

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,
and DON H. GUNDERSON

Plaintiffs,

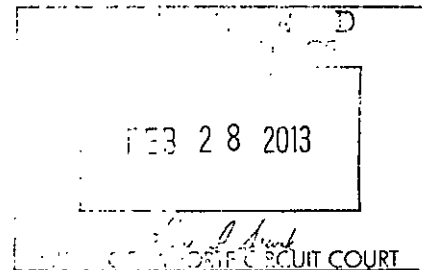
v.

TOWN OF LONG BEACH, INDIANA

Defendant,

ALLIANCE FOR THE GREAT LAKES
and SAVE THE DUNES,

*Applicants for Intervention
as Defendants.*



**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES**

Jeffrey B. Hyman (Atty. No. 24625-89)
W. William Weeks (Atty. No. 1155-49)
Conservation Law Center
116 S. Indiana Ave.
Bloomington, Indiana 47408
Telephone: 812-856-5737
Fax: 812-855-1828
E-mail: jbhyman@indiana.edu

Attorneys for Applicants for Intervention as
Defendants, Alliance for the Great Lakes
and Save the Dunes

TABLE OF CONTENTS

	Page
INTRODUCTION AND STATEMENT OF CASE	1
APPLICANTS FOR INTERVENTION.....	4
ARGUMENT.....	6
I. Alliance for the Great Lakes and Save the Dunes Are Entitled to Intervene as a Matter of Right Under Indiana Trial Rule 24(A)(2).....	6
A. Applicants Have an Immediate, Direct, and Legally Protectable Interest in the Subject of This Litigation	7
1. <i>Disposition of Plaintiffs' Claims Would Directly Affect Both the Rights of Applicants' Members and the Interest of Applicant Organizations</i>	7
2. <i>The Relief Requested by Plaintiffs, if Granted, Would Directly and Substantially Affect the Rights of Applicants' Members to Use and Enjoy the Shore of Lake Michigan</i>	8
3. <i>Intervention by Public Interest Groups Has Been Allowed in Similar Cases</i>	9
4. <i>The Relief Requested by Plaintiffs, if Granted, Would Also Directly and Substantially Affect the Applicant Organizations' Ability to Fulfill Their Respective Missions and Objectives</i>	11
B. A Ruling in Favor of Plaintiffs on the Issues of Public Rights or State Ownership of the Shore May as a Practical Matter Impair the Ability of Applicants to Protect Their Interests	12
1. <i>Stare Decisis in This Case Would Impose a Significant Practical Disadvantage Upon Applicants</i>	12
2. <i>Applicants Cannot Protect Their Interests Except By Intervention</i>	14
C. The Interests of Applicants Are Not Adequately Represented by the Existing Parties	14
1. <i>The Applicants' and Town's Interests in This Case Diverge</i>	15
2. <i>The Town Does Not Represent the Interests of Members Who Are Not Residents of Long Beach</i>	16
3. <i>The Applicants' and State's Interests Also Diverge</i>	16
D. This Motion for Intervention Is Timely	17
II. In the Alternative, Alliance for the Great Lakes and Save the Dunes Should Be Permitted to Intervene Permissively Under Indiana Trial Rule 24(B)(2).....	18

TABLE OF CONTENTS (Continued)

	Page
A. Applicants' Defenses Have Questions of Law and Fact in Common With the Main Action	18
1. <i>Mixed Questions of Law and Fact</i>	19
2. <i>Questions of Law</i>	20
B. Intervention Will Not Unduly Delay or Prejudice the Adjudication of the Rights of the Original Parties	21
DEFENSES FOR WHICH INTERVENTION IS SOUGHT PURSUANT TO RULE 24(C).....	21
I. The State, Not Plaintiffs, Owns the Disputed Shore of Lake Michigan Lakeward of the Ordinary High Water Mark	22
II. Title to the Lake Shore Below the OHWM Is Subject to Public Trust Rights	22
III. The Town's Resolution Is Not a Taking	22
IV. The Resolution's Adopted Policy Likely Does Not Apply to Plaintiffs' Claimed Property	23
V. Under Indiana Law, Plaintiffs' Declaratory Judgment Action is Improper	23
VI. The Town's Resolution Does Not Violate the Home Rule Act.....	23
VII. Plaintiffs Do Not Have Standing to Bring This Lawsuit.....	23
VIII. Plaintiffs are Not Entitled to Collect Attorney Fees or Costs From Applicant Intervenor	23
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
INDIANA CASES	
<i>Bainbridge v. Sherlock</i> , 29 Ind. 364, 1868 WL 2977 (Ind. 1868)	20, 22
<i>Bryant v. Lake County Trust Co.</i> , 166 Ind. App. 92, 334 N.E.2d 730 (Ind. Ct. App. 1975), <i>reh'g denied</i>	13, 17
<i>City of New Haven v. Chemical Waste Management of Indiana, LLC</i> , 685 N.E.2d 97 (Ind. Ct. App. 1997), <i>trans. dismissed</i>	18
<i>Dible v. City of Lafayette</i> , 713 N.E.2d 269 (Ind. 1999)	23
<i>Granite State Insurance Co. v. Lodholtz</i> , 981 N.E.2d 563 (Ind. Ct. App. 2012)	6, 7
<i>Herdrich Petroleum Corp. v. Radford</i> , 773 N.E.2d 319 (Ind. Ct. App. 2002), <i>reh'g denied</i> , <i>trans. denied</i>	6, 7, 17, 18
<i>Heritage House of Salem, Inc. v. Bailey</i> , 652 NE.2d 69 (Ind. Ct. App. 1995), <i>reh'g denied, trans. denied</i>	14, 16
<i>In re Remonstrance Appealing Ordinance Nos. 98-004, 98-005, 98-006, 98-007 and 98-008</i> <i>of Town of Lizton</i> , 737 N.E.2d 767 (Ind. Ct. App. 2000)	7
<i>In re Paternity of Duran</i> , 900 N.E.2d 454 (Ind. Ct. App. 2009), <i>reh'g denied</i>	7
<i>In re Paternity of E.M.</i> , 654 N.E.2d 890 (Ind. Ct. App. 1995)	7
<i>Lake Sand Co. v. State ex rel. Attorney General</i> , 68 Ind. App. 439, 120 N.E. 714 (Ind. Ct. App. 1918)	2, 8, 9, 22
<i>Murray v. City of Lawrenceburg</i> , 925 N.E.2d 728 (Ind. 2010)	8, 23
<i>State ex rel. Indiana Dept. of Conservation v. Kivett</i> , 228 Ind. 623, 95 N.E.2d 145 (Ind. 1950)	1, 2, 8, 13, 21, 22
<i>State ex rel. Prosser v. Indiana Waste Systems, Inc.</i> , 603 NE.2d 181 (Ind. Ct. App. 1992)	7
<i>Stinson v. Butler</i> , 4 Blackf. 285, 1837 WL 1870 (Ind. 1837)	20, 22
<i>Vernon Fire & Casualty Ins. Co. v. Matney</i> , 170 Ind. App. 45, 351 N.E.2d 60 (Ind. Ct. App. 1976)	12, 13

TABLE OF AUTHORITIES (Continued)

Page(s)

OTHER STATE CASES

<i>DeJulius v. Sumner</i> , 373 Ark. 156, 282 S.W.3d 753 (Ark. 2008)	12, 14
<i>State ex rel. Merrill v. Ohio Dept. of Natural Resources</i> , 130 Ohio St.3d 30, 955 N.E.2d 935 (Ohio 2011).....	9, 10
<i>State ex rel. Merrill v. Ohio Dept. of Natural Resources</i> , 2009 WL 2591758 (Ohio Ct. App., Aug. 21, 2009), <i>Judgment Affirmed in Part, Reversed in Part by State ex rel. Merrill v. Ohio Dept. of Natural Resources</i> , 955 N.E.2d 935 (Ohio 2011)	10

FEDERAL CASES

<i>Illinois Central R. R. Co. v. Illinois</i> , 146 U.S. 387 (1892)	2, 9, 11
<i>Nuesse v. Camp</i> , 385 F.2d 694 (D.C. Cir. 1967)	13
<i>PPL Montana, LLC v. Montana</i> , 132 S. Ct. 1215 (2012).....	1
<i>Pollard's Lessee v. Hagan</i> , 44 U.S. 212 (1845)	1
<i>Shively v. Bowlby</i> , 152 U.S. 1 (1894)	1, 8
<i>WildEarth Guardians v. National Park Service</i> , 604 F.3d 1192 (10th Cir. 2010)	11
<i>Trbovich v. United Mine Workers of America</i> , 404 U.S. 528 (1972)	14

STATUTES

Indiana Code § 14-26-2 et seq.	20, 21
Indiana Code § 32-24-1-14.....	23
Indiana Code § 32-24-1-16.....	3

TABLE OF AUTHORITIES (Continued)

Page(s)

TRIAL RULES

Indiana Rule of Trial Procedure 8.....	18
Indiana Rule of Trial Procedure 12(b)(6)	23
Indiana Rule of Trial Procedure 24.....	24
Indiana Rule of Trial Procedure 24(A)(2)	1, 6
Indiana Rule of Trial Procedure 24(B)(2).....	1, 18
Indiana Rule of Trial Procedure 24(C)	1, 21

REGULATIONS

312 IAC 1-1-26.....	2
---------------------	---

OTHER AUTHORITIES

Joseph L. Sax, <i>The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention</i> , 68 Mich. L. Rev. 471, 474 (1970).....	11
59 Am. Jur. 2d Parties § 170.....	14

EXHIBITS

Exhibit A: Proposed Joint Answer by Applicant Intervenors	1, 18, 19
Exhibit B: Resolution No. 12-003, passed on November 12, 2012, by Long Beach Town Council.....	2, 3, 16
Exhibit C: Affidavit of Nicole Barker	4, 5, 9, 11
Exhibit D: Affidavit of Joel Brammeier	5, 8, 11, 12
Exhibit E: Affidavit of Deborah Chubb.....	9, 16
Exhibit F: Affidavit of Carolyn Sue Spitler.....	9

TABLE OF AUTHORITIES (Continued)

Page(s)

EXHIBITS (Continued)

Exhibit G: Affidavit of Jude Rakowski	9
Exhibit H: Affidavit of Martha Maust	9
Exhibit I: Affidavit of Susan Wolz	9, 16
Exhibit J: Affidavit of Cheryl Chapman	9
Exhibit K: Indiana Natural Resources Commission, November 15, 2011, Meeting Minutes, <i>available at</i> http://www.in.gov/nrc/2350.htm	17

INTRODUCTION AND STATEMENT OF CASE

Pursuant to Indiana Rule of Trial Procedure 24(A)(2), Alliance for the Great Lakes and Save the Dunes (jointly “Applicants”) move to intervene as a matter of right as defendants in this case. In the alternative, Applicants move to intervene permissively as defendants pursuant to Trial Rule 24(B)(2). A summary of the legal basis of Applicants’ defenses pursuant to Trial Rule 24(C) is set forth at the end of this brief. *See also* Exhibit A (“Proposed Joint Answer by Applicant Intervenors”).

This lawsuit was brought by owners of private property abutting the shore of Lake Michigan (the “Lakeshore”) in Long Beach, Indiana (“Town”). Plaintiffs appear to contend that their upland private property extends to include the Lakeshore, which is the strip of lake bed between the low water mark and the ordinary high water mark (“OHWM”). Plaintiffs also contend that the Town’s adopted policy to limit enforcement of particular Town ordinances to areas above (*i.e.*, landward of) the OHWM at public beach accesses and Town-owned lots is a taking of their alleged private property. Although the Town’s new enforcement policy is apparently the catalyst for Plaintiffs’ action, the Complaint also appears to challenge fundamental tenets of the equal footing doctrine and public trust doctrine as each applies to Lake Michigan.

The equal footing doctrine establishes that each state (including Indiana), at the time of its entry into the Union, automatically received ownership title to the waters and the beds of waters, up to the OHWM, that were navigable at that time. *See, e.g., PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Pollard’s Lessee v. Hagan*, 44 U.S. 212 (1845); *State ex rel. Indiana Department of Conservation v. Kivett*, 228 Ind. 623, 95 N.E.2d 145 (Ind. 1950). The public trust doctrine, at its core, establishes that navigable

waters and their beds are to be held by the states in trust for the public and that title to these waters and beds is encumbered by public rights of use. *Illinois Central R. R. Co. v. Illinois*, 146 U.S. 387 (1892); *Lake Sand Co. v. State ex rel. Attorney General*, 68 Ind. App. 439, 120 N.E. 714, 716 (Ind. Ct. App. 1918).

Plaintiffs' apparent challenge to these doctrines presents important questions of first impression for Indiana courts: namely, (1) are there public trust rights in the shore of Lake Michigan up to the OHWM; (2) does the State of Indiana hold ownership title to the shore up to the OHWM; and (3) does *Kivett*, 95 N.E.2d 145, reserve those questions for the Indiana Legislature.

A ruling in favor of Plaintiffs on these questions, if affirmed on appeal, would allow Plaintiffs to exclude Applicants' members from portions of the Lakeshore. These members would no longer be free to walk or recreate along those portions of the shore, and their use and enjoyment of the shore would be impaired and harmed. In addition, the precedential effect of such a ruling would substantially impact public use along the entire length of Indiana's Lake Michigan shoreline.

Plaintiffs have specifically challenged Resolution No. 12-003 ("Resolution") passed on November 12, 2012, by the Long Beach Town Council. Ex. B. The Resolution adopts a policy that, with regard to all publicly owned beach accesses and all lots owned by the Town, the Long Beach police will enforce certain property ordinances only above the OHWM. The OHWM applied by the Resolution is defined by the International Great Lakes Datum, which has been adopted by the Indiana Natural Resources Commission ("NRC") as the regulatory OHWM. 312 IAC 1-1-26(2). The Resolution also "recognizes and accepts" the position of the Indiana Department of Natural Resources ("IDNR") on the significance of the OHWM of Lake

Michigan, as reflected in IDNR's publications. According to the Resolution, IDNR's position is that the OHWM "is the line on Lake Michigan used to designate where the state's regulatory jurisdiction lies and, in certain instances, to determine where public ownership or use begins and/or ends." Ex. B at 1.

Plaintiffs perceive in the Resolution a Town policy that unconstitutionally asserts State ownership and possession, and encumbrance by public rights, of the Lakeshore (*i.e.*, below OHWM). Compl. ¶ 14. Plaintiffs' Complaint makes four distinct claims. First, Plaintiffs seek a declaratory judgment that "there are no public rights on the Lakefront in Long Beach, Indiana." Compl. ¶¶ 41–48, Count I. Second, Plaintiffs bring an inverse condemnation claim pursuant to Indiana Code § 32-24-1-16 and the U.S. and Indiana Constitutions, contending that the Town has wrongly asserted ownership rights and public trust rights on the Lakeshore and has "appropriate[ed] the Lakefront for public use." Compl. ¶¶ 49–62, Counts II, III, and IV. Third, Plaintiffs contend that the Town's Resolution violates the Indiana Home Rule Act "by asserting that the Lakefront is public property," a power allegedly foreclosed to the Town by action of the General Assembly. Compl. ¶¶ 63–69, Count V. Fourth, Plaintiffs seek attorney fees and costs. Compl. ¶¶ 49–51, Count II.

Applicants for intervention are public interest conservation organizations with diverse memberships, lengthy histories, and broad perspectives, as well as active programs for protecting the Lake Michigan shoreline. They seek to defend the existing extent of public trust rights under the public trust doctrine, and the existing extent of State ownership under the equal footing doctrine, as applied to the Lakeshore.

Applicants are entitled to intervene in this case as of right. Applicants' members rely on both the public trust rights and State ownership to support their use of the Lakeshore for

recreation and other purposes. These members have a direct and legally protectable interest in the use of the Lakeshore at Long Beach, and disposition of this case in favor of Plaintiffs would harm that interest. Moreover, Applicant organizations rely on the public trust doctrine and State ownership of the shore to help them achieve their missions to conserve the natural resources and ecosystems of Lake Michigan. Intervention by Applicants as defendants in this case is necessary to protect those member and organizational interests.

There is no other forum or opportunity for Applicants to protect their interests. Thus, Applicants have no alternative remedy. Applicants' interests and perspectives are different from the Town, from the State, and even from private Long Beach landowners. Those entities cannot adequately represent Applicants' interests and would not present their unique perspectives. Finally, Applicants' motion is filed before or near the time of the Town's first responsive pleading and so is timely.

In the alternative, Applicants satisfy the test for permissive intervention. Applicants' defenses have multiple questions of law and fact in common with Plaintiffs' action, and this timely intervention would not delay or prejudice the proper adjudication of this dispute.

APPLICANTS FOR INTERVENTION

Save the Dunes is an Indiana nonprofit, 501(c)(3) public interest organization. Its mission is "to preserve, protect and restore the Indiana Dunes and all natural resources in Northwest Indiana's Lake Michigan Watershed for an enhanced quality of life." Ex. C ¶ 9 (Barker Affidavit). Save the Dunes is one of Indiana's oldest environmental groups, having formed in 1952 with the goal of permanently protecting the Indiana Dunes for ecological preservation and public enjoyment. Save the Dunes has since expanded its objectives and programs. Save the Dunes' current objective is to maintain and restore the integrity, vitality,

quality, and use of the natural environment of the Indiana Dunes country and adjacent or nearby ecosystems in the Lake Michigan watershed of Lake, Porter, and LaPorte counties. *Id.* ¶¶ 10–11. To meet that objective, Save the Dunes acquires and stewards land or conservation easements, especially on those lands required to enhance and preserve the vitality of areas and ecosystems in the Lake Michigan watershed, and generally advocates for natural resource protection and conservation. *Id.* ¶¶ 8, 9, 12, 13, 17–30. Many of the organization’s efforts are focused on the Lake Michigan shoreline. Save the Dunes, through its activities, represents the interests of 532 active members, more than half of whom are located in Indiana. *Id.* ¶¶ 15–16.

Alliance for the Great Lakes is an Illinois-based nonprofit, 501(c)(3) public interest organization started in 1970, focused on protecting and restoring the Great Lakes. The Alliance’s mission is “to conserve and restore the world’s largest freshwater resource using policy, education and local efforts, ensuring a healthy Great Lakes and clean water for generations of people and wildlife.” Ex. D ¶ 6 (Brammeier Affidavit). The Alliance has forged Great Lakes policies, promoted Great Lakes education, and implemented on-the-ground efforts to protect and restore thousands of miles of Great Lakes shoreline. For example, “Adopt-a-Beach” is the Alliance’s primary volunteer program, with some 10,000 annual participants ranging from individuals and families to schools and businesses, and includes litter removal and monitoring as well as beach health assessments. *Id.* ¶ 9. The Alliance has conducted water testing and beach clean-ups in LaPorte County since 2006. *Id.* The ecosystem integrity of the Great Lakes’ coasts is of vital concern to the Alliance. *Id.* ¶¶ 10–11. The Alliance is a membership organization with 1782 organizational and individual members in total and 42 organizational and individual members in Indiana. *Id.* ¶ 19.

Applicant organizations bring a valuable perspective to this litigation that is not offered by either the original parties or other prospective intervenors, and this perspective would be beneficial to the disposition of the case. Applicants' conservation and natural resource-oriented perspective on the public trust doctrine and State ownership as applied to Lake Michigan is unique in this litigation. The Complaint asks the Court to negate public trust rights and State ownership on the Lakeshore. The Court's rulings on the geographic extent of public trust rights and State ownership will depend on Indiana and federal precedent and persuasive authority from other jurisdictions, and also on what makes sense given modern scientific understanding of the fluctuations and dynamics of Lake Michigan. Applicants' natural resource perspective can usefully inform the Court's response to Plaintiffs' claims. Some older judicial decisions addressing the boundaries of ownership or public trust in other states have relied in part on outdated conceptions of the natural processes of the Great Lakes. Applicants have the expertise necessary to apply modern scientific understanding and facts to the key issues that appear likely to be adjudicated in this case.

ARGUMENT

I. Alliance for the Great Lakes and Save the Dunes Are Entitled to Intervene as a Matter of Right Under Indiana Trial Rule 24(A)(2).

The test for intervention as of right under Trial Rule 24(A)(2) has three elements: (1) the applicants for intervention must have an interest in the subject of the action; (2) disposition of the action may as a practical matter impede the protection of that interest; and (3) representation of the interest by existing parties is inadequate. *Granite State Insurance Co. v. Lodholtz*, 981 N.E.2d 563, 566 (Ind. Ct. App. 2012); *Herdreich Petroleum Corp. v. Radford*, 773 N.E.2d 319, 324 (Ind. Ct. App. 2002). The Court must also consider whether the request to intervene is

timely. *Id.* The facts alleged in a motion to intervene must be taken as true. *In re Paternity of Duran*, 900 N.E.2d 454, 467 (Ind. Ct. App. 2009). The Alliance and Save the Dunes satisfy these elements and are thus entitled to intervene as of right.

