed or greatly impaired.
4. Whether the diminution of the area of original use would be small compared to the use of the entire area.
5. Whether the area has a history of use

including, but not limited to, services rendered to the general public.

O.A.C. 1501-6-03 (C)(1-5).

There is a long-standing history of jurisprudence surrounding the Public Trust Doctrine and its application to submerged lands along the Great Lakes. In the landmark case *Illinois Central Railroad Co. v. State of Illinois*, the Court described the nature of title to lands subject to the Public Trust Doctrine:

It is 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...

146 U.S. 387, 452 (1892).

In *Illinois*, the United States Supreme Court ruled that the Public Trust Doctrine is applicable to the Great Lakes and obligates the State to protect the public's right to use the public trust lands and waters. *Id.* at 452-54.

One result of the application of the Public Trust Doctrine was a need to address the boundaries of where a government's control of submerged land begins and private property



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ends, in response to multiple and conflicting court decisions on the subject. Therefore, Congress passed the Submerged Land Act in 1953, 43 U.S.C.A. Ch. 29, (the “Act”). The Act defines submerged land as the floor of the first three nautical miles of navigable waters measured from the *shoreline*, and reserved the rights to those submerged lands to the federal government. 43 U.S.C.A. § 1312. The Act does not, however, clearly identify where the natural shoreline is located in order to determine the area comprising submerged lands.

In Ohio, defining and identifying the natural shoreline has proved problematic. Since 2004, a battle has been raging in the Ohio courts regarding the determination of the natural shoreline of Lake Erie and the legality of submerged land leases in general. The legal battle began when littoral property owners in Lake County filed an action against the Ohio Department of Natural Resources (ODNR), Director of Ohio Department of Natural Resources, and the State of Ohio. See *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, Lake Cty. C.P. Case No.04CV001080. The litigation was triggered by ODNR’s attempts to force the submerged land lease program on private littoral owners, requiring them to pay fees for development and/or improvements on private lakefront land abutting Lake Erie.

One of the central issues in this dispute is the determination of the natural shoreline. There have been many rulings at the trial court and appellate court levels, but in 2011 the Ohio Supreme Court reaffirmed its decision in *Sloan v. Cleveland & Pittsburgh RR. Co* (1916), 94 Ohio St. 61:

More than 130 years ago, in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, we determined that when a real estate conveyance calls for Lake Erie as the boundary, the littoral owner’s property interest “extends to the line at which the water usually stands when free from disturbing causes.”

State ex rel. Merrill v. Ohio Dept. of Natural Resources, 2011-Ohio-4612, ¶ 49. It was the *Sloan* decision cited by the Court that resulted in the Fleming Act of 1917, ultimately codified at §§1506.10- 1506.11 of the Ohio Revised Code. Section 1506.10 of the Ohio Revised Code defines the Lake Erie boundary lines,

“It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, 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”

Section 1506.11 of the Ohio Revised Code deals with the development and improvement of lakefront land; specifically, §1506.11(A) defines the term “territory” to mean,

“...the waters and the lands presently underlying the waters of Lake Erie and the lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the international boundary line with Canada.”

In 2012, the Lake County Court of Common Pleas in *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, Case No. 04CV001080, on remand from the Supreme Court of Ohio in *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, entered an Order establishing the following:

1. The farthest landward boundary of the “territory” as that term appears in R.C.1506.10 and 1506.11 is the natural shoreline, a moveable boundary located between the ordinary low and high water marks consisting of the water’s edge when free from disturbing causes, which means the most landward place where the lake water when undisturbed actually touches the land.
2. The proper interpretation of the phrase, “lands formerly underlying the waters of Lake Erie and now artificially filled” in R.C. 1506.11 is all lands formerly beneath the waters of Lake Erie, up to the landward boundary where the lake water in the

absence of disturbance actually touches the land, notwithstanding any subsequent artificial filling of those lands, unless the artificial fill is to remedy an avulsion or reclaim land lost by avulsion.

3. The “natural shoreline” in R.C. 1506.10 and 1506.11 is the moveable boundary on the shore where the lake water in the absence of disturbance touches the land at any given time.
4. The line delineating the state’s public trust in the waters of Lake Erie and private ownership of the littoral upland is the natural shoreline, that is, the most landward of either the low water mark or the water’s edge wherever it may be, when undisturbed by sudden, short-term, dramatic, and perceptible causes.

Although the Trial Court in *Merrill* resolved the “natural shoreline” debate in that case, this debate is not over as other Ohio courts are faced with this issue and whether or not to follow *Merrill*.

Until the Ohio Supreme Court and/or the Ohio General Assembly clearly define “natural shoreline,” littoral owners wanting to utilize and/or develop the waters of Lake Erie must be prepared to face the many challenges arising out of the Public Trust Doctrine, submerged land leases from the State of Ohio and inconsistent interpretation by the Ohio Courts of their littoral rights.



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