COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO EX REL ROBERT MERILL, TRUSTEE, et al.,	}	Court of Appeals No. 2008-L-007
Plaintiff-Appellee/Cross-Appellants, and	}	Lake County Court of Common Pleas
HOMER S. TAFT, Intervening Plaintiff-Appellee/Cross-Appellant and L SCOT and DARLA J DUNCAN Intervening Plaintiff-Appellees	}	No. 04-CV-001080
vs.	}	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	}	
Defendants-Appellants/Cross-Appellees and NATIONAL WILDLIFE FEDERATION, et al,	}	
Intervening Defendants-Appellants	}	

ANSWER OF APPELLEES L. SCOT DUNCAN AND DARLA J DUNCAN TO BRIEF OF INTERVENING DEFENDANTS-APPELLANTS

Appellees L Scot and Darla J. Duncan (Hereafter, the Duncans) are in agreement with the Order by the Trial Court and pray that it is affirmed by the Appellate Court.

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II. STATEMENT OF THE CASE.

The Duncans concur with the NWF summary statement of the case.

III. STATEMENT OF FACTS.

The Duncans are littoral property owners holding title to 70 feet of beachfront located on the Cedar Point peninsula in Sandusky, Ohio. T.d 168, Exhibit 3, p.2. Their property first passed into private ownership in 1792 under the Firelands grant from Connecticut to compensate citizens who had lost property during the Revolutionary War. It was not surveyed and subdivided until the Firelands Survey was authorized by the state of Ohio more than a decade later. OH Law, Ch. 20, April 15, 1803.

NWF cites the Affidavit of Carlette Chordas who owns property adjacent to the shoreline and has used and enjoyed the shore for more than twenty-five years for their proposition that they are supporting existing law. T.d. 121, Exhibit 5, p.2. Like Carlette Chordas, the Duncans are also members of NWF and are long-term conservationists. T.d. 168, Exhibit 3, p.2.

Duncans respect the right of their neighbors to exclude the public from their property if they so choose. The trial court's decision in this matter should be upheld and the status quo preserved. The parties, to the extent that they wish to extend public access, should focus their efforts on restoring Ohio's many miles of long neglected public beaches such as those at East Harbor State Park and Sheldon Marsh State Nature Preserve.

IV. ARGUMENT.

Summary of Argument

NWF misinterprets and misstates more than 200 years of Federal and Ohio law. Their fundamental error is their failure to recognize that Congress authorized President John Adams to issue a patent to quit-claim the soil of the Western Reserve in trust for those who had previously been granted or had purchased it from Connecticut. This history was extensively briefed by Intervening Plaintiffs Taft and Duncan. T.d. 168 at 5. A certified copy of the patent is in the trial court record. T.d. 168, Exhibit 1. For the State of Ohio to now redefine the boundary of the Lake Erie public trust territory as they have attempted, they would violate contracts formed more than 200 years ago. The Supreme Court first declared the unconstitutionality of state actions violating previously formed contracts in *Fletcher v. Peck* (1810) 10 U.S. 87.

Each of the NWF assignment of error is answered separately below.

Answer to NWF First Assignment Of Error - The trial court's holding that the public trust in Lake Erie is demarcated by the line where the water of the lake touches at any given time is a proper interpretation of the law consistent with the historical record and the law. (T.d. 183)

In the trial court the Duncans advocated that the historic Low Water Mark is the proper boundary of the public trust. We continue to believe that this is a proper interpretation of the historic record and the law. This position was supported by the use of that terminology in establishing the riparian boundaries along the Ohio River that were established at a similar point in time. T.d. 168, 9. Plaintiff/Appellant OLG et al. advocated the use of the LWD, or low water datum, as the boundary. Either of these positions yield the same practical result as the "water's edge" holding of the lower court. When water levels are low, all three points are essentially the same. When the water is high, the public had the undisputed right to access the water and any land which is actually submerged under the federal navigational servitude. For this reason, the Duncans accept the trial court's "water's edge" determination as proper.

In contrast, NWF and the State of Ohio advocated the use of a fixed elevation of 573.4 ft. IGLD 1985 as the boundary of the territory. They also claimed that this fixed elevation had been scientifically determined to be the Ordinary High Water Mark using the "IGLD methodology" and that the OHWM was the boundary under both Federal and State law. None of these propositions have any basis in fact or law as was demonstrated in the briefs presented in the court below.