A. Applicants Have an Immediate, Direct, and Legally Protectable Interest in the Subject of This Litigation.

An applicant seeking intervention as of right must claim an immediate and direct interest in the proceedings. *In re Remonstrance Appealing Ordinance Nos. 98-004, 98-005, 98-006, 98-007 and 98-008 of Town of Lizton*, 737 N.E.2d 767, 769 (Ind. Ct. App. 2000). The intervenor “must have an interest recognized by law that relates to the subject of the action in which intervention is sought.” *Id.* (quoting *In re Paternity of E.M.*, 654 N.E.2d 890, 893 (Ind. Ct. App. 1995), which in turn quotes *State ex rel. Prosser v. Indiana Waste Sys.*, 603 N.E.2d 181, 187 (Ind. Ct. App. 1992)).

1. Disposition of Plaintiffs’ Claims Would Directly Affect Both the Rights of Applicants’ Members and the Interest of Applicant Organizations.

The interests of Applicants in this litigation stem from the effect of the Court’s disposition of Plaintiffs’ claims, with respect to shoreline properties and transactions, on both the organizations’ respective members and the organizations themselves. Plaintiffs in Count I seek a declaration that “there are no public rights on the Lakefront in Long Beach.” Compl. ¶ 48. Plaintiffs challenge not only the geographic extent of the public trust and State title on the Lakeshore, but also the very existence of the public trust doctrine as applied to Lake Michigan. *See, e.g.*, Compl. ¶ 24 (asserting that public trust rights do not apply to any part of Lake Michigan). Granting this requested declaration would contravene the State’s public trust obligations below the OHWM for the entire length of Lakeshore within Town limits. *See Lake*

Sand, 120 N.E. at 716 (concluding that “[t]he state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan”).

In Counts II, III, and IV, Plaintiffs seek compensation through an inverse condemnation claim for a taking of private property. The first element of an inverse condemnation claim is that Plaintiffs must show they actually own the property right alleged to have been taken. *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010). Plaintiffs thus challenge the State’s ownership of the shore of Lake Michigan that abuts their properties. Because Indiana has never changed or repudiated the initial equal footing boundary for the Lakeshore (*i.e.*, the OHWM), a ruling in Plaintiffs’ favor on this issue would, as a case of first impression, either contravene the U.S. Supreme Court’s equal footing decisions, *e.g.*, *Shively*, 152 U.S. at 55–58, or re-delineate the “bed” of Lake Michigan without the legislative involvement required by *Kivett*, 95 N.E.2d at 148 (concluding that “the fee simple title to the beds of natural navigable streams passed to the State and the State could not part with title to such real estate, except by an act of the Legislature”).

The relief requested by Plaintiffs, if granted, would harm the rights of Applicants’ members to use the Lakeshore, rights which are legally protected under the public trust doctrine. Moreover, the direct interest of Applicant organizations in relying on the public trust and equal footing doctrines to facilitate natural resource conservation would also be harmed by a decision in favor of Plaintiffs. These components of Applicants’ interests are considered in turn.

2. *The Relief Requested by Plaintiffs, if Granted, Would Directly and Substantially Affect the Rights of Applicants’ Members to Use and Enjoy the Shore of Lake Michigan.*

Alliance for the Great Lakes is a membership organization with 1782 organizational and individual members in total and 42 organizational and individual members in Indiana. Ex. D. ¶

19 (Brammeier Affidavit). Save the Dunes has a total of 532 individual members, with 366 members living in Indiana. Not surprisingly, the Indiana members are mostly from counties bordering the Lake: 103 from Lake County, 153 from Porter County, and 74 from LaPorte County. Ex. C. ¶ 16 (Barker Affidavit).

Attached to this brief are affidavits of individual named members (“Members”) of Applicant organizations. See Exs. E–J. Four affidavits are from members of Save the Dunes (Exs. E (Chubb Affidavit), F (Spitler Affidavit), G (Rakowski Affidavit), and H (Maust Affidavit)) and two are from members of the Alliance (Exs. I (Wolz Affidavit) and J (Chapman Affidavit)). The Members have a direct and legally protectable interest in the disposition of Plaintiffs’ claims regarding both the public trust and the State’s ownership of the Lakeshore. All Members use the shore of Lake Michigan in Long Beach and surrounding communities for recreation, and have definite and concrete plans to continue to do so. Members’ use of the Lakeshore along its length directly depends on, and is a direct exercise of, the legally protectable public rights to the Lakeshore secured by the equal footing and public trust doctrines. See *Lake Sand*, 120 N.E. at 716; *Illinois Central*, 146 U.S. at 452. A ruling by this Court that private property extends below the OHWM on the Lakeshore would harm Members’ interests by re-delineating the public trust and State ownership boundaries, thus impeding and impairing Members’ use of the shore.

3. *Intervention by Public Interest Groups Has Been Allowed in Similar Cases.*

Ohio’s *Merrill* case is instructive on the issue of intervention. *Merrill v. Ohio Dept. of Natural Resources*, 955 N.E.2d 935 (Ohio 2011). There, the Ohio Supreme Court affirmed a grant of intervention to conservation organizations under a substantially similar rule of civil

procedure and under circumstances almost identical to those in this case. Property owners abutting the shore of Lake Erie had brought an action for declaratory judgment and inverse condemnation against the state, claiming that they, and not the state, held title to the shore below the OHWM and that the public trust did not apply to that shore. These claims are substantially the same as those brought by Plaintiffs here. National Wildlife Federation and Ohio Environmental Council applied for intervention as of right and in the alternative for permissive intervention. These applicant intervenors contended that some of their members make recreational use of the shore and that the relief requested by the littoral landowners, if granted by the trial court, would extinguish their members' right to use the shore for recreation. *Id.* at 945. The Ohio Supreme Court affirmed that the conservation groups met the requirements for permissive intervention and so did not analyze the trial court's grant of intervention as of right. *Id.* at 946. The Ohio Court of Appeals opinion reveals, however, that it affirmed the trial court's grant of intervention as of right because the applicant organizations showed that "the relief requested by [plaintiff landowners], if granted, would extinguish the rights of its members to make recreational use of the shore along Lake Erie below the ordinary high water mark and would have a direct and substantial adverse impact upon the recreational use and aesthetic enjoyments of such shorelands." *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 2009 WL 2591758, *27–28 (Ohio Ct. App., Aug. 21, 2009).

The same type of injury would occur here to Members if the relief requested by Plaintiffs were granted. If the Court rules that there are no public rights or State title to the shore and the appellate courts affirm, Plaintiffs would have the ability to exclude Members from using the shore below their property. This could begin a process in which the continuity of the public

character of the Lakeshore, important for many recreational pursuits, would be fragmented and lost.

4. *The Relief Requested by Plaintiffs, if Granted, Would Also Directly and Substantially Affect the Applicant Organizations' Ability to Fulfill Their Respective Missions and Objectives.*

Alliance for the Great Lakes and Save the Dunes as organizations would also be injured by a decision that there are no public trust rights in, or no State ownership of, the bed of Lake Michigan up to the OHWM. Applicants have a direct, substantial, and legally protectable interest in maintaining the vitality of the public trust doctrine as a tool to protect the environment of Lake Michigan, including its shores and surrounding areas, within Indiana. Ex. C. ¶¶ 17–22, 31 (Barker Affidavit); Ex. D. ¶¶ 13–18 (Brammeier Affidavit). An interest in maintaining a tool that furthers an organization's purpose can be a sufficient interest for intervention as of right. *See WildEarth Guardians v. National Park Service*, 604 F.3d 1192, 1200–01 (10th Cir. 2010) (ruling that applicant intervenor Safari Club has “sufficient cognizable interests” to satisfy the first element of the intervention test because of the organization's interest in the culling of wildlife as a conservation tool). The public trust doctrine is both a traditional and modern legal basis for conserving natural resources, particularly the resources of a navigable water such as Lake Michigan. *See Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 474 (1970) (“Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”). Diminishing this branch of law through an adverse decision in this litigation would substantially impair the ability of these organizations to fulfill their missions to protect the environment and natural resources of Lake

Michigan. Applicants also have a significant interest in maintaining State ownership of the bed of Lake Michigan up to the OHWM because the question of State title to navigable waters is often perceived to be intertwined with the public trust issue, and because State ownership, like the public trust doctrine, is a tool that Applicants rely upon to prevent a piecemeal division of the Lakeshore. *See* Ex. D. ¶ 12 (Brammeier Affidavit). Applicants' organizational interest is not simply an intense concern for the Lakeshore and its aesthetic and ecological values, nor is it only to further the public trust and equal footing doctrines in the abstract. Rather, the organizational interest is in upholding the fundamental legal doctrines that Applicants recognize and use as important tools for protecting the natural resources of Lake Michigan, an objective that is a central focus of Applicants' respective missions.

B. A Ruling in Favor of Plaintiffs on the Issues of Public Rights or State Ownership of the Shore May as a Practical Matter Impair the Ability of Applicants to Protect Their Interests.

The second prong of the test for intervention by right requires that disposition of the action may as a practical matter impede protection of Applicants' interests. Considerations raised by this prong include the stare decisis effect of an adverse ruling, *Vernon Fire & Casualty Ins. Co. v. Matney*, 351 N.E.2d 60, 64 (Ind. Ct. App. 1976), and the availability of other remedies, *DeJulius v. Sumner*, 282 S.W.3d 753, 755 (Ark. 2008).

1. Stare Decisis in This Case Would Impose a Significant Practical Disadvantage Upon Applicants.

Indiana courts have concluded that the rule allowing intervention as of right does not require that the court's judgment be binding on the applicant. Rather, the rule requires only that stare decisis – the doctrine of precedent – may impose a practical disadvantage on the applicant for intervention as of right. *Matney*, 351 N.E.2d at 64 (allowing intervention as of right based

on effect of stare decisis); *see also Bryant v. Lake County Trust Co.*, 334 N.E.2d 730, 736 (Ind. Ct. App. 1975) (concluding that stare decisis, which may furnish the required practical disadvantage, had no application to issue in the case because applicants sought to intervene after judgment for purpose of litigating an issue not contested by parties).

Stare decisis is a particularly weighty factor in this case. Because Indiana courts have not expressly declared that Indiana will retain its original rights in the bed of Lake Michigan (to the OHWM), for purposes of public trust and State title, this litigation poses questions of first impression. The impact of stare decisis on would-be intervenors is especially adverse where a court is deciding questions of first impression. *See, e.g., Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). Alliance for the Great Lakes and Save the Dunes seek to intervene in hopes of supporting a precedential decision vindicating State ownership and the public trust to the OHWM of the Lake and to have an opportunity to defend that judgment if appealed.

Thus, Applicants have a vital interest in shaping the record in this Court, which on appeal will be presented to the appellate courts. If Applicants are denied the right to intervene by this Court, they will lose any right to shape the record. Moreover, they are less likely to gain intervenor status at the appellate level. *See Bryant*, 334 N.E.2d at 735 (concluding that attempts to intervene after judgment are disfavored unless extraordinary circumstances are shown). An appellate decision for Plaintiffs that there are no public rights or State ownership of the shore below the OHWM, or even that a private deed or plat can supersede the public trust and equal footing doctrines and the requirement in *Kivett* that only the legislature can dispose of equal footing lands, would negatively shape the fate of Lakeshore abutted by private landowners. The impact of such a precedent would directly and substantially harm Applicants' interests, and as a practical matter disposition of this action would impair their ability to protect those interests.

2. Applicants Cannot Protect Their Interests Except By Intervention.

Courts in other jurisdictions have concluded that a factor to consider under this prong of the test for intervention as of right is whether a person seeking intervention would otherwise have the right to pursue his or her own independent remedy against the parties, regardless of the outcome of the pending case. *E.g., DeJulius*, 282 S.W.3d at 755. Applicants have no other remedy available in this dispute besides intervention in this case. They have no cause of action against the Town or against the littoral landowners. This is typical of these types of challenges. Cases that decide the extent and scope of the public trust and State ownership of navigable waters and their beds often do not involve as parties the public that uses the waters and beds under those doctrines. Alleged landowners may sue the government, the government may sue the alleged landowners, or different levels of government may sue each other. All of these cases require intervention by public users of the disputed land to protect their interests.

C. The Interests of Applicants Are Not Adequately Represented by the Existing Parties.

The third prong of the test for intervention as of right requires that Applicants' interests are inadequately represented by existing parties. Representation is inadequate if existing parties and Applicants have divergent interests. *See Heritage House of Salem, Inc. v. Bailey*, 652 NE.2d 69, 74 (Ind. Ct. App. 1995). Representation also may be inadequate if the existing party fails to vigorously defend a claim or is hindered in making particular arguments. 59 Am. Jur. 2d Parties § 170. Applicants need not show to a certainty that existing parties will not fully protect their interests; rather, they need only show that the parties might fail to do so. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972) ("The requirement of the Rule is

satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.”).

1. *The Applicants’ and Town’s Interests in This Case Diverge.*

Applicants have different interests in this litigation than the Town. Applicants’ main interest is in maintaining the public trust and equal footing boundaries for Lake Michigan at the OHWM and, if the issue arises, maintaining a broad scope of public uses on the shore. Applicants do not seek to uphold the Town’s Resolution or its enforcement policy. This is illustrated by Applicants’ Defense IV, which may lead to invalidation of the Resolution. The Town may be unwilling to make such an argument. Although Applicants do not seek to frustrate or delay swift resolution of this case through either settlement or judgment, any disposition that would weaken the public trust or State title to the shore would be unacceptable to Applicants.

In contrast, the Town’s main interest – other than the cost of litigation – is likely to be in upholding the validity of its Resolution, proving that the Resolution does not take private property, defending broad enforcement discretion to decide where the Town expends resources to enforce Town ordinances, and reducing the Town’s administrative and financial burdens. The Resolution’s purpose is not to establish or defend boundaries of public rights or ownership that have been declared by the State. The stated purpose of the Resolution, rather, is to establish a policy for the “enforcement of public property ordinances on properties adjacent to Lake Michigan in the Town of Long Beach,” and the Resolution uses IDNR’s position statements as support for that policy. Ex. B at 1. If, for example, the Town is given a chance to uphold the Resolution while rejecting IDNR’s position on the OHWM as a supporting basis, the Town may settle the case on terms unfavorable to Applicants’ interests.

State will concede to private landowners the question of title to the Lakeshore below OHWM. See Indiana Natural Resources Commission, November 15, 2011 Meeting Minutes. Ex. K. at 10–11 (reporting statements of Cameron Clark, IDNR’s Chief Legal Counsel: “Clark explained that the ordinary high water mark, the 581.5 feet, sets the regulatory jurisdiction. ‘I don’t look at it so much as a point below which it distinguishes ownership publicly versus ownership privately. . . I am leaning on the ownership issue towards ownership in the private sector rather than the public sector.’”). Moreover, the Complaint documents changes that the State made to the IDNR website in an attempt to appease Plaintiffs’ pre-suit demands. See Compl. ¶¶ 25–26 and Exs. 4 and 5.

Applicants do not agree with IDNR’s chief counsel’s stated position on State title to the shore. As discussed above in subsection A.4, the Court may intertwine the question of State title with the public trust issue, and conceding State title may thus significantly impact the Court’s decision on public trust. Moreover, Applicant organizations rely upon State ownership of the Lakeshore to help prevent a piecemeal division of the shore. Mr. Clark’s statements to the NRC suggest a willingness by the State to settle this case on terms unacceptable to Applicants.

D. This Motion for Intervention Is Timely.

The requirement of timeliness is intended to ensure that the original parties are not prejudiced by an intervenor’s failure to apply sooner, and that the orderly processes of the court are preserved. *Herdreich Petroleum*, 773 N.E.2d at 325; *Bryant*, 334 N.E.2d at 735.

This motion to intervene is timely because it is filed before a first response by the Town, the party defendant. Plaintiffs filed their Complaint on December 11, 2012. The Town’s attorney at the time was employed only through the end of 2012. According to the case docket, on January 4, 2013 the Court granted a 30-day extension, from the date of appointment of

successor counsel, for the Town to file a responsive pleading. The Court also set a hearing date of February 26, 2013, on Plaintiffs' motion for change of venue.

Applicants began preparing this motion as soon as business allowed after receiving notice of the lawsuit. Applicants have timed this motion so that their answers and defenses (*see* Ex. A) to the Complaint, pursuant to Trial Rule 8, are filed with the Court before or near the time of the Town's first response to the Complaint. It would have been impracticable and unnecessary for Applicants to file this motion any sooner. As of the date of this motion, no briefing or rulings on the merits of the case have occurred.

II. In the Alternative, Alliance for the Great Lakes and Save the Dunes Should Be Permitted to Intervene Permissively Under Indiana Trial Rule 24(B)(2).

Indiana courts "have routinely granted permissive intervention when the applicant's claim or defense has a question of law or fact in common with the underlying action." *Herdrich Petroleum*, 773 N.E.2d at 324–325. The Court must also consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.*; *City of New Haven v. Chemical Waste Management of Indiana, LLC*, 685 N.E.2d 97, 100 (Ind. Ct. App. 1997).

A. Applicants' Defenses Have Questions of Law and Fact in Common With the Main Action.

Applicants have direct, substantial, and legally protectable interests in the matters raised by Plaintiffs' Complaint, which challenges application of the public trust and equal footing doctrines to the Lake Michigan shore at Long Beach. Applicants' interests stem from both the interest of their members in maintaining their use of the Lakeshore as supported by the public trust doctrine and the interest of the organizations in maintaining the vitality of the public trust and equal footing doctrines as applied to conservation of Indiana's portion of Lake Michigan.

Intervention by Applicants, which is necessary to protect these interests, would bring a unique perspective to this litigation and allow a more complete and informed development of the issues of fact and law relevant to proper adjudication of this case.

Applicants summarize their defenses to Plaintiffs' claims at the end of this brief and in the attached proposed answer (Ex. A). The following questions are a subset of those that are common to Applicants' defenses and Plaintiffs' claims.

1. *Mixed Questions of Law and Fact*

1. Did IDNR "back down" and retract its claim of State ownership of property abutting Lake Michigan in Long Beach, as Plaintiffs claim (Compl. ¶¶ 14, 29, 34)?
2. Do Plaintiffs' deeds and plats prove that legal title to the parcels of real property abutting Lake Michigan in Long Beach is in private ownership, as Plaintiffs claim (Compl. ¶ 18)?
3. Does the Resolution claim that the Town "support[s] the public use" of certain property in Long Beach abutting Lake Michigan, as Plaintiffs claim (Compl. ¶¶ 14, 31)?
4. Is the Town Council's intent in the Resolution that the Town will not enforce "private property rights" on certain property in Long Beach abutting Lake Michigan, as implied by the Complaint (Compl. ¶¶ 14, 34, 36)?
5. Has the Town's enforcement policy set forth in the Resolution "encouraged the Town and other residents to claim and use the Lakefront as public," as Plaintiffs claim (Compl. ¶ 37)?
6. Would modern scientific principles and understanding of Lake Michigan, including data on fluctuations in Lake Michigan water levels and on shoreline dynamics, support changing the boundary of State title to a line below the OHWM?

7. Does evidence exist that the shore in dispute in this case was either reserved by the federal government prior to Indiana's statehood or relinquished by the State after statehood?

2. *Questions of Law*

1. Is the Town's enforcement policy set forth in the Resolution in "contravention to the Plaintiffs' deeds, grants and plat," as Plaintiffs claim (Compl. ¶ 37)?
2. Do the public have no rights in the shore of Lake Michigan below OHWM, as Plaintiffs claim (Compl. Count I; ¶ 11)?
3. Do the properties subject to the Resolution's new enforcement policy include Plaintiffs' property in Long Beach abutting Lake Michigan, as implied by the Complaint (Compl. ¶ 14)?
4. Do *Bainbridge v. Sherlock*, 29 Ind. 364 (Ind. 1868) and *Stinson v. Butler*, 4 Blackf. 285 (Ind. 1837) control the boundary of State ownership on Lake Michigan's shore, as Plaintiffs imply (Compl. ¶¶ 19–20)?
5. Is "[a]ny concept of 'trust' ownership regarding the public waters of Indiana . . . codified at Indiana Code § 14-26-2 *et seq.*," as Plaintiffs claim (Compl. ¶ 22)? Is a result of Indiana Code § 14-26-2 *et seq.* that "there is no public right regarding (1) Lake Michigan; (2) Land under the waters of Lake Michigan; (3) Any part of the land in Indiana that borders on Lake Michigan," as Plaintiffs claim (Compl. ¶ 24)?
6. Has the Town Council deprived the Plaintiffs of their real property and taken Plaintiffs' property without just compensation, as Plaintiffs claim (Compl. Counts II, III, and IV)? Has the Town's Resolution "damaged the Plaintiffs," as Plaintiffs claim (Compl. ¶ 40)?

7. Does *Kivett*, 95 N.E.2d 145, reserve any changes to the original equal footing boundary on the shore of Lake Michigan for the Indiana Legislature?

