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Ohio Supreme Court to hear arguments on Lake Erie shoreline case tomorrow

Court case is more than a boundary dispute; decision could impact 200 years of public access to Lake Erie shore and protection of coastal resources

(Columbus, OH)—The battle over ownership of Ohio’s Lake Erie shore will reach a legal watermark tomorrow as each side in this hotly contested dispute attempts to sway Ohio’s seven Supreme Court justices during oral arguments, scheduled to begin at 9 a.m.

The court case—known as Merrill vs. State of Ohio—revolves around ownership of the strip of land between the water’s edge and the lake’s ordinary high water mark, when that land is not covered by water.

Some private property owners with upland property adjoining the lake claim ownership to various points offshore, including the international boundary with Canada. The Ohio Attorney General and wildlife and nature groups cite state law confirming state ownership to the ordinary high water mark.

“The Court has a choice to make. It can protect 200 years of Ohio’s public trust doctrine and follow a century’s worth of Ohio Supreme Court case law. Or it can hand a free ticket for unfettered development to the wealthiest of landowners – a pass to reek havoc on our north coast and jeopardize Ohio’s greatest natural resource,” said Trent Dougherty, Director of Legal Affairs for the Ohio Environmental Council, an intervening defendant in the case.

Michigan and Pennsylvania guarantee their citizens the right to walk the Lake Erie coast up to the high water mark. In Ohio, that right is under attack, as is the state’s authority to protect the shoreline’s scenic beauty and fragile ecosystem. Beyond just a simple property line dispute, this case and the Supreme Court’s decision could have reverberations on the future of Lake Erie and precedent for whether the state can guard the public trust.

In its contested decision in the case, the 11th Ohio District Court of Appeals ruled on Aug. 24, 2009 that:

- The boundary between privately-owned upland property and the Lake Erie shore is the point where the water touches the land—a movable boundary that advances and recedes with Lake Erie’s ever-changing water level. If left unchallenged, the finding would outlaw families and anglers to stroll or fish along the dry beach bordering the water’s edge and would allow upland owners to claim ownership over artificially filled bottomlands.
- The State of Ohio had no standing in the case and the Ohio Attorney General had no right to represent the interests of the public in the case without the express permission of the General Assembly or the Governor. This finding threatened to cast adrift the rightful owners of Ohio’s portion of Lake Erie—the state’s 11 million citizens—with no one to represent their interests in what may prove to be a landmark decision involving ownership and stewardship of the Lake Erie shore.

If the lower court’s decision were to stand, the case also would strip away essential responsibility given to the state to enforce reasonable and necessary protection of the Lake Erie shore. This would put coastal resources at risk by giving the relative few Ohioans who own land directly abutting the lakeshore the ability to fill and take ownership of shallow bottomlands, thereby extending their holdings across the shore and into the lake. By handing them this additional property, such a finding also would give upland owners new rights to develop the Lake Erie coast up to the high watermark without regard to impacts such development would have on the lake, neighboring property owners or the general public’s right to use this public resource.

In 2005, a handful of owners of upland private property bordering Ohio’s Lake Erie shore sued the Ohio Department of Natural Resources (ODNR). The property owners objected to the ODNR’s enforcement of Ohio law, which requires upland landowners to obtain leases and permits to place docks, wharves, and other structures along the shore.

After Gov. Ted Strickland took office, on July 13, 2007, he announced that the ODNR no longer would require a lease to place a structure along the shoreline. Property owners still were required to obtain a state permit, though. He also stated that the ODNR no longer would contest the court case.

The then-Attorney General, Marc Dann, declared that he would remain in the case, representing the State of Ohio and its citizens and defending the Lake Erie public trust doctrine. Interim Attorney General Nancy Rogers continued to represent the State of Ohio in the case after Dann left office in 2008.

The property owners sued the state in 2005 after several unsuccessful attempts to get the General Assembly to amend Ohio law in the first half of the decade.

Lawmakers decided against changing the law, in part because of opposition from the ODNR under then Ohio Gov. Bob Taft.

The National Oceanic and Atmospheric Administration, which oversees state coastal management programs, advised the ODNR in 2005 that the proposed legislation

would grant upland owners “the unabridged right” to fill submerged lands or construct docks, wharves, and other structures along the shore without state oversight.

In a May 13, 2005 letter to then ODNR Director Sam Speck, the federal agency warned that diminished state control over coastal development could compromise the state’s authority to preserve fish habitat and the public’s right to recreate on Lake Erie.

The 2009 appeals court ruling, however, went even further than the proposed legislation, enabling upland owners to claim ownership over filled-in lands along the lakeshore.

“On three separate occasions (in 1878, 1916, and 1948), the Ohio Supreme Court has definitively ruled that the ordinary high water mark is the boundary of Ohio’s public trust. The Ohio Supreme Court has specifically ruled that the state can never abandon the lands of Lake Erie that it holds in trust for the people of Ohio and upland owners have no title beyond that natural shore line. We hope the current Supreme Court ultimately will respect the precedence established by its predecessors and once again recognize the ordinary high water mark as the landward boundary of Ohio’s Great Lake,” concluded Dougherty.

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The mission of the Ohio Environmental Council (OEC) is to secure healthy air, land, and water for all who call Ohio home. The OEC is Ohio’s leading advocate for fresh air, clean water, and sustainable land use. The OEC has a 40-year history of innovation, pragmatism, and success. Using legislative initiatives, legal action, scientific principles, and statewide partnerships, the OEC secures a healthier environment for Ohio’s families and communities. For more information, visit www.theOEC.org.