No matter how many times one rereads the pertinent sections of R.C. 1506.10 and R.C. 1506.11 as quoted by the NWF, the term Ordinary High Water Mark does not appear. Instead, these sections talk about the "waters of Lake Erie" and the "land underlying the waters of Lake

Erie." Clearly, this wording leads to the interpretation held by the court and not that which is advocated by NWF. NWF Brief, p.8, quoting R.C.15106.10, R.C. 1506.11(A).

NWF apparently understands that, under certain conditions, "that Congress may sometimes convey lands below the high water mark of a navigable water", defeating a new States title. NWF Brief, p.9. It is unclear why they do not recognize that the Quieting Act was just such an Act of Congress.

The historic determination of Ohio's Lake Erie public trust boundary was thoroughly briefed by Intervening-Plaintiffs Taft and Duncan in the court below. T.d. 168, T.d. 172, and T.d. 179. The essence of the arguments presented by Taft and Duncan were well captured by the trial court and are included in its Order. T.d. 183 at 60-64. *Montana v. United States* (1981), 450 U.S. 544, 551, 101 S.Ct. 1245, 67 L.Ed.2d 493.

At the beginning of the 19th century, Ohio was the proving ground for the Cadastral Survey system from which today's Federal Cadastral surveying principles eventually evolved. Because of this unique historical position of Ohio in the sale of the Public Lands of the United States, analyzing and understanding the historic record is critical. The trial court did exactly this and has satisfied the requirements of both federal and state law in its determination that the boundary of Ohio's Lake Erie Public Trust is the "most landward place where the water touches the land at any given time."

NWF fails to understand the meaning of the designation "Ordinary High Water Mark", a clearly defined term of Cadastral art, when applied to the tideless oceans which make up the Great Lakes. They also misinterpret the significance and derivation of the elevation 573.4 ft. IGLD as applied to the actual physical conditions of Lake Erie. As the result, even if the boundary of the Public Trust were the OHWM, it would be further offshore than the line

advocated by NWF. Ironically, if the OHWM were truly the border of the Public Trust, the public would be relegated to walking many feet offshore rather than at the water's edge during the summer months. During the summer, the waters of Lake Erie are typically more than a foot above the annual average elevation. As the result, the OHWM is, typically many feet lake-ward of the water's edge. T.d. 172, p.23, Exhibit 7.

As the result of their misconceptions, NWF attempts to force fit inapplicable case law from western states that was developed long after the Cadastral boundaries in question were established. These boundaries were established in accordance with the instructions from both Congress and the Ohio State Legislature in effect at the time.

NWF seems to acknowledge that Congress had the ability to make a pre-statehood grant of lands below the OHWM but they seem to be unwilling to accept that such a transfer of the lands of the Connecticut Western Reserve occurred under the Quieting Act. In fact, if there had been no Quieting Act, the boundary of the State of Ohio would be far different than it is today. It is unclear why NWF thinks that the Quieting Act "raises issues of fact inappropriate for resolution of this matter by summary judgment." The wording of the Quieting Act is quite clear and, as an Act of Congress, is quite appropriate for consideration in a summary judgment.

It is elemental geography that the metes and bounds description of the "tract of land known as the Western Reserve" extends far into Lake Erie. Similarly the survey of the Firelands, as authorized by the Ohio Legislature shortly after statehood, refers to "the whole beach" when describing the original Cedar Point parcel from which the Duncans' parcel was later subdivided. T.d. 168, p.10, Exhibit 3.

NWF also seems to ignore the the impact of the various Swampland Acts of Congress that deeded additional lands below the OHWM to private individuals later in the nineteenth century.

Answer to NWF Second Assignment of Error - The trial court was correct to hold that the Ohio Department of Natural Resources erred in locating the boundary of the territory at 573.4 ft (IGLD1985) since there is no scientific or legal basis for that location. (T.d. 183)

As the trial court notes, even if the OHWM were the boundary of the territory, it would not be at 573.4 ft (IGLD1985). (T.d. 183 at 72)

NWF misunderstands what government entity has responsibility for the survey and resurvey of the boundaries of the public lands of the United States. This authority rests not with the Army Corps of Engineers but with the Bureau of Land Management and its predecessor organization. The standards used for public land surveys have changed significantly since the first surveys were authorized in 1785. Under Federal law, any resurvey of a public land boundary must resurvey to the standards initially established. See http://www.blm.gov/wo/st/en/prog/more/cadastralsurvey.html. See also T.d. 168, p.6., T.d. 172, p.13.