B. Intervention Will Not Unduly Delay or Prejudice the Adjudication of the Rights of the Original Parties.

This motion to intervene comes to the Court before the party defendant – the Town of Long Beach – has filed any response to Plaintiffs’ Complaint, before any motion to decide the substantive claims has been filed by either party, and before the Court has considered any of Plaintiffs’ substantive claims. Applicants also have not raised any new issues or areas of inquiry; all of their defenses directly contravene claims made by Plaintiffs in their Complaint.

Applicants do not seek to frustrate speedy settlement or judgment of this litigation. Nor do Applicants seek to duplicate the Town’s defenses to the Complaint. Rather, they seek only to ensure that any settlement or judgment does not weaken or ignore the State’s public trust obligation or its rightful claim to ownership of the Lakeshore up to the ordinary high water mark. Applicants’ involvement in this case would contribute to the exposition of the relevant law and facts and would materially aid in the Court’s efficient and informed disposition of the issues.

Therefore, the adjudication of rights in this case will not be delayed or prejudiced by Applicant’s intervention.

**DEFENSES FOR WHICH INTERVENTION IS SOUGHT
PURSUANT TO TRIAL RULE 24(C)**

Indiana Trial Rule 24(C) requires an applicant for intervention to “set forth or include by reference,” in the motion to intervene, “the claim, defense, or matter for which intervention is sought.” Applicants seek to intervene as defendants. Summarized in this part is the legal background for defenses set forth in Applicants’ proposed answer to Plaintiffs’ Complaint.

Defense I. The State, Not Plaintiffs, Owns the Disputed Shore of Lake Michigan Lakeward of the Ordinary High Water Mark.

Ownership of an interest in the disputed property is an element of a claim for inverse condemnation. Absolute fee title to the bed of Lake Michigan, up to the ordinary high water mark, passed to Indiana from the federal government upon statehood to be held in trust for the public. The Ohio River decisions cited in the Complaint – including *Stinson v. Butler*, 4 Blackf. 285, 1837 WL 1870 (Ind. 1837) and *Bainbridge v. Sherlock*, 29 Ind. 364, 1868 WL 2977 (Ind. 1868) – do not control current questions of title or public trust on the shore of Lake Michigan. No entity except the Indiana Legislature has the power to convey those lands that are rightfully the State's. *Kivett*, 95 N.E.2d at 148.

Defense II. Title to the Lakeshore Below the OHWM Is Subject to Public Trust Rights.

The State's title to the bed of Lake Michigan is constrained by the public trust doctrine and is encumbered by public rights. The lake bed includes the shore up to the OHWM. The State is without power to convey or curtail the public trust rights of its people in the bed of Lake Michigan. *Lake Sand*, 120 N.E. at 716.

Defense III. The Town's Resolution Is Not a Taking.

First, Plaintiffs cannot displace the State's claim to title on the Lakeshore. Second, Plaintiffs have not alleged that the Resolution's enforcement policy breaches any affirmative duty to act on the part of the Town. Third, the Resolution does not categorize land or declare the boundaries of State title or public trust; rather, it merely accepts what the State has already declared. Fourth, under background principles of law, Plaintiffs have never had a reasonable expectation that they own the shore of Lake Michigan below the OHWM.

Defense IV. The Resolution's Adopted Policy Likely Does Not Apply to Plaintiffs' Claimed Property.

The reference to "private property ordinances" in the Resolution is inconsistent with the text as a whole and the drafters most likely intended to refer to public property ordinances. If the shore below OHWM is really private property, the Resolution likely does not apply to Plaintiffs' claimed land, and Plaintiffs' standing to bring this action is in doubt. If the shore below OHWM is really public property, then Plaintiffs have no claim of inverse condemnation.

Defense V. Under Indiana Law, Plaintiffs' Declaratory Judgment Action is Improper.

Under Indiana precedent, an inverse condemnation claim is the *sole* remedy for a government action that purports to take private property for a public use without initiating eminent domain proceedings. *Murray*, 925 N.E.2d at 732–33; *Dible v. City of Lafayette*, 713 N.E.2d 269, 274 (Ind. 1999). Therefore, Plaintiffs' declaratory judgment action is barred under Trial Rule 12(b)(6).

Defense VI. The Town's Resolution Does Not Violate the Home Rule Act.

The Resolution does not purport to define or declare state ownership or public rights. Rather, it simply quotes and adopts language found on IDNR's website and in Indiana law.

Defense VII. Plaintiffs Do Not Have Standing to Bring This Lawsuit.

Plaintiffs have no standing because they have not sustained, and are not in immediate danger of sustaining, some direct injury as a result of the Town's conduct, including its Resolution, for the reasons presented in the preceding defenses.

Defense VIII. Plaintiffs are Not Entitled to Collect Attorney Fees or Costs From Applicant Intervenors.

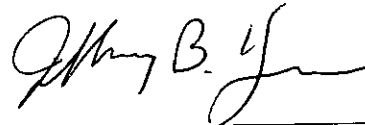
There is no legal basis for Plaintiffs' request for attorney fees and costs in Count II as applied to Applicant intervenors. Indiana Code § 32-24-1-14 does not provide for attorney fees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by U.S. Mail, first class, postage prepaid, this 28 day of February, 2013, on the following counsel of record:

Michael V. Knight
D. Michael Anderson
Barnes & Thornburg LLP
600 1st Source Bank Center
100 North Michigan Street
South Bend, IN 46601

L. Charles Lukmann, III
Julie A. Paulson
Harris, Welsh, & Lukmann
107 Broadway
Chesterton, IN 46304



Jeffrey B. Hyman

RESOLUTION NO. 12-003

**RESOLUTION AMENDING RESOLUTION NO. 10-002 CONCERNING PROPERTY
ADJACENT TO LAKE MICHIGAN IN LONG BEACH, INDIANA**

WHEREAS, there exists in the Town of Long Beach, Indiana, publicly owned property and privately owned property adjacent to Lake Michigan which is a navigable waterway; and,

WHEREAS, there are a number of local Ordinances contained in the Code of Ordinances of the Town of Long Beach, Indiana, which are designed to regulate or prohibit activity on public and/or Town property (hereinafter referred to as "PUBLIC PROPERTY ORDINANCES"); and,

WHEREAS, the bed of Lake Michigan adjacent to Long Beach, Indiana, is owned by the State of Indiana; and,

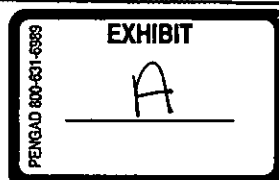
WHEREAS, disputes have arisen relative to the location of boundary lines between private owners and the state of Indiana along the shores of Lake Michigan in Long Beach, Indiana; and,

WHEREAS, these disputes can create issues regarding the enforcement by the Long Beach Police Department of PUBLIC PROPERTY ORDINANCES; and,

WHEREAS, it is desirable that a clear policy be established relative to the enforcement of PUBLIC PROPERTY ORDINANCES on properties adjacent to Lake Michigan in the Town of Long Beach, Indiana, both for the benefit of private property owners, the general public and law enforcement officials; and,

NOW THEREFORE BE IT RESOLVED, by the TOWN COUNCIL of the Town of Long Beach, Indiana, that the following policy be and is hereby adopted:

1. The Town of Long Beach, Indiana, recognizes and accepts the Indiana Department of Natural Resources' position as reflected in its publications including, but not limited to, its website, the ordinary high watermark is the line on Lake Michigan used to designate where the state's regulatory jurisdiction lies and, in certain instances, to determine where public ownership or use begins and/or ends.
2. That the ordinary high watermark is an elevation of 581.5 feet, as adopted by the U.S. Army Corps of Engineers, and the Indiana Natural Resources Commission found at 312 IAC 1-1-26.
3. The Long Beach Police Department shall only enforce the PRIVATE PROPERTY ORDINANCES between Lake Shore Drive and Lake Michigan in the following locations:



- A. The entire lengthy and width of all publicly owned beach accesses above the elevation of 581.5 feet.
- B. The entire length and width of all lots owned by the Town of Long Beach, Indiana, above the elevation of 581.5 feet.

4. The Long Beach Police Department shall continue to enforce all state and local statutes, Ordinances, rules and regulations within its jurisdiction subject to the specific provisions of this policy.

ALL OF WHICH IS APPROVED AND ADOPTED this 12th day of November 2012.

TOWN COUNCIL OF THE TOWN OF
LONG BEACH, INDIANA

Robert J. Schaefer
ROBERT J. SCHAEFER, President

Robert Angelo
ROBERT ANGELO

Patrick McDonald
PATRICK MCDONALD

Peter Byvoets 11.12.12
PETER BYVOETS

Jane Neulieb
JANE NEULIEB

Attest:

William A. Defuniar
BILL DEFUNIAR
Clerk-Treasurer

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

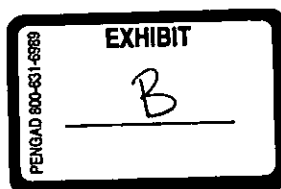
IN THE LAPORTE CIRCUIT COURT
SITTING AT LAPORTE, INDIANA
2013 CONTINUOUS TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,)
and DON H. GUNDERSON,)
)
Plaintiffs)
)
and)
)
TOWN OF LONG BEACH, INDIANA,)
Defendant)
*****)
LONG BEACH COMMUNITY ALLIANCE,)
Intervenor)

**AFFIDAVIT OF TIMOTHY M. STANTON IN SUPPORT OF
LONG BEACH COMMUNITY ALLIANCE MOTION TO INTERVENE**

1. My name is Timothy M. Stanton.
2. I am a member of the Long Beach Community Alliance.
3. My wife and I have owned property at 1601 Lake Shore Drive, Long Beach, Indiana, since April 1999, which is located less than one block from the Lake Michigan beach.
4. I have always believed that the Lake Michigan beaches of Long Beach are for all the residents, not just a few select land owners.
5. I chose my property in Long Beach, and have continued to invest in my property, based on its proximity to the beach, and the value of beach access to myself, my family, and Long Beach is priceless.



6. I have spent every summer since the spring of 1999 with my family, including my wife and four children, at the "stop 16" beach on Lake Michigan in Long Beach, including time on the beach and shore located between the ordinary high water mark to the lake.

7. My family has developed life long friendships with our neighbors and families through our summer days spent on the beach in Long Beach.

8. My family and I have countless family events at the beach, including birthdays, graduations, family reunions, and stop 16 "block parties," including visits from extended families, with brothers, sisters, nephews and nieces from as far as Vancouver, London, and Switzerland.

9. Our family and extended family have enjoyed activities on the Lake Michigan shore and beaches of Long Beach, such as swimming, building sand castles, running bases, sailing, reading a book and searching for sea glass along the shore during the day and wonderful beach fires in the evening.

10. Myself, my family, and other stop 16 residents will commonly trek to the beach at the end of the day to watch the sun slowing set upon the lake while the kids search the shoreline for the perfect rock for "skipping" across the calm evening waters of the lake.

11. The residents of stop 16, including myself and my family, have joined together to voluntarily funded, constructed, installed and maintain a permanent community bench/sitting area at the top of the dune and 100 plus foot boardwalk that is voluntarily installed and removed with the change in seasons.

12. Myself and other residents volunteer for the upkeep of the stop with an annual clean up, painting of the stop structure and flowers.

13. I personally install the stop 16 volleyball net every June, and it take down after labor day, and it has hosted more stop 16 beach volleyball "tournaments" than North avenue beach in Chicago.

14. As long as I have owned property in Long Beach, I have observed that access to the shore and the beach is considered public and the owners and guests of the "backlot" homes in Long Beach can access the beach along Lake Michigan and use the dry portion of the beach for all the activities I have described.

15. I have never asked, or been given, permission to use the beach from the owners of homes along the beach.

16. My family's lives revolve around our activities, friends, and time spent at the beach when in Long Beach, and beach access, including specifically the stop 16 beach access and the community we've built around it, is essential to my use and enjoyment of my property.

17. I intend to continue using the beach and shores of Lake Michigan with my family for summers in the future, but if we lost access to the beach, it would significantly impair our ability to enjoy our property in Long Beach and we would consider selling our property.

18. If we could no longer access the beach in Long Beach, it would greatly decrease the value of my property.

19. To the best of my knowledge, the section of beach which I and my family have used and enjoyed as described in this affidavit is the beach that is the subject of Long Beach Resolution Number 12-003, which the Resolution describes as property adjacent to Lake Michigan to the ordinary high water mark.

20. This Affidavit is made on my own personal knowledge and/or I have reasonable cause to believe the existence of the facts or matter stated herein, and would so testify in a Court of Law.

21. I am over the age of twenty-one (21) years.

22. I have never been adjudicated insane or incompetent, and I am not now insane or incompetent.

I, Timothy M. Stanton, affirm, under the penalties for perjury, that the foregoing representations are true.

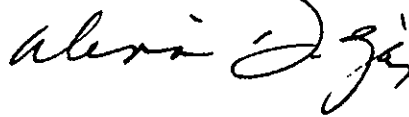
Date:

3/20/13

Name







STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

IN THE LAPORTE CIRCUIT COURT
SITTING AT LAPORTE, INDIANA
2013 CONTINUOUS TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,)
and DON H. GUNDERSON,)
)
Plaintiffs)
)
and)
)
TOWN OF LONG BEACH, INDIANA,)
Defendant)
*****)
LONG BEACH COMMUNITY ALLIANCE,)
Intervenor)

**AFFIDAVIT OF GRAHAM HERSHMAN IN SUPPORT OF
LONG BEACH COMMUNITY ALLIANCE MOTION TO INTERVENE**

1. My name is Graham Hershman.
2. I am a member of the Long Beach Community Alliance.
3. I have owned property at 2404 Florimond, Long Beach, Indiana, since 2010,
which is located a 1/2 mile from the beach in Long Beach.
4. Use of the beach was the primary decision making factor in acquiring a house in
Long Beach.
5. I go to the beach approximately 40 days per year.
6. My primary activities are walking, sunbathing, picnicking, reading and the
occasional bon fire.

7. I have visited the beach and used it in this manner in Long Beach since 2007.
8. I visit the beach with my family and extended family, and I have observed many other members of the public and Long Beach residents and property owners at the beach.
9. I plan to continue to visit Long Beach and use the beach, just as I have in the past, and if we lost beach access it would significantly impair my use and enjoyment of my property.
10. If I lost access to the beach in Long Beach, the property value of my home would decline substantially if a sale could be generated at all.
11. To the best of my knowledge, the section of beach which I and my family have used and enjoyed as described in this affidavit is the beach that is the subject of Long Beach Resolution Number 12-003, which the Resolution describes as property adjacent to Lake Michigan to the ordinary high water mark.
12. I have never asked, or been given, permission to use the beach from the owners of homes along the beach, and I believe I have the right to use it.
13. I was once stopped by a front lot owner in 2011 and told that I could not access the beach in front of his house.
14. This Affidavit is made on my own personal knowledge and/or I have reasonable cause to believe the existence of the facts or matter stated herein, and would so testify in a Court of Law.
15. I am over the age of twenty-one (21) years.
16. I have never been adjudicated insane or incompetent, and I am not now insane or incompetent.

I, Graham Hershman, affirm, under the penalties for perjury, that the foregoing representations are true.

Date: _____

Name

Date: 3-16-13

Mr. & Mrs.

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

IN THE LAPORTE CIRCUIT COURT
SITTING AT LAPORTE, INDIANA
2013 CONTINUOUS TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,)
and DON H. GUNDERSON,)
)
Plaintiffs)
)
and)
)
TOWN OF LONG BEACH, INDIANA,)
Defendant)
*****)
LONG BEACH COMMUNITY ALLIANCE,)
Intervenor)

**AFFIDAVIT OF DAVID OEI IN SUPPORT OF
LONG BEACH COMMUNITY ALLIANCE MOTION TO INTERVENE**

1. My name is David Oei.
2. I am a member of the Long Beach Community Alliance.
3. I have owned property at 3007 Mayfield Way, Long Beach, Indiana, for over five years, which is located approximately two blocks from the beach
4. I am a resident of Long Beach, Indiana.
5. My family and I go to the beach as often as possible; during non summer months, I would say we average visiting the beach about twice a month, and during the summer, I would say that we use the beach 4-5 times a week.
6. My family and I do typical family beach things at the beach, like build sand castles/forts, play catch, football, body surf, collect beach glass and of course, swim.

7. When at the beach, I often see other residence of Long Beach and catch up with my Long Beach neighbors.

8. I plan to continue using the beach in the manner and with the frequency I have in the past.

9. Beach access is of the highest importance to owning our house.

10. We would have never bought our house if we did not have beach access, and we would have looked in other towns to purchase.

11. Our property value would severely decrease if we lost beach access.

12. If we lost beach access, it would severely my use and enjoyment of home.

13. As long as I have lived in Long Beach, the the public and the owners and guests of the "backlot" homes in Long Beach can access the beach along Lake Michigan and use the dry portion of the beach.

14. To the best of my knowledge, the section of beach which I and my family have used and enjoyed as described in this affidavit is the beach that is the subject of Long Beach Resolution Number 12-003, which the Resolution describes as property adjacent to Lake Michigan to the ordinary high water mark.

15. I have never asked, or been given, permission to use the beach from the owners of homes along the beach, but there was one incident over 2 or 3 years ago where a lakefront owner at our stop, Stop 30, called the police on us and made us move.

16. This Affidavit is made on my own personal knowledge and/or I have reasonable cause to believe the existence of the facts or matter stated herein, and would so testify in a Court of Law.

17. I am over the age of twenty-one (21) years.

18. I have never been adjudicated insane or incompetent, and I am not now insane or incompetent.

I, David Oei, affirm, under the penalties for perjury, that the foregoing representations are true.

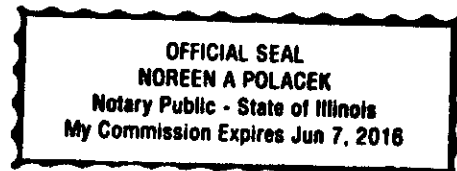
Date: 03.22.13


Name

3-22-13

Noreen A. Polacek

n



Noreen A. Polacek

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

IN THE LAPORTE CIRCUIT COURT
SITTING AT LAPORTE, INDIANA
2013 CONTINUOUS TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,)
and DON H. GUNDERSON,)
)
Plaintiffs)
)
and)
)
TOWN OF LONG BEACH, INDIANA,)
Defendant)
*****)
LONG BEACH COMMUNITY ALLIANCE,)
Intervenor)

**AFFIDAVIT OF JOAN SMITH IN SUPPORT OF
LONG BEACH COMMUNITY ALLIANCE MOTION TO INTERVENE**

1. My name is Joan Smith.
2. I am a member of the Long Beach Community Alliance.
3. I own property at 1701 Storey Avenue, Long Beach, Indiana, which is located
about a block from the Lake Michigan beach in Long Beach.
4. I am resident of Long Beach, and I live here with my husband.
5. I have lived here for seven years.
6. My husband and I are at the beach most days in season (late March up to mid-
November), and on average a few times a month out of season (mid-November to late March).
7. We have kayaks that we carry down to the beach to enter into Lake Michigan,
and at the beach we also swim, sunbathe, walk, look for interesting rocks and shells, etc.

8. We have a daughter and grandchildren in Chicago who visit us and make use of the beach as well, and a steady stream of friends that visit us and also use the Long Beach beach.

9. There are a group of regulars from the Town of Long Beach that we can count on to be there on the beach, and we've made many good friends that way.

10. In the summer I go to the beach in Long Beach daily, weather permitting.

11. In other seasons including winter I typically go several times a month.

12. I read, swim, kayak, sunbathe, visit with family and friends, observe nature, walk the shoreline, play catch with my children, and search for beach glass.

13. I usually access the beach at Stop 16, and I have been involved in beautification projects at Stop 16.

14. We also access the beach through stop 18.

15. We are involved with the stop 16 association and have contributed to the maintenance of the wooden walkway from the bus stop 16 shelter to the beach.

16. The beach is critical to our owning property and living where we do, and we would never have bought there without beach access.

17. I plan to continue to live in Long Beach and use the beach, just as I have in the past, and if we lost beach access it would significantly impair my use and enjoyment of my home.

18. If we were to lose beach access our property value would drop significantly; my guess is that it would drop by as much as \$200,000.

19. To the best of my knowledge, the section of beach which I and my family have used and enjoyed as described in this affidavit is the beach that is the subject of Long Beach

Resolution Number 12-003, which the Resolution describes as property adjacent to Lake Michigan to the ordinary high water mark.

20. The claims of the named plaintiffs in the above matter will or threatens to interfere with my and my family's use and enjoyment of the beach and our property.

21. This Affidavit is made on my own personal knowledge and/or I have reasonable cause to believe the existence of the facts or matter stated herein, and would so testify in a Court of Law.

22. I am over the age of twenty-one (21) years.

23. I have never been adjudicated insane or incompetent, and I am not now insane or incompetent.

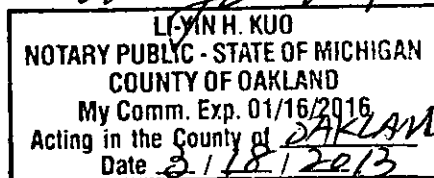
I, Joan Smith, affirm, under the penalties for perjury, that the foregoing representations are true.

Date: 3-18-2013

Joan M. Smith
Name

Joan M. Smith

Li-Yin H. Kuo



STATE OF TEXAS)
) SS:
COUNTY OF TARRANT)

IN THE LAPORTE CIRCUIT COURT
SITTING AT LAPORTE, INDIANA
2013 CONTINUOUS TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,)
and DON H. GUNDERSON,)
)
Plaintiffs)
)
and)
)
TOWN OF LONG BEACH, INDIANA,)
Defendant)
*****)
LONG BEACH COMMUNITY ALLIANCE,)
Intervenor)

**AFFIDAVIT OF BERNARD RABINOWITZ IN SUPPORT OF
LONG BEACH COMMUNITY ALLIANCE MOTION TO INTERVENE**

1. My name is Bernard Rabinowitz.
2. I am a member of the Long Beach Community Alliance.
3. I have owned property at 1603 Blinks Avenue, Long Beach, Indiana, since 1980,
which is located two blocks from the Lake Michigan beach.
4. Ever since we bought the house, My wife and I visit the house almost every
weekend from May through October and usually twice per month from November through April.
5. Our children grew up on the beach and today as adults they visit us in Long Beach
along with our grandchildren.
6. We also spend time on the beach with our neighbors and friends.

7. On the beach, my wife and I sit in the sun, read books, socialize with our neighbors, swim in Lake Michigan and go for long walks along the shore.

8. My wife and I are involved with our "loose" Stop 16 association, which has get-togethers on the beach, and we contributed to the cost of the Stop 16 boardwalk and help maintain it.

9. As long as I have visited Long Beach, the public and the owners and guests of the "backlot" homes in Long Beach can access the beach along Lake Michigan and use the dry portion of the beach for various beach activities.

10. I have never asked for, nor been given, permission to use the beach from the owners of homes along the beach.

11. My wife and I plan to continue to enjoy our Long Beach house and the beach in this manner and frequency in the future, with our friends and neighbors.

12. The reason we own property in Long Beach and visit the area is the access to the beach, and our major recreation and enjoyment of our home involves using the beach; there would be no reason to visit Long Beach if we couldn't use the beach.

13. If we could no longer use the beach, we would significantly decrease our visits to the area, and perhaps stop visiting altogether and consider selling our property.

14. I believe that our property value would be significantly reduced if we lost beach access.

15. To the best of my knowledge, the section of beach which I and my family have used and enjoyed as described in this affidavit is the beach that is the subject of Long Beach Resolution Number 12-003, which the Resolution describes as property adjacent to Lake Michigan to the ordinary high water mark.

16. This Affidavit is made on my own personal knowledge and/or I have reasonable cause to believe the existence of the facts or matter stated herein, and would so testify in a Court of Law.

17. I am over the age of twenty-one (21) years.

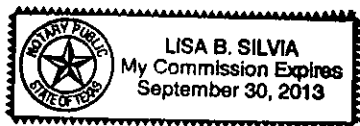
18. I have never been adjudicated insane or incompetent, and I am not now insane or incompetent.

I, Bernard Rabinowitz, affirm, under the penalties for perjury, that the foregoing representations are true.

Date: March 26, 2013

[Signature]
Name

SUBSCRIBED AND SWORN TO BEFORE ME on this the 26th day of March, 2013, to certify which my hand and official seal.



[Signature]
NOTARY PUBLIC, STATE OF TEXAS

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

IN THE LAPORTE CIRCUIT COURT
SITTING AT LAPORTE, INDIANA
2013 CONTINUOUS TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,)
and DON H. GUNDERSON,)
)
Plaintiffs)
)
and)
)
TOWN OF LONG BEACH, INDIANA,)
Defendant)
*****)
LONG BEACH COMMUNITY ALLIANCE,)
Intervenor)

**AFFIDAVIT OF PATRICK CANNON IN SUPPORT OF
LONG BEACH COMMUNITY ALLIANCE MOTION TO INTERVENE**

1. My name is Patrick Cannon.
2. I am a member of the Long Beach Community Alliance, as well as an officer and board member.
3. I own property at 2005 Nethercliffe Way, Long Beach, Indiana, which is located 1 and 1/2 blocks from the beach or about a 2 minute walk.
4. I am resident of Long Beach, and I live here with my wife and children.
5. I began visiting and using the Lake Michigan beach in Long Beach in 1973.
6. I moved here as a full-time resident in 1993, and I have owned property here since then.
7. In the summer I go to the beach in Long Beach daily, weather permitting.
8. In other seasons including winter I go at least weekly.

9. I read, swim, jet ski, sunbathe, visit with family and friends, observe nature, walk the shoreline, play catch with my children, and search for beach glass.

10. I often park my jet ski at various points along the beachfront upon the sand on days when I am using the vehicle.

11. I usually access the beach at Stop 21 or 20, and I have been involved in beautification projects at Stop 20.

12. I have been involved in spring beach clean-up projects of the entire beach.

13. I choose to live in Long Beach because of the beach access, and the beach is very important to my life and my use and enjoyment of my home.

14. I plan to continue to live in Long Beach and use the beach, just as I have in the past, and if we lost beach access it would significantly impair my use and enjoyment of my home.

15. If my access to the entire shoreline and beachfront of Lake Michigan was limited in any way I would estimate that the value of my home would decrease by 50%-75%.

16. To the best of my knowledge, the section of beach which I and my family have used and enjoyed as described in this affidavit is the beach that is the subject of Long Beach Resolution Number 12-003, which the Resolution describes as property adjacent to Lake Michigan to the ordinary high water mark.

17. I have attended public meetings to voice support for the Resolution, and I have been a big proponent of the Resolution and defending my right to use the beach, including contributing my time and financial resources to researching the historical basis for that right, hiring legal help, and organizing the Long Beach Community Alliance to help defend that right.

18. I have never asked, or been given, permission to use the beach from the owners of homes along the beach, and I believe I have the right to use it.

19. The beach ordinance has provided peace of mind in my use of the beach and my walking and boating the entire beach.

20. I witnessed lakeside residents of Lakeshore Drive attempt to block passage to those members of the community who were attempting to walk and sit along the shoreline by barricading the shoreline in front of their homes with chairs, tables, jet skis and other paraphernalia so that individuals could not walk or sit or use the beach in the aforementioned manners, and I personally voiced my objection to the resident who attempted this barricade.

21. This Affidavit is made on my own personal knowledge and/or I have reasonable cause to believe the existence of the facts or matter stated herein, and would so testify in a Court of Law.

22. I am over the age of twenty-one (21) years.

23. I have never been adjudicated insane or incompetent, and I am not now insane or incompetent.

I, Patrick Cannon, affirm, under the penalties for perjury, that the foregoing representations are true.

Date:

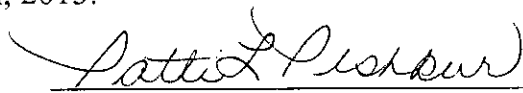
3/18/2013

Patrick Cannon
Name

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

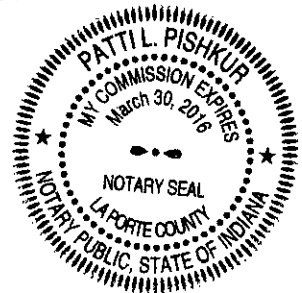
Before me, a Notary Public in and for said County and State, personally appeared Patrick Cannon, as a Member, Officer and Board Member of the Long Beach Community Alliance, and acknowledged execution of the Affidavit in Support of Long Beach Community Alliance Motion to Intervene as his free and voluntary act and deed.

DATED this 18th day of March, 2013.



Patti L. Pishkur, Notary Public
Resident of LaPorte County, IN

My Commission expires:
March 30, 2016



STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

IN THE LAPORTE CIRCUIT COURT
SITTING AT LAPORTE, INDIANA
2013 CONTINUOUS TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,)
and DON H. GUNDERSON,)
)
Plaintiffs)
)
and)
)
TOWN OF LONG BEACH, INDIANA,)
Defendant)
*****)
LONG BEACH COMMUNITY ALLIANCE,)
Intervenor)

**AFFIDAVIT OF ROGER GANSAUER IN SUPPORT OF
LONG BEACH COMMUNITY ALLIANCE MOTION TO INTERVENE**

1. My name is Roger Gansauer.
2. I am a member of the Long Beach Community Alliance.
3. I have owned property at 2017 Somerset Road, Long Beach, Indiana, since 1988,
which is located approximately 500 yards from the beach.
4. Since we purchased the property, I spend nearly every weekend in the spring,
summer and fall at our home in Long Beach.
5. We wouldn't have bought property in Long Beach if there were no beach and no
beach access; instead, we probably would have bought on a lake in Michigan or on a golf course
or just a bigger primary residence in Illinois.

6. I go to the beach along Lake Michigan in Long Beach to sunbathe, swim, relax and sometimes walk along the shore of the beach almost everyday I am in Long Beach, weather permitting.

7. My wife usually goes to the beach in Long Beach to sunbathe and relax everyday she is in Long Beach.

8. My wife's identical twin sister, Karen Simac, purchased a house two doors from ours at 2017 Somerset Road in the mid-1990's because she enjoyed coming to Long Beach and going to the beach.

9. My brother, Jason, and his wife purchased a condominium at Karwick Glen (Karwick Road and US 12 in Michigan City) in the late 1990s mainly because they enjoyed visiting us in Long Beach.

10. My wife and I, and my sister and her partner, regularly have family and friends visiting with us during the holidays and we all enjoy going to the beach.

11. During the holiday weekends (Memorial Day, Independence Day, Labor Day), I have observed that the Stop 20 beach is especially crowded with residents and their guests.

12. I know my neighbors in Long Beach much better than those in Illinois.

13. My wife and I have the intention to move fulltime to Long Beach whenever we sell our current home in Illinois, and to continue to use the beach regularly for the described activities.

14. I have contributed some money to one of our neighbors who has been working on landscaping the Stop 20 property.

15. I believe property values of homes not on the lake shore, including my home, would drop dramatically once it became known that homeowners could not freely access and use the beach.

16. If we could not access the beach in Long Beach, it would significantly impair our use and enjoyment of our property, and we would not visit as often.

17. To the best of my knowledge, the section of beach which I and my family have used and enjoyed as described in this affidavit is the beach that is the subject of Long Beach Resolution Number 12-003, which the Resolution describes as property adjacent to Lake Michigan to the ordinary high water mark.

18. I have never asked, or been given, permission to use the beach from the owners of homes along the beach.

19. I believe the seas and lakes and their beaches belong to the public not property owners.

20. This Affidavit is made on my own personal knowledge and/or I have reasonable cause to believe the existence of the facts or matter stated herein, and would so testify in a Court of Law.

21. I am over the age of twenty-one (21) years.

22. I have never been adjudicated insane or incompetent, and I am not now insane or incompetent.

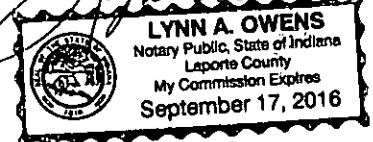
I, Roger Gansauer, affirm, under the penalties for perjury, that the foregoing representations are true.

Date:

3/19/13

Name

Roger Gansauer



RESOLUTION NO. 101002

WHEREAS, there exists in the Town of Long Beach, Indiana, publicly owned property and privately owned property adjacent to Lake Michigan which is a navigable waterway; and,

WHEREAS, there are a number of local Ordinances contained in the Code of Ordinances of the Town of Long Beach, Indiana, which are designed to regulate or prohibit activity on public and/or Town property (hereinafter referred to as "PUBLIC PROPERTY ORDINANCES"); and,

WHEREAS, the bed of Lake Michigan adjacent to Long Beach, Indiana, is owned by the state of Indiana; and;

WHEREAS, disputes have arisen relative to the location of boundary lines between private owners and the state of Indiana along the shores of Lake Michigan in Long Beach, Indiana; and,

WHEREAS, these disputes can create issues regarding the enforcement by the Long Beach Police Department of PUBLIC PROPERTY ORDINANCES; and,

WHEREAS, it is desirable that a clear policy be established relative to the enforcement of PUBLIC PROPERTY ORDINANCES on properties adjacent to Lake Michigan in the Town of Long Beach, Indiana, both for the benefit of private property owners, the general public and law enforcement officials.

NOW THEREFORE BE IT RESOLVED, by the TOWN COUNCIL of the Town of Long Beach, Indiana, that the following policy be and is hereby adopted:

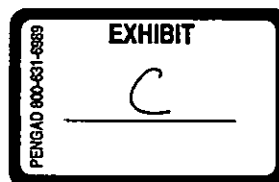
1. The Town of Long Beach, Indiana, recognizes and accepts the Indiana Department of Natural Resources' position as reflected in its publications including, but not limited to, its website that the dividing line on Lake Michigan between state and non-state ownership is the ordinary high watermark.

2. That the ordinary high watermark is an elevation of 581.5 feet as adopted by the U.S. Army Corps of Engineers and the Indiana Natural Resources Commission found at 312 IAC 1-1-26.

3. The Long Beach Police Department shall only enforce PRIVATE PROPERTY ORDINANCES between Lake Shore Drive and Lake Michigan in the following locations:

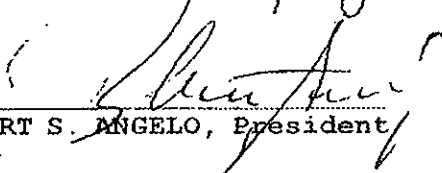
A. The entire length and width of all publicly owned beach accesses above the elevation of 581.5 feet.


B. The entire length and width of all lots owned by the Town of Long Beach, Indiana, above the elevation of 581.5 feet.




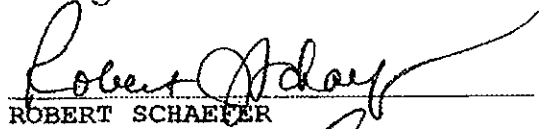
4. The Long Beach Police Department shall continue to enforce all state and local statutes, Ordinances, rules and regulations within its jurisdiction subject to the specific provisions of this policy.

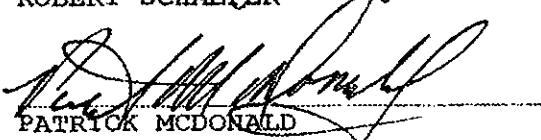
ALL OF WHICH IS APPROVED AND ADOPTED this 12th day of July, 2010.


DR. ROBERT S. ANGELO, President

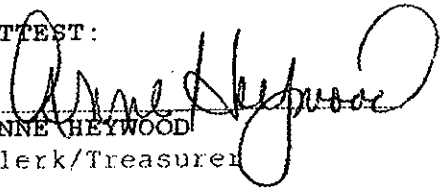

HENRY J. BAUSBACK


MARY LOU MCFADDEN


ROBERT SCHAEFER


PATRICK McDONALD

ATTEST:


ANNE HEYWOOD
Clerk/Treasurer

BARNES & THORNBURG LLP

600 1st Source Bank Center
100 North Michigan
South Bend, IN 46601-1632 U.S.A.
(574) 233-1171
Fax (574) 237-1125

www.btlaw.com

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

February 28, 2011

Commissioner	Steve Davis	
Indiana Department of Natural Resources	Indiana Department of Natural Resources	P
402 West Washington Street	Lake Michigan Specialist	E
Indianapolis, Indiana 46204	Indiana Department of Natural Resources	R
	100 West Water Street	M
	Michigan City, IN 46360	A
The Town of Long Beach, Indiana	Steve Davis, individually	N
2400 Oriole Trail	100 West Water Street	E
Long Beach, Indiana 46360-1614	Michigan City, IN 46360	N
Long Beach Town Council	Attorney General Greg Zoeller	
The Town of Long Beach, Indiana	Office of the Indiana Attorney General	
2400 Oriole Trail	Indiana Government Center South	
Long Beach, Indiana 46360-1614	302 W. Washington St., 5th Floor	T
Anne Heywood, Clerk/Treasurer	Indianapolis, IN 46204	
The Town of Long Beach, Indiana		
2400 Oriole Trail		
Long Beach, Indiana 46360-1614	Courtesy Copy to:	F
Anne Heywood, individually	Jeff Thorne	I
2308 Florimond	Sweeney, Dabagia, Thorne & Pagos LLP	L
Long Beach, Indiana 46360	709 Franklin Street	E
	Michigan City, Indiana 46360	

Re: NOTICE OF POTENTIAL CLAIM
Private lakefront ownership in Long Beach, Indiana
Indiana DNR <http://www.in.gov/dnr/water/3658.htm>
Long Beach Resolution 10.002
Long Beach Newsletter 2010

To Whom It May Concern:

The ordinary high watermark (the "OHWM") for Lake Michigan, as defined in 312 IAC § 1-1-26 (2) in 1995, at best merely sets the jurisdictional limit of the Indiana Department of Natural Resources' (the "IDNR") authority to protect and preserve the public right of navigation (even assuming such a right found at Indiana Code § 14-26-2-5 applies to Lake Michigan, which it expressly does not as stated in Indiana Code § 14-26-2-1).

Atlanta

Chicago

Delaware

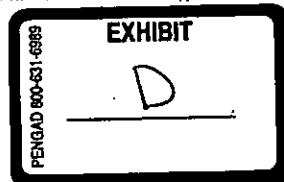
Indiana

Michigan

Minneapolis

Ohio

Washington, D.C.



This 1995 definition did not and could not confer, establish, grant or transfer ownership in fee to any "dry" property below the OWHM as this property belongs to the title owner as deeded, recorded and in the present owner's chain of title and long before the Lakes Preservation Act, passed in 1995, gave us this definition and gave us the public rights doctrine found at Indiana Code § 14-26-2-5.

The posting by the IDNR found at <http://www.in.gov/dnr/water/3658.htm> is simply wrong and without legal support. Especially wrong is the Case #2 Scenario claiming that "When Lake Michigan's water level is 'below' the Ordinary High Watermark (OHWM) the State 'does' own part of the dry beach" (the "Erroneous Statement").

All statements based on the Erroneous Statement are also wrong and contrary to law including, without limitation, the Town of Long Beach's Newsletter 2010 ("Newsletter 2010"), stating that "Riparian Rights: means that you have access to the water; does NOT mean you own to the water's edge or high water mark," (emphasis in original) and, the Town of Long Beach Resolution No. 10.002 ("Resolution 10.002") recognizing and accepting the Erroneous Statement and stating "that the dividing line on Lake Michigan between state and non-state ownership is the ordinary high watermark."

This Erroneous Statement, Newsletter 2010 and Resolution 10.002 will be the source of confrontation and legal action unless corrected and/or removed from the IDNR website, corrected and removed from Resolution 10.002 and corrected in the Long Beach Newsletter and never again attempted to be enforced by the IDNR and/or the Town of Long Beach, Indiana.

Please be advised that Barnes & Thornburg LLP represents a number of lakefront property owners on Lake Michigan in Long Beach, Indiana. Upon information and belief Steve Davis of the IDNR, the IDNR's Lake Michigan Specialist -- the final decision maker for the IDNR regarding Lake Michigan ("Davis")--authored the Erroneous Statement. Again on information and belief, Davis met with certain individuals in the Town of Long Beach and together they asserted State ownership of dry beach property allegedly below the OWHM in Long Beach, which resulted in the Newsletter 2010 and the Resolution 10.002. These statements are contrary to law. Simply put, my property owner clients are ready to prove their titles run to the waters of Lake Michigan. This begs the question (answered in the first paragraph above)--

WHERE IS THE STATE'S TITLE TO THIS PROPERTY OR WHAT IS THE STATE'S BASIS FOR CLAIMED "OWNERSHIP" TO LAKEFRONT PROPERTY IN LONG BEACH, INDIANA?

312 I.A.C. § 1-1-26, passed in 1995, did not, nor could it, grant title to the State for any property. It is a mere and at best, navigational jurisdictional "rule." It states:

312 IAC 1-1-26 "Ordinary high watermark" defined
Authority: IC 14-10-2-4
Affected: IC 14; IC 25

Sec. 26. "Ordinary high watermark" means the following:
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(2) Notwithstanding subdivision (1), the shore of Lake Michigan at five hundred eighty-one and five-tenths (581.5) feet I.G.L.D., 1985 (five hundred eighty-two and two hundred fifty-two thousandths (582.252) feet N.G.V.D., 1929).
(Natural Resources Commission; 312 IAC 1-1-26; filed Dec 1, 1995, 10:00 a.m.: 19 IR 659; readopted filed May 8, 2001, 3:51 p.m.: 24 IR 2895; readopted filed May 29, 2007, 9:42 a.m.: 20070613-IR-312070111RFA.

The cited authority for 312 I.A.C. § 1-1-26(2)'s definition, Indiana Code § 14-10-2-4, merely provides that the IDNR may adopt "rules" to ensure navigation. Rule adoption authority cannot equate to the authority to take real property without just compensation. "Takings" are expressly prohibited by the Fifth and Fourteenth Amendments to the United States Constitution and the Indiana Constitution, Article 1, Section 21.