ODNR's use of the OHWM as the boundary of the public trust was adopted without any rulemaking processes in an attempt to simplify their permits procedure by aligning their boundary definition with that used administratively by the Army Corps of Engineers. ODNR, which had previously used the LWD as a boundary delineation ignored the fact that 573.4 ft was an international designation of the High Water Mark which is *seldom* exceeded, and not the Ordinary High Water Mark which is the annual *average* of all daily high water levels. See T.d. 172, p.23, Exhibit 7. The Corp's selection of a fixed 573.4 ft (IGLD1985) elevation as their internal administrative OHWM was intended for the Corp's administrative purposes only and not

as a property boundary. However, even the use of the administrative determination by the Corps has been held to be unreasonable by the courts.

The court in *U.S. v. Marion L. Kincaid Trust* (2006) 463 F.Supp.2d 680 found that the methodology used was not even sufficiently scientific even for administrative purposes. In fact, the selected elevation had been chosen for "consistency" without regard to scientific measurement.

The Kincaid court opined in some detail and clearly rejected the scientific validity of the Army Corps OHWM determination which underlies the NWF's second assignment of error.

> There is no evidence in this case that the plaintiff conducted any investigation to determine the location of the OHWM on the Kincaids' property. Rather, the attorney for the government readily acknowledged that she relied on an "administrative OHWM," which the Corps set at "581.5 feet IGLD in 1985." Pl.'s Resp. to Defs.' Supp. Br. Ex. 1, Halliday Aff. at ¶ 12. There are no federal regulations that establish, authorize, or condone the establishment of an "administrative" ordinary high water mark. The Michigan legislature has established an OHWM figure for Lake Huron (of which Saginaw Bay is a part) of 579.8 feet IGDL based on the 1955 survey for certain regulatory purposes, *see* Mich. Comp. Laws § 324.32502; but the Michigan courts reject that delineation for the purpose of determining the rights, privileges, obligations, and responsibilities of shoreline landowners. *Glass*, 473 Mich. at 682-85, 703 N.W.2d at 66-69. However, the concept of an administrative OHWM finds no support in federal law. Moreover, it appears that the Corps has chosen the highest level reached by Lake Huron in decades as its selection of an "ordinary" high water mark. That choice violates the traditional notion of the concept of an *ordinary* high water mark, which was intended to account for the day-to-day fluctuations of the levels of oceans, and later lakes and rivers, if not due to tides then as a result of wind and weather. Moreover, the selection of an extraordinarily high lake level as the administrative OHWM alone defies the plain meaning of the term "ordinary." *See* Oxford English Dictionary (2004) (defining the word as "[b]elonging to the regular or usual order or course of things; having a place in a fixed or regulated sequence; occurring in the course of regular custom or practice;normal; customary; usual"). The historic maximum lake level cannot constitute an "ordinary" high water mark as that term is defined by the cases and regulations or the common-sense meaning of the term's constituent words. Based on the language of the regulations and the case law, it appears that land on which non-aquatic vegetation grows is above the OHWM. The Court finds, therefore, that reliance by the government on an administrative OHWM was unreasonable. *U.S. v. Marion L. Kincaid Trust* (2006) 463 F.Supp.2d 680

Once again, these issues were thoroughly addressed by the trial court.

Answer to NWF Third Assignment of Error - The trial court was correct in holding that the public has no right to walk above the water's edge since that is the landward limit of the territory. (T.d. 183)

NWF cites *Glass v. Goeckel* for the proposition that the public has the right to walk the beach anywhere below the OHWM. Brief of Defendants-Appellants at 20 citing to *Glass v. Goeckel* (2005), 473 Mich. 667, 703 N.W.2d 58. Taft and Duncan briefed the trial court on why *Glass* was, in part, wrongly decided. T.d. 172. p.10. The trial court agreed with Taft and Duncan. T.d. 183, p.67, at ¶236.

NWF fails to note that *Glass v. Goeckel* clearly affirms that the littoral owner holds title to the low water mark, making it stand against NWF's second assignment of error. Unfortunately, after the court properly held that littoral owners can have title to the low water mark, and that title should rely on the deeds, the majority in *Glass v Goeckel* then came to its bizarre holding that the public has the right to walk the privately held lands up to the line of vegetation.