As further evidence that a property transfer did not and could not occur, the transfer of real property in Indiana is also governed by statute. See Indiana Code § 32-21-1 *et seq.* All transfers must be in writing, must describe the property with particularity, must be signed by the transferring party and then must be recorded in order to have broad enforceability. *Id.* The Long Beach lakefront property owners have not transferred their deeded property to the State. More reasons why "rule making" by the IDNR cannot transfer real property in Indiana.

And, if the State claims it holds title to the disputed property by a common law public rights doctrine, the Indiana General Assembly expressly excluded the codified public rights doctrine from any application to Lake Michigan. The Indiana Code states:

IC 14-26-2-1

Applicability of chapter

Sec. 1. This chapter does not apply to the following:

- (1) Lake Michigan.
- (2) Land under the waters of Lake Michigan.
- (3) Any part of the land in Indiana that borders on Lake Michigan.

As added by P.L.1-1995, SEC.19. (emphasis added).

Finally, even assuming there is a public right to navigate the WATER of Lake Michigan for Indiana citizens, the right never extended to the banks of rivers or the dry shore of Lake Michigan. See *Stinson v. Butler*, 4 Blackf. 285 (Ind. 1837) (holding the land owner's right extends at least to the low water mark); *Sherlock v. Bainbridge*, 41 Ind. 35 (1872) (holding that coming to shore without the landowner's permission is a trespass for which damages can accrue); *cited with approval* in *Dyer v. Hall*, 928 N.E.2d 273 (Ind. Ct. App. 2010) (explaining that entry without permission can support a claim for trespass).

THEREFORE, the lakefront property owners demand that: 1) the IDNR remove the Erroneous Statement found at <http://www.in.gov/dnr/water/3658.htm>; 2) The Town of Long Beach remove and rescind from its resolutions and Newsletter, Resolution 10.002, the Newsletter 2010, and any other document, resolution, ordinance or regulation, the acceptance of

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the Erroneous Statement and reference to State owned property below the OHWM; and, 3) demand that the IDNR and Town of Long Beach, Indiana, including their agents and employees, agree not to again claim ownership or title, or further attempt to slander the titles of the lakefront property owners in Long Beach, Indiana.

Please consider this matter and provide your agreement or other response to me by March 18, 2011.

Sincerely,

BARNES & THRONBURG LLP

Original Signed by
Michael V. Knight
Michael V. Knight

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Ordinary High Watermarks

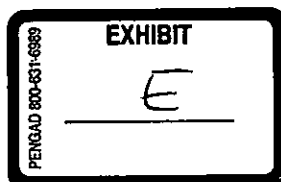
Lake Michigan is a navigable waterway, but it is the only Great Lake which is not also an international waterway. The bed of Lake Michigan is owned by the four states which share its shoreline: Wisconsin, Illinois, Indiana, and Michigan. Indiana holds the portion of Lake Michigan within its borders in trust for our citizens, but this trust is subject to the federal navigational servitude. Lake Michigan and its navigable tributaries are referenced in Navigable Waterways Roster.

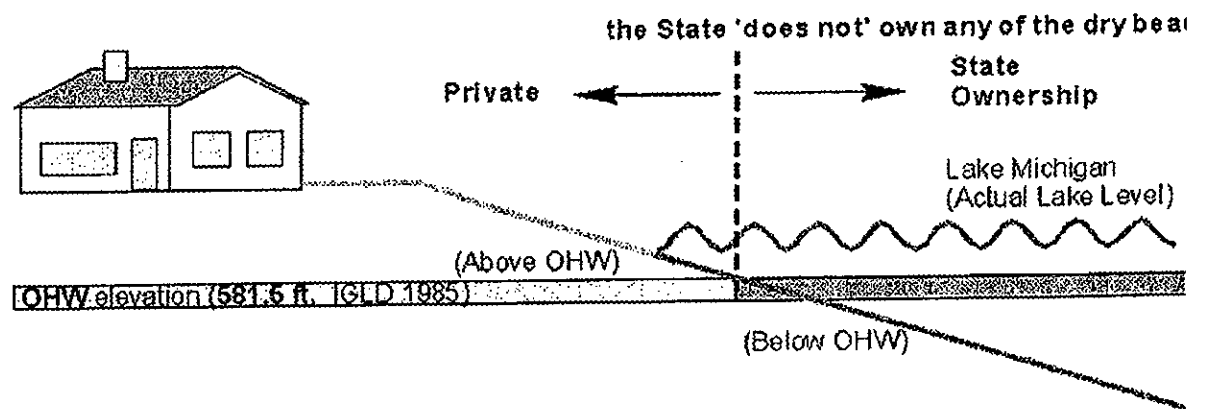
The dividing line on Lake Michigan and other navigable waterways between public and private ownership is the ordinary high watermark. In general terms, "ordinary high watermark" (OHW) has been defined to be the line on the shore of a waterway that is

1. established by the fluctuations of water; and
2. indicated by 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.

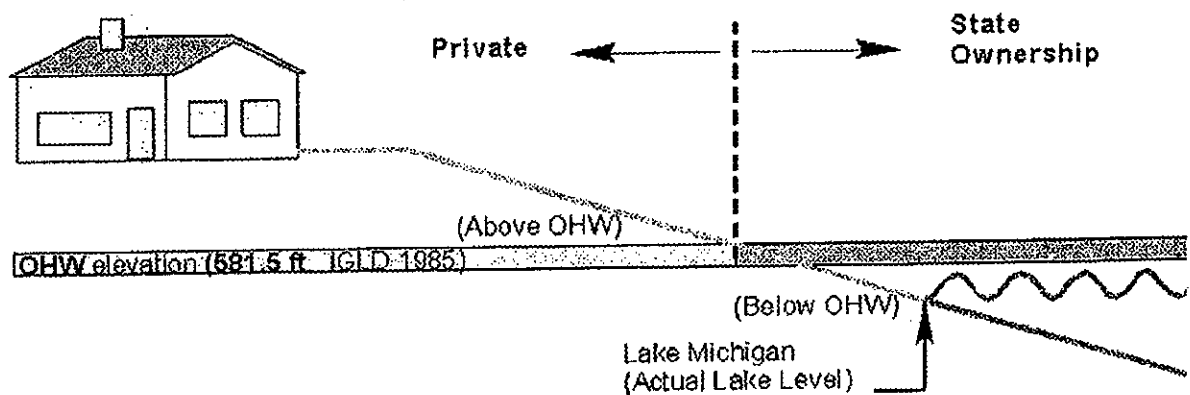
For Lake Michigan, both the U.S. Army Corps of Engineers and the Indiana Natural Resources Commission have recognized the ordinary high watermark to be at elevation 581.5 feet, International Great Lakes Datum (1985). The Commission has established the elevation of the OHW for the Indiana shoreline of Lake Michigan by rule at 312 IAC 1-1-26.

Although the actual elevation of Lake Michigan fluctuates, the elevation of the ordinary high watermark is fixed. The OHW is significant to many permitting activities, questions of ownership, and commercial and recreational boating usage. Regulatory authority may be referenced to the OWM, but there are instances when authority extends outside the OHW. For example, boating laws and fishing laws are enforced outside the boundaries of the OHW when the lake is high.



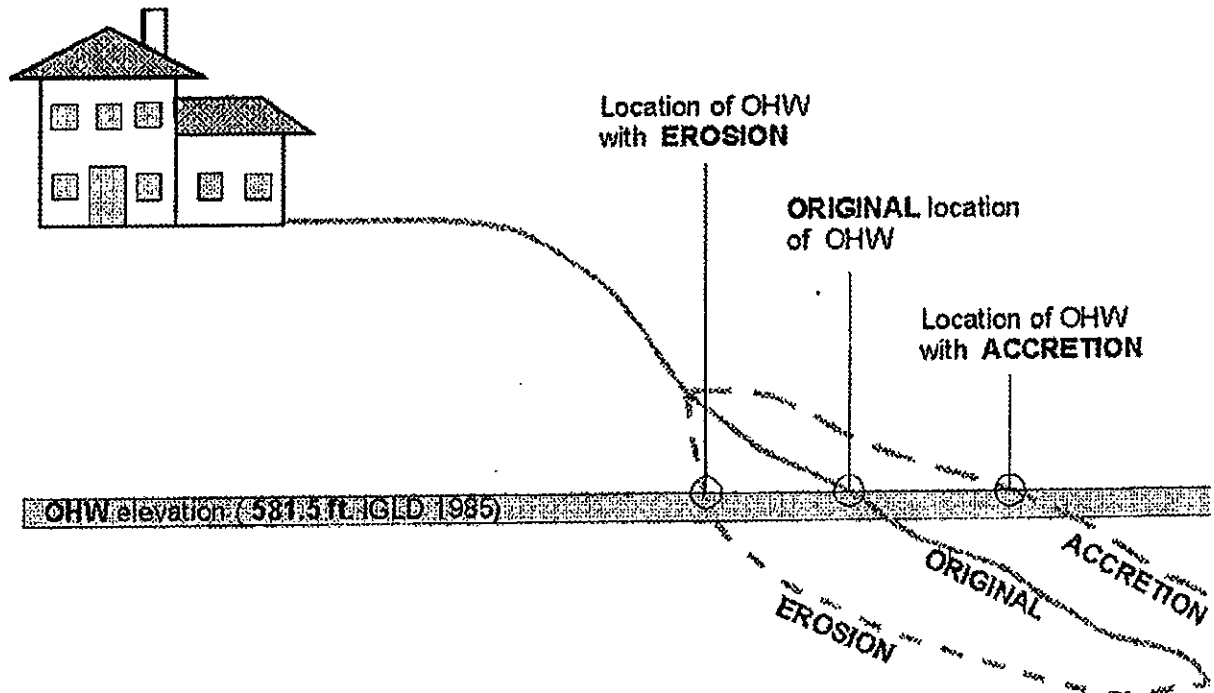
CASE #1 When Lake Michigan's water level is 'above' the Ordinary High Watermark (OHW)**CASE #2 When Lake Michigan's water level is 'below' the Ordinary High Watermark (OHW)**

the State 'does' own part of the dry beach



While the elevation of the OHW does not change, the physical location of the OHW moves with the erosion and deposit (called "accretion") of sand along the shoreline due to natural causes. Ownership can move as the line moves.

Movement of Location of "Ordinary High Watermark" (OHW)



BARNES & THORNBURG LLP

600 1st Source Bank Center
100 North Michigan
South Bend, IN 46601-1632 U.S.A.
(574) 233-1171
Fax (574) 237-1125

www.btlaw.com

February 28, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Police Commission
Town of Long Beach, Indiana
ATTN: Bob Schaefer, Bob Angelo, Val Sliwa and Robert Sulkowski
2400 Oriole Trail
Long Beach, Indiana 46360

Jeffrey L. Thorne
Sweeney, Dabagia, Thorne, & Pagos, LLP
709 Franklin Square
P.O. Box 769
Michigan City, Indiana 46361-0769

Re: Private Property Rights in Long Beach, Indiana and the use of Police ATVs.

Gentlemen:

Please be advised that Barnes & Thornburg LLP represents certain Long Beach property owners. At this time, these owners prefer to remain anonymous—as is not unexpected when making a complaint or recommendation about the Town's Police Department. These owners own property in Long Beach on the northerly side of Lake Shore Drive and abutting the waters of Lake Michigan.

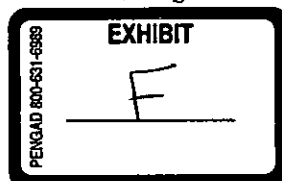
As you are likely aware, the Long Beach Police Department owns Bombardier All Terrain Vehicles and uses these ATVs to patrol the lakefront in Long Beach, Indiana. As you may or may not be aware, a significant majority of the lakefront in Long Beach is private property, including the properties owned by my clients. No other property owners are subject to this sort of inconvenience by the Police Department. The use of these ATVs over private property, absent certain exigent circumstances not present on a daily basis, is technically a trespass. See *Turner v. Sheriff of Marion County*, 94 F. Supp.2d 966 (S.D. Ind. 2000) (holding that pursuant to Indiana law, officers who enter private property without authority are subject to trespass actions). I am unaware of any law or local ordinance that altered the general rule and would like to see such a law if it exists.

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Assuming such a law does not exist, my clients have acquiesced regarding the previous trespasses hoping that the ATV patrol is more valuable than the ATV trespass is damaging. Unfortunately, that is not always the case because, at times, the officers do not comport themselves in a manner which reflects the fact that they are on private property without the express permission of the owner.

My clients do not wish to have a battle with their Police Department but merely would like a dialog regarding the use, frequency and scope of ATV patrols over their private property. Please contact me to set a convenient time to conduct this dialog.

Sincerely,

BARNES & THORNBURG LLP

Original Signed by
Michael V. Knight
Michael V. Knight

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BARNES & THORNBURG LLP



Indiana Department of Natural Resources

Mitchell E. Daniels, Jr., Governor
Robert E. Carter, Jr., Director

May 12, 2011

Michael V. Knight, Esq.
Barnes & Thornburg, LLP
600 1st Source Bank Center
100 N. Michigan
South Bend, IN 46601

Re: Lake Michigan Real Property Rights

Dear Mr. Knight:

It is well settled law Indiana acquired title to the beds of the navigable waters of the state when Indiana was granted statehood. (See *State v. Kivett*, 228 Ind. 623, 95 N.E.2d 145) That Lake Michigan is navigable water is likewise not in dispute. With the exception of the Ohio River, the local boundaries of which were established by the Commonwealth of Virginia when it ceded the Northwest Territory to the United States, federal case law seems to hold consistently the appropriate boundary line of state property under navigable waters is the high watermark. (See, *Goodtitle v Kibbe*, 50 U.S. (9 How.) 471 (1849); *Barney v Keokuk*, 94 U.S. 324 (1876); *United States v Oregon*, 295 U.S. 1 (1935)). In Indiana, *Kivett* appears to suggest federal law should be applied in these instances.

In my opinion, the purpose of 312 I.A.C. 1-1-26 (2) defining "Ordinary high watermark" was not to assert for the first time or expand the boundary of public land but to codify established common law and, in the case of Lake Michigan, definitively establish where the high watermark is located. That was determined and accepted by the State of Indiana to be 581.5 feet International Great Lakes Datum.

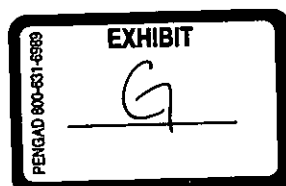
Your letter does not set out the extent of the alleged lake-ward boundary of your clients' properties. It is entirely possible your clients own to a point below the ordinary high watermark. However, for that to be the case, ownership of a portion of the bed of Lake Michigan must have come by way of either U.S. patent or by legislative act. Without an opportunity to view the instrument of origin to your clients' properties, I am not in a position to argue where your clients' property lines may be found. However, I believe the statements on the IDNR website are legally accurate.

Very Truly Yours;

Cameron F. Clark
IDNR General Counsel

Cc: Robert Carter, Jr.
Steve Davis

CFC: str



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BARNES & THORNBURG LLP

600 1st Source Bank Center
100 North Michigan
South Bend, IN 46601-1632 U.S.A.
(574) 233-1171
Fax (574) 237-1125

www.btlaw.com

June 13, 2011

Cameron F. Clark, Esquire
IDNR General Counsel
402 West Washington Street
Indianapolis, Indiana 46204

Re: NOTICE OF POTENTIAL CLAIM

Private lakefront ownership in Long Beach, Indiana
Indiana DNR <http://www.in.gov/dnr/water/3658.htm>
Long Beach Resolution 10.002
Long Beach Newsletter 2010

Mr. Clark:

Regarding your letter dated May 12, in Long Beach, the issue is ownership--the right to use or exclude others from using--the dry land bordering Lake Michigan (not the soil underlying the waters). My clients have grants/deeds/plats evidencing that their ownership and private property rights run to the waters of Lake Michigan. They would be happy to sit down and share these documents with the State and IDNR. They are not claiming ownership of the soil underlying the waters of Lake Michigan but only of that and all that property abutting the waters of Lake Michigan. Property ownership is a matter of state law. Even *Kivett* admits ownership of the bordering land is a matter of state law. *Kivett* holds: "the land emerging on either side of a navigable stream is a matter to be determined by the laws of each state involved." *State v. Kivett*, 95 N.E.2d 145, 151 (Ind. 1950).

As a matter of state law in Indiana, private ownership of the banks, lands bordering navigable waters, was explained over a hundred years earlier than *Kivett*. See *Stinson v. Butler*, 4 Blackf. 285 (Ind. 1837) (holding that in Indiana a land owner's right extends at least to the low water mark); *Bainbridge v. Sherlock*, 29 Ind. 364 (1868) (holding that navigators coming to shore without the landowner's permission is a trespass for which damages can accrue); cited with approval in *Dyer v. Hull*, 928 N.E.2d 273 (Ind. Ct. App. 2010) (explaining that entry without permission can support a claim for trespass). The Indiana Supreme Court in *Bainbridge* explained:

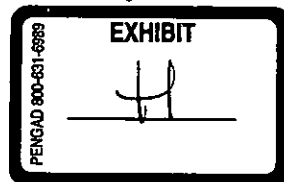
The inquiry that meets us at the threshold is, what are the rights of the navigator of this [navigable waterway], to use its banks and margins? The [water] is a great navigable highway between states, and the public have all the rights that by law appertain to public [lake] as against the riparian owner. But 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. The banks belong to the riparian owner, and he owns an absolute fee down to the low water mark. *Bainbridge v. Sherlock*, 29 Ind. 364, 367 (1868) (emphasis added).

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The right to the use of the river as a highway for passage is distinct from the right to land for the purpose of receiving or discharging freight and passengers. The former is secured to the public; the latter must be exercised with reference to the rights of the riparian owner. *Bainbridge v. Sherlock*, 29 Ind. 364, 369 (1868)

The State has ignored this precedent—private property rights extend to the low water mark.

Indiana law clearly states that the banks belong not to the State, but to the riparian owner. In Long Beach, not only is it entirely possible that my clients own below the administratively set OHWM and down to the actual point where the water touches on the shore, which they do, the issue is a matter of state, not federal law. And the foregoing state law is clear, riparian owners have the right to exclude the users of the Navigational Servitude and all others from using the bank or shore of the navigable waters.¹

My clients would prefer not to sue but look toward a reasonable compromise with the State, the IDNR and the Town of Long Beach. Long Beach based its actions and resolutions on the State's publication found at <http://www.in.gov/dnr/water/3658.htm> wherein the State claims ownership below the OHWM. This position is contrary to the precedents cited above. If the State and IDNR compromise, Long Beach will likely follow. Is the State and IDNR willing to meet and discuss?

Sincerely,

BARNES & THORNBURG LLP

Original Signed by
Michael V. Knight

Michael V. Knight

MVK:glf

¹ None of the cases cited by you in your letter change the rule that ownership of the bank or shore is a matter of state law. *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471 (1849) (determining the legal effect (none) of an inchoate Spanish grant pursuant to Alabama law); *Barney v. Keokuk*, 94 U.S. 324 (1876) (decided pursuant to Iowa law); *United States v. Oregon*, 295 U.S. 1 (1935) (discussion regarding non-navigable waters but did not reach the issue regarding previously conveyed uplands under Oregon law).

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State of Indiana
Office of the Secretary of State
CERTIFICATE OF INCORPORATION
of

LONG BEACH COMMUNITY ALLIANCE INC.

I, Connie Lawson, Secretary of State of Indiana, hereby certify that Articles of Incorporation of the above Non-Profit Domestic Corporation has been presented to me at my office, accompanied by the fees prescribed by law and that the documentation presented conforms to law as prescribed by the provisions of the Indiana Nonprofit Corporation Act of 1991.

NOW, THEREFORE, with this document I certify that said transaction will become effective Wednesday, September 05, 2012.

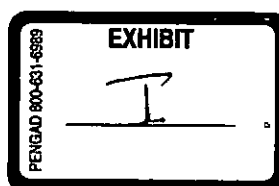


In Witness Whereof, I have caused to be affixed my signature and the seal of the State of Indiana, at the City of Indianapolis, September 06, 2012

Connie Lawson

CONNIE LAWSON,
SECRETARY OF STATE

2012090600043 / 2012090600043



APPROVED AND FILED
CONNIE LAWSON
INDIANA SECRETARY OF STATE
9/5/2012 5:23 PM

ARTICLES OF INCORPORATION

Formed pursuant to the provisions of the Indiana Nonprofit Corporation Act of 1991.

ARTICLE I - NAME AND PRINCIPAL OFFICE

LONG BEACH COMMUNITY ALLIANCE INC.

PO BOX 167, MICHIGAN CITY, IN 46361

ARTICLE II - REGISTERED OFFICE AND AGENT

ERIN M GERAGHTY
2404 FLORIMOND DR, LONG BEACH, IN 46360

ARTICLE III - INCORPORATORS

ERIN M GERAGHTY
2404 FLORIMOND DR, LONG BEACH, IN 46360
Signature: ERIN M GERAGHTY

ARTICLE IV - GENERAL INFORMATION

Effective Date: 9/5/2012

Type of Corporation: Mutual Benefit Corporation (all others)

Does the corporation have members?: Yes

The purposes/nature of business

"THIS ORGANIZATION IS ORGANIZED EXCLUSIVLEY FOR CHARITABLE, RELIGIOUS, EDUCATIONAL, AND SCIENTIFIC PURPOSES UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE, OR CORRESPONDING SECTION OF ANY FUTURE FEDERAL TAX CODE. NOTWITHSTANDING ANY OTHER PROVISION OF THESE ARTICLES, THE ORGANIZATION SHALL NOT CARRY ON ANY ACTIVITIES NOT PERMITTED BY TO BE CARRIED ON BY (1) A CORPORATION EXEMPT FROM FEDERAL INCOME TAX UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE OR CORRESPONDING SECTION OF A FUTURE TAX CODE OR (2) A CORPORATION FOR WHICH CONTRIBUTIONS ARE DEDUCTIBLE UNDER SECTION 170(C)(2) OF THE INTERNAL REVENUE CODE.

THE ORGANIZATION'S PURPOSES INCLUDE PRESERVING, FOR PUBLIC USE AND BENEFIT, THE NATURAL, ECOLOGICAL, RECREATIONAL, AESTHETIC, HISTORICAL, AND EDUCATIONAL VALUES OF THE LONG BEACH AREA, ITS WATERSHED, ITS BEACHES AND WATERS, AND ITS ADJACENT LANDS, AND THE PUBLIC TRUST THEREIN."

Long Beach will treat the elevation of 581.5 feet, as adopted by the U.S. Army Corps of Engineers, as the ordinary high water mark.

3. The Long Beach Police Department shall only enforce the PRIVATE PROPERTY ORDINANCES between Lake Shore Drive and Lake Michigan in the following locations:

A. The entire length and width of all publicly owned beach accesses above the elevation of 581.5 feet.

B. The entire length and width of all lots owned by the Town of Long Beach, Indiana, above the elevation of 581.5 feet.

4. Notwithstanding the foregoing, this Resolution shall not be construed to affect the use and enjoyment of riparian rights, if any, of front lot landowners on Long Beach over the shore below the ordinary high water mark to the water's edge of Lake Michigan, subject to the State's ownership and the public trust below the ordinary high water mark.

5. The Long Beach Police Department shall continue to enforce all state and local statutes, Ordinances, rules and regulations within its jurisdiction subject to the specific provisions of this policy.

ALL OF WHICH IS APPROVED AND ADOPTED this ____ day of ____.

PETITION TO INDIANA NATURAL RESOURCE COMMISSION

WE

the undersigned are property owners north of Lake Shore Drive and abutting

Lake Michigan in Long Beach, Indiana. Certain non-lake front owners are claiming free use of our property up to the administratively set ordinary high water mark ("OHWM") found at 312 IAC 1-1-26.¹ Although the Indiana Administrative Code does not claim ownership of land below the OHWM, an Indiana Department of Natural Resource ("IDNR") web page claims that the State owns dry land below the OHWM. See, <http://www.in.gov/dnr/water/3658.htm>.²

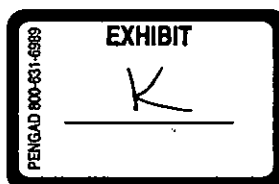
The claim of state ownership is contrary to our deeds, contrary to our littoral rights, is without legal basis and has now become the source for similarly wrong and illegal claims by the Town of Long Beach and other non-lake front owners in Long Beach.

This is a matter of state law and property ownership. Our deeds predate any IDNR action and claim of ownership.

We disagree with this posting by the IDNR and state that our property runs to the shore, the low water mark of Lake Michigan, and strongly encourage the Natural Resource Commission to instruct the IDNR to remove the offending web page to stem the confrontations underway in Long Beach.

Thank you for your consideration.

Name	Address	Stop #
1. Dean Uminski	1512 Lake Shore Drive Long Beach, IN 46360	15
2. Maria K. Daley	1420 LAKE SHORE DRIVE Long Beach, IN 46360	15
3. Robert J. Daley	1420 LAKESHORE DR. Long Beach, IN 46360	14
4. John M. Daley	1418 LAKESHORE DR. Long Beach, IN 46360	14
5. Mary K. Daley	1416 Lake Shore Dr. Long Beach, IN 46360	14
6. Christopher Lorie	1414 Lake Shore Dr. Long Beach, IN 46360	14
7. [Signature]	1302 LAKE SHORE DRIVE Long Beach, IN 46360	13
8. [Signature]	1302 Lakeshore Drive Long Beach, IN 46360	13
9. [Signature]	1514 Lake Shore Drive Long Beach, IN 46360	15
10. Norine Smith	1514 Lake Shore Drive Long Beach, IN 46360	15



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Name	Address	Stop #
1. <i>Jeffrey</i>	1516 LAKE SHORE DR.	Long Beach, IN 46360 15
2. <i>Angela Chaffin</i>	1412 Lake Shore Dr	Long Beach, IN 46360 14
3. <i>John G. Gough</i>	1400 LSD/LB	Long Beach, IN 46360 14
4. <i>David Stephens</i>	" "	Long Beach, IN 46360 14
5. <i>Samuel J. J. J.</i>	1408 LSD, LB	Long Beach, IN 46360 14
6. <i>Armine Dysart</i>	1518 LSD LB IN	Long Beach, IN 46360 15
7. <i>Marilyn Millet</i>	1528 LSD LB, IN	Long Beach, IN 46360 15
8. <i>Dalia K. Wendt</i>	1922 Lake Shore Drive by Dean	Long Beach, IN 46360 19
9.		Long Beach, IN 46360
10.		Long Beach, IN 46360

PETITION TO INDIANA NATURAL RESOURCE COMMISSION

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Name	Address	Stop #
1. Mary Lynn	1510 Lake Shore Dr.	Long Beach, IN 46360 15
2. Marcela O'Shaughnessy	1410 LSD	Long Beach, IN 46360 14
3. Edward J. Lyons	1504 LSD	Long Beach, IN 46360 15
4. Terence Oetting	1516 LSD	Long Beach, IN 46360 15
5. Jean L. O'Connell	1500 LSD	Long Beach, IN 46360 15
6. Margaret R. Behr	1500 LSD	Long Beach, IN 46360 15
7. Donald O'Shaughnessy		Long Beach, IN 46360 14
8. Nick J. Corsini	1950 C.S.D.	Long Beach, IN 46360 20
9.		Long Beach, IN 46360
10.		Long Beach, IN 46360

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Name	Address	Stop #
1. Robert J. Gellagher	1700 Lake Shore Dr Long Beach, IN 46360	17
2. Beverly L. Gellagher	1700 Lake Shore Dr Long Beach, IN 46360	17
3. Cath. J. Gellagher	1636 Lake Shore Dr Long Beach, IN 46360	17
4. Eunice O. Nardozi	1702 Lake Shore Dr Long Beach, IN 46360	17
5. Mark T. Nardozi	1706 Lake Shore Dr Long Beach, IN 46360	17
6. Candace J. Nardozi	1706 Lake Shore Dr Long Beach, IN 46360	17
7. Thomas P. Nardozi	1710 Lake Shore Dr Long Beach, IN 46360	17
8. Dr. B. Nardozi	1704 Lake Shore Dr Long Beach, IN 46360	17
9. Michael J. Nardozi	1618 Lake Shore Dr Long Beach, IN 46360	16
10. Judith L. Nardozi	1618 Lake Shore Dr Long Beach, IN 46360	16

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Name	Address	Stop #
1. Mrs. Jerome R. Rupp	1116 Lake Shore Dr Long Beach, IN 46360	16
2. J. Mellon	1112 Lake Shore Dr Long Beach, IN 46360	16
3. Marjorie T. Rupp	1808 Lake Shore Dr Long Beach, IN 46360	18
4. J. T. Rupp	1814 Lake Shore Drive Long Beach, IN 46360	18
5. Anthony C. Rupp	1814 Lake Shore Drive Long Beach, IN 46360	18
6. Lake Shore	1810 LAKE SHORE DR Long Beach, IN 46360	18
7. J. R. Rupp	1810 LAKE SHORE DR Long Beach, IN 46360	18
8. Richard C. Rupp	1816 Lake Sh Dr Long Beach, IN 46360	18
9. J. R. Rupp	1816 Lake Shore Dr Long Beach, IN 46360	18
10. R. Rupp	1704 Lake Shore Drive Long Beach, IN 46360	17

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Thank you for your consideration.

Name	Address	Stop #
1. <u>Patricia B. [Signature]</u>	<u>1516 Lakeshore Dr. Long Beach, IN 46360</u>	<u>15-16</u>
2. <u>Connie N. [Signature]</u>	<u>1530 Lakeshore Dr. Long Beach, IN 46360</u>	<u>15-16</u>
3. <u>Cheryl [Signature]</u>	<u>1532 LAKESHORE DR Long Beach, IN 46360</u>	<u>15-16</u>
4. _____	<u>Long Beach, IN 46360</u>	_____
5. _____	<u>Long Beach, IN 46360</u>	_____
6. _____	<u>Long Beach, IN 46360</u>	_____
7. _____	<u>Long Beach, IN 46360</u>	_____
8. _____	<u>Long Beach, IN 46360</u>	_____
9. _____	<u>Long Beach, IN 46360</u>	_____

219-874-4480 Dean Umishu

PETITION TO INDIANA NATURAL RESOURCE COMMISSION

WE

the undersigned are property owners north of Lake Shore Drive and abutting Lake Michigan in Long Beach, Indiana. Certain non-lake front owners are claiming free use of our property up to the administratively set ordinary high water mark ("OHWM") found at 312 IAC 1-1-26.¹ Although the Indiana Administrative Code does not claim ownership of land below the OHWM, an Indiana Department of Natural Resource ("IDNR") web page claims that the State owns dry land below the OHWM. See, <http://www.in.gov/dnr/water/3658.htm>.²

The claim of state ownership is contrary to our deeds, contrary to our littoral rights, is without legal basis and has now become the source for similarly wrong and illegal claims by the Town of Long Beach and other non-lake front owners in Long Beach.

This is a matter of state law and property ownership. Our deeds predate any IDNR action and claim of ownership.

We disagree with this posting by the IDNR and state that our property runs to the shore, the low water mark of Lake Michigan, and strongly encourage the Natural Resource Commission to instruct the IDNR to remove the offending web page to stem the confrontations underway in Long Beach.

Thank you for your consideration.

Name	Address	Stop #
1. _____	Long Beach, IN 46360	
2. _____	Long Beach, IN 46360	
3. _____	Long Beach, IN 46360	
4. _____	Long Beach, IN 46360	
5. James M. Brown 1532 150	Long Beach, IN 46360	15
6. _____	Long Beach, IN 46360	
7. _____	Long Beach, IN 46360	
8. _____	Long Beach, IN 46360	
9. _____	Long Beach, IN 46360	
10. _____	Long Beach, IN 46360	

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Thank you for your consideration.

Name	Address	Stop #
1. <i>Roy Milins</i>	2410 LAKE SHORE DR Long Beach, IN 46360	24
2. <i>John G. Glick</i>	2410 LAKE SHORE DR Long Beach, IN 46360	24
3. <i>Mark R. Hoyer</i>	Tracts 25/2 L.S.D. Long Beach, IN 46360	25
4.	Long Beach, IN 46360	
5.	Long Beach, IN 46360	
6.	Long Beach, IN 46360	
7.	Long Beach, IN 46360	
8.	Long Beach, IN 46360	
9.	Long Beach, IN 46360	
10.	Long Beach, IN 46360	

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Name	Address	Stop #
1. <u>[Signature]</u>	<u>2424 Lake Shore Dr.</u> Long Beach, IN 46360	<u>24</u>
2. _____	Long Beach, IN 46360	<u>24</u>
3. <u>[Signature]</u>	<u>2412 LAKE SHORE DR.</u> Long Beach, IN 46360	<u>24</u>
4. <u>Burt Hton</u>	<u>2412 LAKESHORE DR</u> Long Beach, IN 46360	<u>24</u>
5. <u>John Farner</u>	<u>2424 Lakeshore Dr.</u> Long Beach, IN 46360	<u>24</u>
6. _____	Long Beach, IN 46360	
7. _____	Long Beach, IN 46360	
8. _____	Long Beach, IN 46360	
9. _____	Long Beach, IN 46360	
10. _____	Long Beach, IN 46360	



OLSON BZDOK & HOWARD

www.envlaw.com

September 12, 2012

Indiana Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204-2200

Re: Boundary of State Title Along the Shoreline of Lake Michigan
Our File No. 5877.00

Dear Members of the Indiana Natural Resource Commission:

On behalf of our clients, the Long Beach Community Alliance and its members, we submit to you this letter providing background on the rights held by the state of the Indiana, in trust for the benefit of the public, to the shorelines of Lake Michigan. This letter is provided as a basis for the discussion to be held at your September 18, 2012, meeting, and in response to the letters and petition submitted to you by Mr. Michael Knight, filed on behalf of yet-to-be-disclosed property owners whose lots front the beach ("Petitioners"). We have been placed on the agenda for the meeting, and appreciate the opportunity to address these matters on behalf of the Long Beach Community Alliance, residents of Long Beach, and the citizens of Indiana.

Contrary to the claims of Petitioners, we urge that the State of Indiana does indeed hold title in trust for the public to the lands under the beds and shore of Lake Michigan up to the ordinary high watermark. Further, the State has a duty to preserve and protect the waters for certain public uses associated with use and enjoyment of Lake Michigan. Accordingly, we urge that you do not need to take any action in response to the petition submitted by Mr. Knight on behalf of the undisclosed property owners. The positions presented in the Petitioner's letters demonstrate a fundamental misconception of the law governing this issue.

420 East Front Street, Traverse City, Michigan 49686 | Ph 231.946.0044 | Fax 231.946.4307 | www.envlaw.com

James M. Olson | Christopher M. Bzdok | Scott W. Howard | Jeffrey L. Jocks | Ross A. Hammersley
Katherine E. Redman | William Rastetter, Of Counsel | Michael H. Dettmer, Of Counsel

PENCLAD 800-631-6869

EXHIBIT

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INTRODUCTION

Long-held principles of law establish that at the time of statehood, Indiana took title to the beds of Lake Michigan to the ordinary high watermark, in order to hold the waters and the beds in trust for the public. Under what is known as the "equal footing doctrine," based on principles of state sovereignty, upon statehood each state gained title to the beds of navigable or tidal waters within its borders,¹ including the Great Lakes. In fact, the Great Lakes are treated as if they are tidally-influenced like the oceans and seas, which under sovereign ownership carry title to the foreshore.² Unlike other property, however, the state could not freely sell or transfer its rights in the waters or the beds of Lake Michigan. Instead, according to both the "equal footing" and "public trust" doctrines, the state took title to the water and the beds and held them in trust for the public to ensure "public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses."³ Under legal principles long-recognized by the United States Supreme Court, the state's title extended to the ordinary high watermark.⁴ As stated by an Indiana court, "[Indiana] in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan."⁵

Under these well-established principles, the State of Indiana has sovereign ownership and title to the beds underlying Lake Michigan to the ordinary high watermark.⁶ Accordingly, the Department of Natural Resources' posting of these legal principles at

¹ The first 13 states, in accord with English common law, held "the absolute right to all their navigable waters and the soils under them." See *PPL Montana, LLC v. Montana*, 132 S Ct 1215, 1227 (2012). Accordingly, all states acquired these rights upon statehood because they had to be treated as coequal sovereigns, or given "equal footing" under the Constitution *Id.*

² The Great Lakes are treated as if they are seas for purposes of sovereign ownership and the public trust doctrine. See *Illinois Cent R Co v. State of Illinois*, 146 US 387 (1892).

³ *PPL Montana, LLC v. Montana*, 132 S Ct 1215, 1234-35 (2012).

⁴ See, for example, *Shively v. Bowlby*, 152 US 1 (1894); *Illinois Cent R Co v. State of Illinois*, 146 US 387 (1892).

⁵ *Lake Sand Co v. State*, 68 Ind. App 439; 120 NE 714, 716 (1918).

⁶ 312 I.A.C. 1-1-26(2). The fact that the legislature has also recognized public rights in water and bottomlands under public rights principles for inland lakes and streams, IC 14-26-2-1 has no bearing on the State's title to the bottomlands or the public trust to the ordinary high water mark of Lake Michigan.

www.in.gov/dnr/water/3658.htm is an accurate statement of the law, and the arguments presented by Petitioners lack substantive merit and to a large extent are questions that are either not properly before or should not be addressed by the Commission.

I. BACKGROUND: STATE OWNERSHIP OF THE LAND UNDERLYING NAVIGABLE AND TIDAL WATERS AND THE PUBLIC TRUST DOCTRINE

To begin with, we will take a step back and place the status of the private and public rights in the shoreline of Lake Michigan in Indiana in the context of the overarching American legal framework governing these issues. Most significant are the historical principles of public ownership of the beds and shores of tidal and navigable waters and the related “public trust” doctrine, from which is derived the state’s duty to preserve and protect its waters for the public. These principles have deep roots, and it is valuable to understand their historical underpinnings.

A. The English Common Law and the Public Trust Doctrine

The American public trust law descended from the English common law. The English public trust doctrine, derived from the Justinian Codes of Rome and passed to England through the Magna Carta, decreed that because of the unique nature of the sea and the shoreline, these tidal waters were “incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce”⁷ Accordingly, the sea and the lands underneath were not subject to usual rules governing private ownership of property. Instead, the Crown held title in trust for the public to the sea, the soil under the sea and over which the sea ebbed and flowed, and the seashore between the low and high watermarks.⁸ Private rights to use the water and the soil under the sea, also called the “*jus privitum*”, could be recognized by the Crown, and landowners who held property adjacent to the water had certain riparian rights to use the water; however, any such conveyance and private rights would remain subject always to the public right to use the water and the underlying beds for public purposes, also called the “*jus publicum*.”⁹

⁷ *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

⁸ See *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894).

⁹ *Illinois Cent R Co v. Illinois*, 146 U.S. 387 (1892).

B. Sovereign Right and Duty to Hold Title, Preserve, and Protect the Beds and Waters of Navigable and Tidal Waters in the United States

The rights of the Crown to hold tidal waters, submerged lands, and tidal lands to the ordinary high watermark in trust for the public transferred to the American colonies, and upon the American Revolution, the rights of the Crown were vested in the 13 original states, each as sovereign, subject only to the rights surrendered by the states to the federal government in the United States Constitution.¹⁰ The states granted the federal government the right to regulate all navigable waters in the United States Constitution, but otherwise reserved all rights and duties with regard to their ownership of tidal and navigable bodies of water. Soon after, owing to the unique circumstances of a new nation in North America, the doctrine was expanded to include non-tidal, navigable waters, as well, in recognition of the country's vast inland water system.¹¹ Accordingly, the United States Supreme Court recognized that "for the 13 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 [regulation of navigation] granted by the Constitution to the Federal Government."¹²

Under the "equal footing" doctrine, each new state must be treated as a coequal sovereign, entitled to the same rights, and subject to the same duties, as the original 13 states. As a result, when the United States acquired new territory, it would hold that title and right in the territories in trust for the people, and when the territory became a state, it would gain the same title in the tidal and navigable waters as that held by the original 13 states, and the land underneath to the ordinary high watermark, held in trust for the public.¹³ The boundary between

¹⁰ *Phillips Petroleum Co v. Mississippi*, 484 U.S. 469, 473-74 (1988); *Shively v. Bowlby*, 152 U.S. 1 (1894).

¹¹ *Phillips Petroleum Co v. Mississippi*, 484 U.S. 469, 473-74 (1988); *Shively v. Bowlby*, 152 U.S. 1 (1894).

¹² *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S. Ct. 1215, 1227 (2012), quoting *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842).

¹³ See *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S. Ct. 1215, 1227 (2012).

the upland and the tideland is determined by the ordinary high watermark at the time of admission to statehood, as defined by federal law.¹⁴

After statehood, the scope of the public trust doctrine is subject to state law and may vary by state, unlike the equal footing doctrine for state title, which is a matter of federal law.¹⁵ However, because the states took not only the title under the "equal footing" doctrine, but also title in trust for the public, there are certain inherent public trust background principles that a state cannot abandon or alter.

First, with regard to title to the shore, particularly inland navigable lakes and streams, a state may decide to convey private rights in the lands under the water, the *jus privitum*, but it must do so expressly for a proper public trust purpose, and usually through legislation, and the land will always be subordinate to the rights of the public in the waters and the shore.¹⁶ Even if a landowner technically has been granted title, "[i]t is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."¹⁷ A transfer that is not subject to and consistent with the public trust and its protected public uses is either void or subject to revocation.¹⁸

¹⁴ *Oregon ex rel State Land Bd v. Corvallis Sand & Gravel Co*, 429 U.S. 363, 377 (1977). For lands transferred by federal patent, the boundary for transfers of riparian or littoral property held by the United States after statehood will be based on the definition of "ordinary high watermark" under federal law. See *Borax Consol v. City of Los Angeles*, 296 U.S. 10, 15 (1935). When the U.S. patent first conveyed property in 1830, that later became the plats in Long Beach, Indiana, all that the U.S. conveyed, indeed all that it could convey, was land above the ordinary high water mark, because the State necessarily owned the bottomland and property below the ordinary high water mark.