In it's third assignment of error, NWF wants the Ohio courts to reject the first undisputed part of the holding in *Glass v. Goeckel* while adopting the wrongly decided second part. Such a proposition is even more bizarre the *Glass* holding itself.

The following excerpts are from the majority opinion in *Glass*:

> "The concepts behind the term "ordinary high water mark" have remained constant since the state first entered the Union up to the present: boundaries on water are dynamic and water levels in the Great Lakes fluctuate. In light of this, the aforementioned factors will serve to identify the ordinary high water mark, but 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 30.
>
> "We must conclude 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. See *Ryan v Brown*, 18 Mich 196, 209 (1869). 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 36.
>
> "We conclude that plaintiff, as a member of the public, may walk the shores of the Great Lakes below the ordinary high water mark. Under longstanding common-law principles, defendants hold private title to their littoral property according to the terms of their deed and subject to the public trust." Id. at 44.

Two members of the *Glass* court issued separate concurring and dissenting opinions. The first, issued by Justice Young was the less critical of the majority opinion.

> "However, I join Justice Markman's opinion with respect to the other issues presented by this appeal. Like Justice Markman, I believe the majority errs by recognizing a right that we have never before recognized-the right to "walk" the private beaches of our Great Lakes- and by granting public access to private shore land up to an ill-defined and utterly chimerical "ordinary high water mark" as described in the majority opinion." Id. at 46.

Justice Markman, the second concurring and dissenting judge was far less kind to the analysis and decision of the majority.

> "However admirable the majority's effort, I remain convinced that the "ordinary high water mark" concept on which the majority relies applies only to tidal waters, with their regularly recurring high and low tides.3 The only "water mark" that one can find on the Great Lakes is the water's edge—viz., the wet portion of the shore over which the lake is presently ebbing and flowing. I believe it is only in this area of wet shoreline that the public may walk." Id. at 47.
>
> "One of the few things that is clear about the majority's opinion is that it will lead inevitably to more litigation-- more litigation in an area of the law that, mercifully, has been largely free from such litigation for the past century and a half in our state. In the place of the reasonable harmony that has developed between the public and littoral property owners, there will be litigation. In the place of open beaches, there almost certainly will be a proliferation of fences erected by property owners determined to protect their now uncertain rights." Id. at 54.

V. CONCLUSION.

For all of the reasons outlined above, as well as those presented in the courts below, Appellees L. Scot and Darla J. Duncan respectfully request that this court affirm the decision of the court below.

Respectfully submitted,

L. Scot Duncan, Esq. (0075158)
Intervening Plaintiff-Appellee, Pro Se and
Counsel for Intervening Plaintiff-Appellee
Darla S. Duncan
1530 Willow Drive
Sandusky, OH 44870
419-627-2945
scotduncan@alum.mit.edu

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing Memorandum on all parties on this 30th day of April, 2008, by mailing copies to their counsel of record addressed as follows:

Neil S. Kagan, Esq.
Counsel for Intervening-Defendants/Cross-Appellees
National Wildlife Federation
213 West Liberty Street STE 200
Ann Arbor, MI 48104

James F. Lang, Esq.
Fritz E. Berckmueller, Esq.
Counsel for Plaintiffs-Appellees/Cross-Appellants
Calfee, Halter & Griswod LLP
1400 McDonald Investment Center
800 Superior Ave. NE
Cleveland, OH 44114-2688

Cynthia K. Frazzini, Esq.
John P. Bartley, Esq.
Counsel for Defendant-Appellant/Cross-Appellee
State of Ohio
Environmental Enforcement Section
Attorney General of Ohio
2045 Morse Road, Bldg. D-2
Columbus, OH 43229-6693

Kathleen M. Trafford, Esq.
Counsel for Appellees Ohio Department of Natural Resources and Sean D. Logan, Director
Porter, Wright, Morris & Arthur LLP
41 S. High Street
Columbus, OH 43215

Homer S. Taft, Esq.
Appellee/Cross-Appellant (Pro Se)
20220 Center Ridge Road STE 300
P.O. Box 16216
Rocky River, OH 44116-0216

Absent a court-order so directing, Intervening Plaintiff-Appellee does not serve copies on counsel of interested non-parties City of Cleveland, Northeast Ohio Regional Sewer District or others, as they are neither parties to the case below nor to this Appeal.

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L. Scot Duncan
Attorney at Law (Pro Se)
Intervening Plaintiff-Appellee