¹⁵ See *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S. Ct. 1215 (2012), explaining that "Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law" and "the States retain residual power to determine the scope of the public trust over waters within their borders."

¹⁶ *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900); *Illinois Cent R Co v. Illinois*, 146 U.S. 387 (1892).

¹⁷ *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900).

¹⁸ *Illinois Cent R Co v. Illinois*, 146 U.S. 387 (1892).

Distribution of assets on dissolution or final liquidation

"UPON THE DISSOLUTION OF THIS ORGANIZATION, ASSETS SHALL BE DISTRIBUTED FOR ONE OR MORE EXEMPT PURPOSES WITHIN THE MEANING OF SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE, OR CORRESPONDING SECTION OF ANY FUTURE FEDERAL TAX CODE, OR SHALL BE DISTRIBUTED TO THE FEDERAL GOVERNMENT, OR TO A STATE OR LOCAL GOVERNMENT, FOR A PUBLIC PURPOSE."



OLSON BZDOK & HOWARD

www.envlaw.com

September 7, 2012

Long Beach Town Council Members
2400 Oriole Trail
Long Beach, Indiana, 46360

Re: Town Resolution 10-002
Our File N° 5877.00

Dear Long Beach Town Council Members:

On behalf of our client, the Long Beach Community Alliance and its members, we request that you consider a clarifying amendment of Town Resolution 10-002.

The Resolution provides that the Long Beach Police Department will not enforce Public Property Ordinances along the shores of Lake Michigan above the ordinary high water mark because the state of Indiana holds title to the beds of Lake Michigan up to the ordinary high water mark. This is a correct statement of the law, supported by well-established legal principles that have long been recognized by the United States Supreme Court. However, the Resolution cites to an Indiana Department of Natural Resources ("DNR") non-binding guideline on its webpage ("guideline") that reflects this general law as promulgated by the Natural Resources Commission ("NRC") pursuant to Indiana law. We suggest that you amend the resolution to instead rely directly on the legal principles, themselves, because it is these principles and not the guideline that are the source of the state's claim to title.

Long-held principles of law establish that at the time of statehood, Indiana took title to the beds of Lake Michigan to the ordinary high water mark, in order to hold the waters and the beds in trust for the public. Under what is known as the "equal footing doctrine," based on principles of state sovereignty, upon statehood each state gained title to the beds of navigable or tidal waters within its borders,¹ including the Great Lakes.² Unlike other property, however, the state could not freely sell or transfer its rights in the waters or the beds of Lake Michigan.

¹ The first 13 states, in accord with English common law, held "the absolute right to all their navigable waters and the soils under them." See *PPL Montana, LLC v Montana*, 132 S Ct 1215, 1227 (2012). Accordingly, all states acquired these rights upon statehood because they had to be treated as coequal sovereigns, or given "equal footing" under the Constitution *Id*.

² The Great Lakes are treated as if they are tidally-influenced for purposes of the public trust doctrine. See *Illinois Cent R Co v State of Illinois*, 146 US 387 (1892).

Instead, according to the "public trust doctrine," the state took title to the water and the beds in order to hold them in trust for the public to ensure "public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses."³ Under legal principles long-recognized by the United States Supreme Court, the state's title extended to the ordinary high water mark.⁴ As stated by an Indiana court, "[Indiana] in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan."⁵

Because the state of Indiana's ownership of the beds of Lake Michigan to the ordinary high water mark is well established in general principles of law, the Town can rely on these principles without also having to rely on a guideline on the DNR's webpage, that simply refers to a regulation setting the ordinary high water mark. Moreover, it is unnecessary to rely on the the DNR website guideline or referenced regulation per se, given that the guideline and regulation are not the source of the state's claim of title to the beds of Lake Michigan, and, indeed, the NRC would not have the authority to relinquish the state's claim to this property even if it wanted to do so. If the Town relies on the principles of law underlying the guideline, instead of the guideline, it will allow the Town and the NRC or DNR to avoid becoming embroiled, unnecessarily, in the issues each might face with regard to this issue.

Notably, you can still use the elevation of 581.5 feet to define the ordinary high water mark for purposes of ordinance enforcement in Long Beach. This is consistent with the decisions of the federal government and the state of Indiana to treat this elevation as a proxy for the ordinary high water mark in Long Beach for the sake of convenience and predictability. This does not reflect an intent by the state to abandon its duty to hold the beds and the water in trust for the public to the ordinary high water mark as that mark might otherwise be defined in the future. It does not reflect an intent by the Town of Long Beach to disregard where the ordinary high water mark is actually established. It simply states, for the sake of the Town's implementation of the Resolution regarding ordinance enforcement, that the 581.5 is a convenient benchmark.

It should also be noted that such a modification can expressly include a statement, already based on Indiana and United States Supreme Court law, that to the extent any lake front lot owner on Long Beach has riparian rights, those riparian rights are not affected by state ownership, since a riparian owner enjoys a qualified riparian right over the state's shoreline title to the water's edge. Under established legal principles, public ownership and use of the shore below the ordinary high water mark and the continuation and enjoyment of riparian rights are not inconsistent.

³ *PPL Montana, LLC v Montana*, 132 S Ct 1215, 1234-35 (2012).

⁴ See, for example, *Shively v Bowlby*, 152 US 1 (1894); *Illinois Cent R Co v State of Illinois*, 146 US 387 (1892).

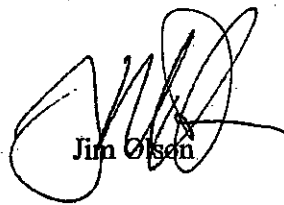
⁵ *Lake Sand Co v State*, 68 Ind App 439; 120 NE 714, 716 (1918).

Long Beach Town Council Members
September 7, 2012
Page 3

Accordingly, we respectfully submit the attached, revised resolution for your review. The revised Resolution is substantially the same as the current Resolution, except that it relies on the principles of the equal footing doctrine and the public trust doctrine, instead of the NRC regulation. We hope that you find this proposal helpful and look forward to your thoughts and questions.

Thank you for your consideration.

Sincerely,



Jim Olson



Kate Redman

JMO:KER:djs
xc: Clients

Resolution No. _____
Resolution Amending Resolution No. 10-002
Concerning Property Adjacent to Lake Michigan in Long Beach, Indiana

WHEREAS, there exists in the Town of Long Beach, Indiana, publicly owned property and privately owned property adjacent to Lake Michigan which is a navigable waterway; and,

WHEREAS, there are a number of local Ordinances contained in the Code of Ordinances of the Town of Long Beach, Indiana, which are designed to regulate or prohibit activity on public and/or Town property (hereinafter referred to as "PUBLIC PROPERTY ORDINANCES"); and,

WHEREAS, the bed of Lake Michigan adjacent to Long Beach, Indiana, is owned by the State of Indiana; and,

WHEREAS, these disputes can create issues regarding the enforcement by the Long Beach Police Department of PUBLIC PROPERTY ORDINANCES; and,

WHEREAS, it is desirable that a clear policy be established relative to the enforcement of PUBLIC PROPERTY ORDINANCES on properties adjacent to Lake Michigan in the Town of Long Beach, Indiana, both for the benefit of private property owners, the general public and law enforcement officials; and,

WHEREAS, under the "equal footing doctrine," when Indiana became a state, it gained title to the beds of navigable or tidal waters within its borders, including Lake Michigan to the ordinary high water mark; and,

WHEREAS, in accord with the "public trust doctrine," Indiana took title to the water and the beds in order to hold them in trust for the public to ensure public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses; and,

WHEREAS, the equal footing doctrine and the public trust doctrine were both recently affirmed by the United States Supreme Court in its decision in *PPL Montana v Montana*, 132 S. Ct. 1215, issued February 12, 2012.

NOW THEREFORE BE IT RESOLVED, by the TOWN COUNCIL of the Town of Long Beach, Indiana, that the following policy be and is hereby adopted:

1. Consistent with the state's authority and duties under the equal footing and public trust doctrines, the Town of Long Beach, Indiana, recognizes the ordinary high water mark as the dividing line on Lake Michigan between state and non-state ownership.

2. That for purposes of convenience and certainty for landowners, but without surrendering the sovereign duty to hold the bed and the waters in the public trust, and recognizing that the definition of ordinary high water mark may change over time, the town of

Second, with regard to the public's right to use the water, the shore, and the bottomlands under the public trust doctrine, the state cannot alienate or abandon these rights. The land cannot be conveyed except as subject to these rights. The scope of the public trust may be altered by states, in terms of the boundary of the land protected or the types of uses that are protected for public use, but the fundamental duty to protect and preserve the waters and the bottomlands up to the ordinary high watermark cannot be abandoned. As stated by the United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*, the lodestar public trust case:

A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *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.¹⁹

In short, the general framework governing the beds and waters of navigable or tidal waters has several layers. At statehood, the states took title to the waters and beds of navigable waters to the ordinary high watermark, including Lake Michigan, which was recognized to be governed by principles applicable to the seas, with the duty and the right to hold the beds, shores, and waters in trust for the public, subject only to the federal government's Constitutional authority to regulate the navigable waters of the country for commerce and travel. Second, a state may through proper procedures recognize private rights in the water and the land below the ordinary high watermark for certain purposes consistent with the public trust. But even in this second instance, the so-called *jus privitum* is always subject to and limited by the *jus publicum*, meaning the paramount rights of the public in the waters and the beds underneath. Because the

¹⁹ *Illinois Cent R Co v. Illinois*, 146 U.S. 387, 453-54 (1892). (Emphasis added.)

state took title in trust for the public, it can never abdicate that trust, although the scope and boundaries of the public rights may vary as a matter of state law -- provided it does not abdicate the sovereign ownership or control required by the "equal footing" doctrine and does not abdicate or violate the rights of the public to use these trust lands under the public trust.

II. THE RIGHTS AND DUTIES OF THE STATE OF INDIANA IN LAKE MICHIGAN AND THE LAND UNDERNEATH

The boundary of public and private ownership along Lake Michigan in Indiana must be viewed in the context of these background principles. Upon statehood, Indiana took title to the beds and shores of Lake Michigan to the ordinary high watermark in trust for the people of the State, and subject to the public trust duty to hold them in trust for the public to ensure "public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses."²⁰ The title extends to the ordinary high watermark as a matter of federal constitutional law under the "equal footing" doctrine, but because the public trust for the most part became a question of state law, subject to the limitations inherent in the "equal footing" and "public trust" doctrines, it is necessary to look to Indiana law to analyze how the State has addressed the public trust in its navigable waters.

To the extent that Indiana law distinguishes between tidal waters and navigable inland lakes and rivers or tributary waters²¹, it is worth noting that the United States Supreme Court long ago established that the Great Lakes should be treated as tidal bodies, subject to the English common law governing the seas. In a landmark case, the Court explained:

The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of states on th borders of the sea. . . . So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of

²⁰ *PPL Montana, LLC v. Montana*, 132 S Ct 1215, 1234-35 (2012).

²¹ Indiana law establishes two different bases for defining the ordinary high water mark," one for inland lakes and waters based on physical characteristics; and one for Lake Michigan based on a scientifically established high water mark set by the U.S. Corps of Engineers. See 312 IAC 26-1-1 and IC 14-26-2-1. The public rights recognized in the latter provision apply only to inland lakes and streams. The Legislature expressly left the rights of the State and public under the "equal footing" title and public trust doctrines as established by the common law.

the tide over the lands, but upon the fact that the waters are navigable; "tide waters" and "navigable waters," as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. *We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.*²²

Thus, to describe the scope of the state title and public trust duties to the beds and shores of Lake Michigan, it is necessary to look, to the extent a distinction is made, to the laws governing tidal bodies. Although the Indiana courts and Legislature have not often addressed the issue of title or the public trust doctrine for the shores of Lake Michigan, it appears that the State's title to the ordinary high watermark remains largely unchanged from when the state was formed.

A. The State Holds Title to the Beds of Lake Michigan to the Ordinary High Watermark

Upon statehood in 1816, Indiana took title to the submerged lands and tidelands of Lake Michigan to the ordinary high watermark. In other words, there is no need for a document or deed showing that the land was conveyed to the State; it belongs to the State by virtue of becoming a state. The only exception would be if the federal government conveyed land to private ownership before Indiana became a state, but there is a strong presumption against the federal government having intended to do so, and it may do so only for specific narrow *public* purposes.²³ Any attempt by the federal government to convey land below the ordinary high

²² *Illinois Cent R Co v. State of Illinois*, 146 U.S. 387, 436-37 (1892). (Emphasis added.)

²³ See, e.g., *Montana v. United States*, 450 U.S. 544, 551-52 (1981). Notably, this statement of law also applies to tribal claims to the submerged lands because the United States Supreme Court has generally held that a state's rights to the submerged lands and shorelines under the equal footing doctrine are superior to that of the tribes unless the a specific grant of ownership was expressly made to the tribes by the federal government. *Id.* The reasoning is that

watermark after statehood would be invalid because, as stated by the United States Supreme Court, "the Federal Government has no power to convey lands which are rightfully the State's under the equal-footing doctrine."²⁴

The Indiana courts have not often addressed the question, but it was long ago affirmed that the state owns the title to the bed of Lake Michigan in trust for the public. The Indiana Supreme Court has recognized the state title to the land under navigable waters and held that the title gained by the state cannot be alienated except through an act of the Legislature, stating:

Indiana, by virtue of the Ordinance of 1787, acquired title to the beds of the navigable waters of the State when Indiana, in fact became a State and took what rights the Northwest Territory had in said area. If [a river] was susceptible of navigation, or available for navigation in 1816, it follows that the fee simple title to the beds of natural navigable streams passed to the State and the State could not part with title to such real estate, except by an act of the Legislature.²⁵

In a case addressing Lake Michigan, specifically, the Indiana Court of Appeals also long ago recognized that the states took title to the beds in trust for the people in furtherance of the English common law:

Although 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 coronæ*, or private rights of the crown." The sovereign was the proprietor of these waters, as the representative or trustee of the

European nations gained fee title to land when it was "discovered" and the tribes held at most "Indian title", which was a right of occupancy but not fee ownership. The United States then gained fee title as it acquired territory from other European nations, regardless of whether the tribes had ceded the land. Thus, title to submerged lands transferred to the new states under the "equal footing" doctrine unless the United States had expressly granted a tribe title for a proper public purpose. This approach to tribal ownership has been heavily criticized by commentators but remains the current law. Further, the United States Supreme Court has held that the Treaty of Greenville, signed in 1795, conveyed the tribes only a right of occupancy, not ownership, over much of Indiana and Illinois, including the Indiana Lake Michigan coastline: *Williams v. City of Chicago*, 242 U.S. 434, 437 (1917).

²⁴ *Oregon ex rel State Land Bd v. Corvallis Sand & Gravel Co*, 429 U.S. 363, 376 (1977).

²⁵ *State ex rel Ind. Dept of Conservation v. Kivett*, 228 Ind. 623, 630 (1950).

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.²⁶

In that same decision, the Court also approvingly quoted cases establishing that a state's title extended to the ordinary high watermark, describing the state's title as "the right to own and hold the lands under navigable waters within the state, including the shores or space between ordinary high and low watermarks, for the benefit of the people of the state."²⁷

The State's laws and regulations are also consistent with the State's recognition of its continuing ownership of the beds of Lake Michigan to the ordinary high watermark because the state continues to regulate and claim ownership to the ordinary high watermark through its laws. For example, a person can only obtain 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 for a permit to fill in the land from the State of Indiana.²⁸ As another example, the regulations governing the placement of fill sand to protect erosion state that "beach nourishment" is "the placement of sand to mitigate beach erosion: (1) within the ordinary high watermark of Lake Michigan; or (2) within such proximity to the shoreline of Lake Michigan that wind or water erosion is likely to transport sand into the lake."²⁹ Consistent with this, the NRC regulations properly provide that "[i]n the absence of a contrary state boundary, the line of demarcation for a navigable waterway is the ordinary high watermark."³⁰ The regulations also set guidance for when "an emergency condition warrants the approval of a construction activity along or within the ordinary high watermark of Lake Michigan"³¹ Groups piers require a

²⁶ *Lake Sand Co v. State*, 68 Ind. App. 439 (1918), quoting *Sloan v. Biemiller*, 34 Ohio St. 492 (1878). Accord *State ex rel Ind. Dept of Conservation v. Kivett*, 228 Ind. 623, 628 (1950), stating that "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations."

²⁷ *Lake Sand Co v. State*, 68 Ind. App 439 (1918).

²⁸ IC 14-18-6-4.

²⁹ 312 IAC 6-2-3.

³⁰ 312 IAC 6-1-1(b).

³¹ 312 IAC 6-7-1.

license if placed "along or within the ordinary high watermark."³² A person cannot extract minerals from the bed of a navigable waterway, up to the ordinary high watermark, without a license from the state.³³ These laws and regulations reflect that the State continues to hold title to the ordinary high watermark in trust for the public.

As a final note, it is important to highlight several lines of Indiana cases and law that address boundary issues along lakes but are not relevant to the issue before the Commission. First, there are cases addressing the boundary of riparian rights in submerged lands.³⁴ These cases are not addressing title in the submerged lands or shoreline, but instead the private riparian rights acquired by a landowner who owns lands adjacent to navigable waters. Riparian rights are not title rights; it is merely the right to use the waters and the underlying beds, subject to the limits imposed by the public trust doctrine. As explained by the Indiana Court of Appeals:

Generally, a property owner whose property abuts a lake, river, or stream possesses certain riparian rights associated with ownership of such a property. The term "riparian rights" indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. Riparian rights are special rights pertaining to the use of water in a waterway adjoining the owner's property. Riparian rights of the owners of lands fronting navigable waters are derived from common law as modified by statute. According to some authorities, riparian rights do not necessarily constitute an independent estate and are not property rights per se; they are merely licenses or privileges.³⁵

The scope of riparian rights in Indiana generally include "(1) the right of access to navigable water; (2) the right to build a pier out to the line of navigability; (3) the right to accretions; and (4) the right to a reasonable use of the water for general purposes such as boating, domestic

³² 312 IAC 6-4-1(a).

³³ 312 IAC 6-5-3; 312 IAC 6-1-1(a).

³⁴ For example, see *Shedd v. Am Maize Products Co*, 60 Ind. App 146 (1915), holding that "[a]n easement in land bordering on a body of navigable water carries with it such riparian rights in the submerged lands between the shore and the navigable portion of such body of water as are appropriate and necessary to give effect to such easement, " and "[t]he portion of such submerged lands over which riparian rights may be asserted is, as a general rule, determined between adjoining property owners by extending lines from the water's edge at right angles to the prevailing shore line."

³⁵ *Ctr Townhouse Corp v. City of Mishawaka*, 882 N.E.2d 762, 767-68 (Ind. Ct. App. 2008).

use.”³⁶ The owner of land adjacent to Lake Michigan might acquire these riparian rights; but the right to use the water and the submerged lands for these limited purposes is not a right of a title in the lands or the waters, and, regardless, remains subject to the public trust. As stated long ago by the Indiana Supreme Court:

this riparian ownership does not carry with it the right to the exclusive and unrestricted use of the lands ordinarily covered by the water; as in the case of rivers, that use must in all cases be subordinate to the paramount public right of navigation, and such other public rights as may be incident thereto.³⁷

Cases discussing the riparian rights of landowners to use the shore or submerged land of navigable waters do not affect the issue before the Commission. Riparian rights are tied to riparian land and constitute a use of those waters. They do not determine State’s title to bottomlands or public trust to ordinary high water mark.

A second line of cases that is not relevant are those addressing title of non-navigable waters.³⁸ As explained, title to land beneath waters, which were not navigable at statehood, did not pass to the states but remained with the federal government. They are subject to different rules and are not derived from the same English common law rules governing tidal or navigable waters. They are not relevant to the title of shores of Lake Michigan.³⁹

Finally, there is a line of Indiana cases addressing ownership of the bed of the Ohio River and stating that the owner’s title extends to the low watermark on the Ohio River.⁴⁰ These cases

³⁶ *Ctr Townhouse Corp v. City of Mishawaka*, 882 N.E.2d 762, 771 (Ind. Ct App. 2008).

³⁷ *Sherlock v. Bainbridge*, 41 Ind. 35, 47 (1872)

³⁸ See, e.g., *Brophy v. Richeson*, 137 Ind. 114; 36 NE 424 (1894), relying on *Stoner v. Rice*, 121 Ind. 51 (1889). See also *State v. Tuesburg Land Co*, 61 Ind. App. 555 (1915). Cases relying on *Brophy* cite it for this proposition. See *Earhart v. Rosenwinkel*, 108 Ind. App. 281 (1940), stating “[n]umerous and well-considered cases support the doctrine that a grant of land adjacent to a *non-navigable* lake or river carries title to the thread thereof, unless the contrary clearly appears or is necessarily implied.” See also *Ross v. Faust*, 54 Ind. 471, 478 (1876).

³⁹ Many of them address land that passed to the state through the federal Swamp Lands Act of 1850, which did not include land below navigable water because such title had already passed to the state.

⁴⁰ *Stinson v. Butler*, 4 Blackf 285 (1837), explaining that “[t]he 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-watermark because “[t]he *English* authorities relied on by the

are not applicable for a couple of reasons: First, they expressly distinguish between the law governing navigable rivers and the law governing waters considered part of the sea. As noted above, Lake Michigan is considered to be part of the sea and therefore would not be affected by these cases. Second, these cases predate *Kivett* and even to the extent they are good law for the Ohio River, would not replace the *Kivett* rule for other navigable waters. Third, the Ohio River boundary has a unique role in Indiana history, because the Court has held that the river is not considered to be within the boundary of the State of Indiana since the state boundary along the Ohio River only extends to the low watermark.⁴¹ In theory, this might have prevented title to the beds from passing to Indiana if it was not within its boundaries, but, regardless, these unique circumstances and law regarding the Ohio River are not easily transferable, and have not been transferred, to other navigable waters, including Lake Michigan.

In short, under the equal footing doctrine, the State acquired ownership of the beds and shores of Lake Michigan to the ordinary high watermark. This has been recognized by the Indiana courts and is reflected in the statutes and regulations adopted by the State. Accordingly, the State's website accurately reflects the status of Indiana law.

B. The Rights of the Public in the Shores of Lake Michigan are also Subject to the Public Trust

In addition to the State holding title in trust for the public, the State also has a continuing to preserve and protect the waters and lands underneath for the benefit of the public. In Indiana, the state's public trust duties have been often recognized and affirmed by the state courts and are reflected in state laws and regulations.⁴² The scope of the public trust doctrine is a matter of

defendants, to show that high-watermark is the boundary, are all cases respecting waters which ebb and flow with the tide, and which are therefore considered as a part of the sea."

⁴¹ See *Gentile v. State*, 29 Ind. 409, 411 (1868), explaining that "[t]he southern boundary of Indiana only extends to the Ohio river at low watermark" and "[t]hat river is not therefore within the territorial limits of this State."

⁴² See, e.g., *Sherlock v. Bainbridge*, 41 Ind. 35, 47 (1872), stating that private use of navigable waters "must in all cases be subordinate to the paramount public right of navigation, and such other public rights as may be incident thereto." See also *State ex rel Ind. Dept of Conservation v. Kivett*, 228 Ind. 623 (1950); *Peck v. City of Michigan City*, 149 Ind. 670 (1898); *Martin v. City of Evansville*, 32 Ind. 85, 86 (1869); *Cox v. State*, 3 Blackf 193, 199 (1833); *Bissell Chilled Plow Works v. S Bend Mfg Co*, 64 Ind. App. 1 (1916); IC 14-26-2-5.

state law, as the United States Supreme Court recently affirmed.⁴³ Importantly, this duty is distinct from the state holding title to the beds and shores of Lake Michigan, and any conveyance by the state of private title, the *jus privitum*, are and must remain subject to the *jus publicum*, or the rights of the public under the public trust doctrine. Moreover, the definition of the “ordinary high watermark” for purposes of issues of state title might not be the same as the scope of the boundary of the public trust doctrine.⁴⁴ The scope and existence of the public trust doctrine does not appear to be at issue in the Petition before the Commission. However we will briefly discuss the doctrine and its scope in Indiana, given that the doctrine underscores the importance of the state’s role in protecting the waters and shores for the public.

There are two principle contours of the public trust doctrine that are important to address: (1) the geographic boundary of the public trust and (2) the scope of public uses protected by the public trust doctrine.

As discussed in Section I, *infra*, at the time of Indiana statehood, the rights of the public under the public trust doctrine, and the duty of the state to preserve and protect these rights, extended to the ordinary high watermark. The state can decide how to define the “ordinary high watermark” and perhaps even alter the boundary if it determines that doing so is necessary to protect public trust purposes. The inherent limitations in the doctrine would suggest that the state cannot reduce the scope of the public trust to an area less than the ordinary high watermark,⁴⁵ but it probably does have discretion to determine how the ordinary high watermark is defined and whether it is fixed at its location at the time of statehood or whether it can change over time. It appears inherently reasonable for a state to do as the federal government has done and fix the “ordinary high watermark” at a set elevation in order to avoid unnecessary case-by-case, costly disputes and litigation, an advantage or benefit to private landowners, the state, and

⁴³ *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S. Ct. 1215, 1235 (2012), stating that the “the States retain residual power to determine the scope of the public trust over waters within their borders. . . .”

⁴⁴ *Glass v. Goeckel*, 473 Mich. 667 (2005).

⁴⁵ Indeed, doing so might also violate the “equal footing” doctrine, since the public trust must at a minimum extend to boundary of state title, and the boundary of title is derived from the federal Constitution. See *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S. Ct. 1215, 1235 (2012).

the public. It also is seemingly reasonable for a state to do as Michigan has done and adopt a boundary based on the physical characteristics of the land that may change over time.⁴⁶ Regardless, the state's determination of the ordinary high watermark for a specific regulatory purpose does not necessarily define the boundary for the public trust doctrine. The geographic boundary of the public trust doctrine for Lake Michigan has not been addressed by the Legislature in Indiana, but at a minimum the cases cited herein affirm that it reaches the ordinary high watermark, however that might be defined.

Similarly, the scope of the public uses in Lake Michigan protected by the public trust doctrine has not been expressly defined by the courts or the Legislature, but indications are that it is likely to be broadly interpreted. Indiana courts' statements on the subject suggest that the uses permitted could be broad and vary as needed over time. This is reinforced by the Legislature's recognition of a broad public trust doctrine for inland lakes and streams because the authority for the public trust in Lake Michigan has similar roots. In the Lake Preservation Act, the Legislature codified the public trust doctrine to include fishing, boating, swimming, the storage of water to maintain water levels, and any other purpose for which lakes are ordinarily used and adapted, and then proclaimed that the public of Indiana has a vested right in "[t]he preservation, protection, and enjoyment of all the public freshwater lakes of Indiana in their present state" and "the use of the public freshwater lakes for recreational purposes."⁴⁷ Moreover, the Legislature stated that the state "has full power and control of all of the public freshwater lakes in Indiana both meandered and unmeandered" and "holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes."⁴⁸ This statute does not apply to Lake Michigan, because Lake Michigan is deemed governed by the law of seas and

⁴⁶ See *Glass v. Goeckel*, 473 Mich. 667 (2005), adopting the Wisconsin definition of the "ordinary high watermark" as the place where "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."

⁴⁷ IC 14-26-2-5(b) and (c).

⁴⁸ IC 14-26-2-5(d).

oceans, and hence is protected by the public trust doctrine, but does suggest that the Indiana law may define a broad scope of uses for the public trust doctrine.⁴⁹

Given the importance of the state's duty to preserve and protect the waters and the shores of Lake Michigan for the benefit of the public, we urge the Commission to continue to act in furtherance of this duty.

III. LACK OF MERIT IN PETITIONER'S CLAIMS

The Petitioner's Letters and Petition to the State claim that State title only extends to the low watermark. For the reasons discussed above, this proposition completely lacks merit as a general principle of law and Petitioners have not provided any evidence establishing private ownership of the shore under the principles discussed above. Indeed, the legal "support" offered by Petitioners is irrelevant because it cites only cases addressing non-navigable waters.⁵⁰

To the extent that Mr. Knight's claims, which are made without disclosing his client or clients, rely on state law, the claims lack merit under the doctrines of equal footing and the public trust. In his February 28, 2011, and June 13, 2011, letters, Mr. Knight claims that, in Indiana, private ownership of lands bordering navigable waters extends to the low watermark. For this proposition he relies on *Stinson v Butler* and *Bainbridge v Sherlock*. He also cites the Act codifying the public trust for inland lakes, but excluding Lake Michigan, as evidence that the state does not hold title to the bottomlands of Lake Michigan.

There are several problems with this argument. First, as discussed at length in this letter, and as properly and eloquently explained by Mr. Clark in his May 12, 2011, response to Mr. Knight, upon statehood the state of Indiana acquired title to the beds underlying navigable waters in the state to the ordinary high watermark, with the exception of the Ohio River. These lines cannot simply be abandoned or altered by the state in light of the fact that it took title in trust for the public and has a duty to preserve and protect the waters for the public. Even a plat were to

⁴⁹ IC 14-26-2-1.

⁵⁰ While not addressed at this time, there are serious questions the allegations in Mr. Knight's "petition" have properly invoked the jurisdiction of the NRC. Certainly, the matter is not before the NRC for a quasi-judicial or adjudicative decision. For these reasons, jurisdiction is not conceded.

convey ownership to low watermark, such conveyance would not affect state title unless it was made by the State through legislation for a proper public purpose, and, regardless, could not affect public trust lines up the shore or beach. Instead, it would simply serve as a reference for how far the rights of a riparian, if any, extended. No inference of state title is made, nor could it be made. Mr. Knight does not address or acknowledge these fundamental principles of law and instead makes a bare assertion to the contrary, citing barely any legal authority in support of his position.

Second, the fact that the Legislature might have codified a portion of the law with regard to other watercourses in Indiana does not, and could not, change the title that the State took upon Statehood to the beds and shores of Lake Michigan. The State does not need to look to Legislation to establish its title because it was indisputably conveyed at statehood under the equal footing doctrine.

Third, the limited cases that Mr. Knight does cite are either not applicable to the issue before the Commission because they either do not apply to Lake Michigan or address the extent of riparian rights in water and not the underlying title to the beds. The cases cited by Mr. Knight address the Ohio River, which is subject to unique rules because of its unusual historical status. Under *Kivett*, the statements in those cases regarding the state's ownership of the beds under navigable waters do not even apply to other navigable streams and inland lakes in Indiana, let alone Lake Michigan, which is treated as a sea under the United States Supreme Court decision in *Illinois Central*.⁵¹ Moreover, *Bainbridge* is discussing riparian rights, which as discussed, are wholly separate from the issue of title to the shore. There is no dispute that if a landowner established that they own land adjacent to water, then they will acquire private, riparian rights to use the water and the shore to the extent permitted by Indiana law; however riparian rights to use the shore do not, and can not, establish title ownership of the shore itself, and a landowner's riparian rights are always subordinate to the rights of the public under the public trust doctrine.

As a final note, Mr. Knight alleges that the Indiana regulation arises to the level of taking. However, it was long ago established by the United States Supreme Court that a landowner does not have a taking claim against the government when it acts to protect or preserve the shores or

⁵¹ *Illinois Cent R Co v. Illinois*, 146 U.S. 387, 453-54 (1892).

the water consistent with its duty to do so under the public trust doctrine because the landowner took title subject to the public trust.⁵²

In short, Mr. Knight has raised no cognizable legal argument or evidence in support of his position that his clients own title to the shore to the low watermark of Lake Michigan, and his arguments either ignore or incorrectly describe the fundamental tenets of the equal footing and public trust doctrines.

IV. THE ISSUES RAISED BY PETITIONERS ARE NOT PROPERLY BEFORE THE NRC

As discussed, Petitioner's claims lack merit. However, we also urge that the Commission need not respond to them because they do not raise issues that should be addressed by the NRC.

A. Claims under Private Property Law Should Not Be Addressed by Commission

As discussed above, the general legal rule is that the State holds title of the property under Lake Michigan to the ordinary high watermark. To the extent that Petitioners' arguments are based not on the general law but instead on private property claims specific to their properties, these claims cannot and should not be addressed or resolved by this Commission. Any merit to these claims, such as those based on the history of title, the law of plats, adverse possession, or similar doctrines, would be severely undermined by the principles of state title law and the public trust doctrine discussed in this letter. But, regardless, the NRC is not the proper forum to settle a boundary dispute with regard to individual properties. These claims belong in a proper trial court in LaPorte County where the property is located, not before an administrative agency. Accordingly, we urge you to refrain from addressing these issues.

B. Resolution of Long Beach

Petitioners indicated that they are in part dissatisfied because Long Beach is relying on the website in a local ordinance. Dissatisfaction with a local ordinance is not properly before the Commission, regardless, but, just for the information of the Commission, Long Beach Community Alliance (LCBA) has submitted a shorter version of this analysis to the Town of

⁵² *Scranton v. Wheeler*, 179 U.S. 141, 146 (1900).

Long Beach. At a meeting held Monday evening, September 10, 2012, the residents of Long Beach heard and asked questions about a presentation from LBCA's attorney on the ownership of title of Long Beach to the ordinary high watermark, and reiterated that the Town was on sound footing in passing the Resolution that the state owned title to the beach up to the ordinary high watermark, and in referencing the similar statement contained in the DNR website that Mr. Knight complained about in his "petition" to the NRC. Moreover, for purposes of guiding the Town's law enforcement on officer discretion in not having to enforce town ordinances below the ordinary high watermark, the Town was well within its powers to rely on the 581.5 level for OHWM as set forth in 312-IAC-1-26. Indeed, the Town has the right to rely on state title under equal footing and public trust, as well as the right to select, as a matter of police enforcement discretion, the 581.5 feet level. The matter was educational at the September 10th meeting, but will be considered as events continue. In the meantime, the Town firmly believes its Resolution is on solid ground and will continue to apply it.

CONCLUSION

Under long-established principles of law, at the time of statehood, Indiana took title to the beds of Lake Michigan to the ordinary high watermark in order to hold the waters and the beds in trust for the public. The State of Indiana properly relies on these principles in maintaining that it continues to hold title to the ordinary high watermark. Petitioners have offered absolutely no argument or evidence that undermine these fundamental principles. Accordingly, on behalf of our clients, we urge that the Commission need take no action at this time.

Sincerely,

OLSON, BZDOK & HOWARD, P.C.



James M. Olson



Kate Redman

JMO:KER:djs

Ordinary High Watermarks

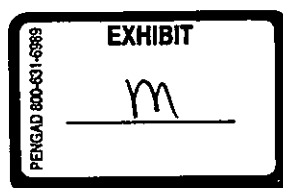
Lake Michigan is a navigable waterway, but it is the only Great Lake which is not also an international waterway. The bed of Lake Michigan is owned by the four states which share its shoreline: Wisconsin, Illinois, Indiana, and Michigan. Indiana holds the portion of Lake Michigan within its borders in trust for our citizens, but this trust is subject to the federal navigational servitude. Lake Michigan and its navigable tributaries are referenced in Navigable Waterways Roster.

The ordinary high watermark is the line on Lake Michigan and other navigable waterways used to designate where regulatory jurisdiction lies and in certain instances to determine where public use and ownership begins and/or ends. In general terms, "*ordinary high watermark*" (OHW) has been defined to be the line on the shore of a waterway that is

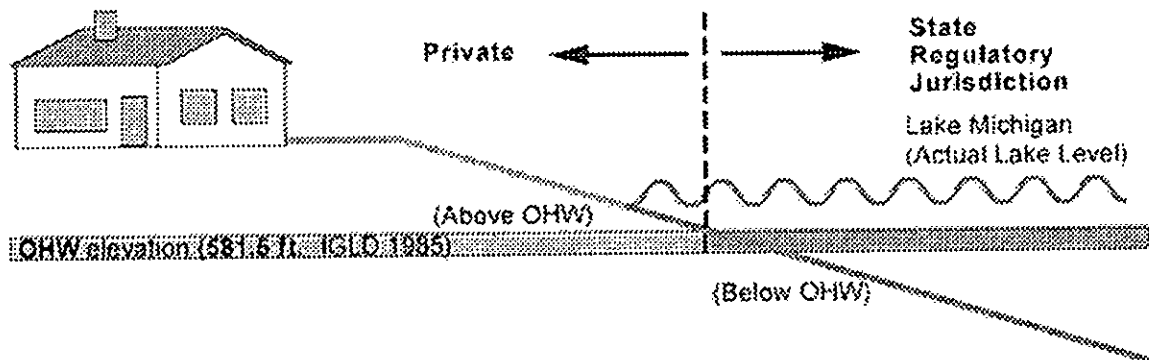
1. established by the Fluctuations of water; and
2. indicated by physical characteristics such as a clear and natural line impressed on the bank, shelving, changes in the character of the soil, the destruction of terrestrial vegetation, or the presence of litter or debris.

For Lake Michigan, both the U.S. Army Corps of Engineers and the Indiana Natural Resources Commission have recognized the ordinary high watermark to be at elevation 581.5 feet, International Great Lakes Datum (1985). The Commission has established the elevation of the OHW for the Indiana shoreline of Lake Michigan by rule at 312 IAC 1-1-26.

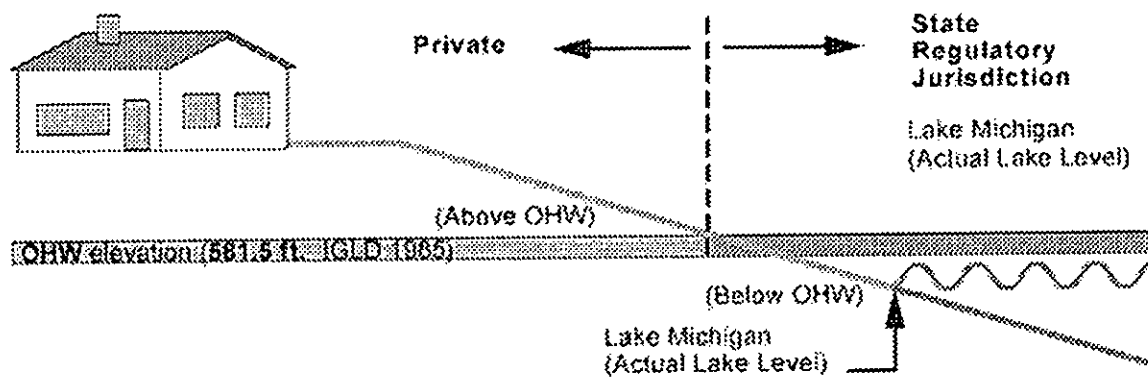
Although the actual elevation of Lake Michigan fluctuates, the elevation of the ordinary high watermark is fixed. The OHW is significant to permitting activities, and in certain respects to questions of ownership, and commercial and recreational boating usage. Regulatory authority may be referenced to the OWM, but there are instances when authority extends outside the OHW. For example, boating laws and fishing laws are enforced outside the boundaries of the OHW when the lake is high.



CASE# 1 When Lake Michigan's water level is "above" the Ordinary High Watermark (OHW), the State does not regulate any of the dry beach.

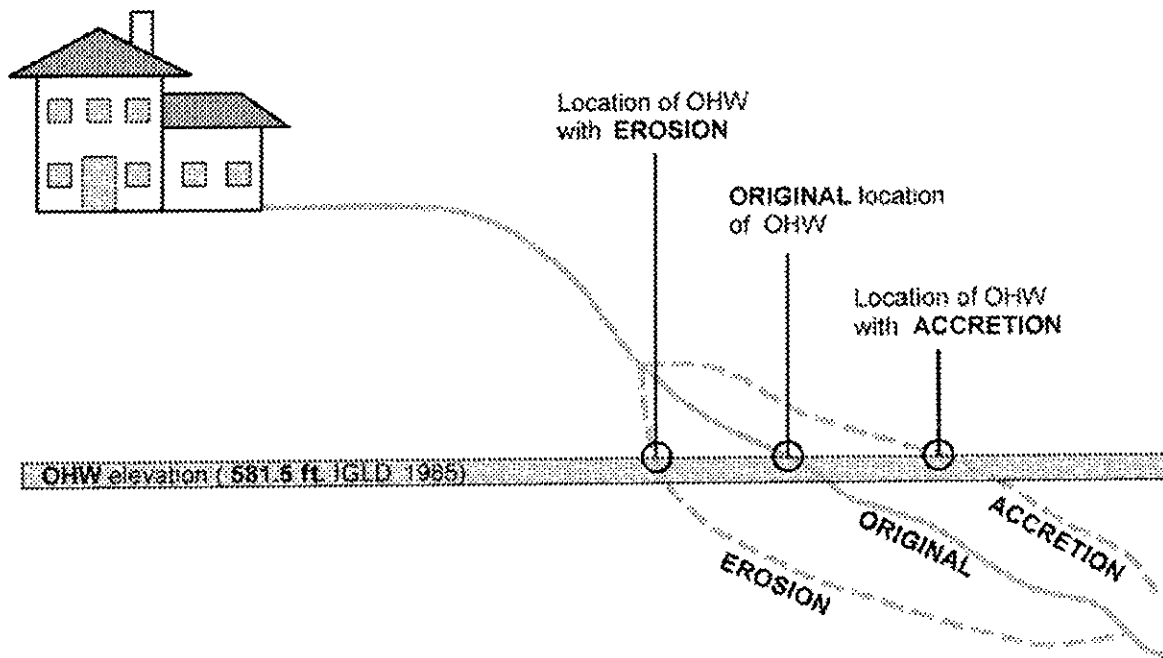


CASE# 2 When Lake Michigan's water level is "below" the Ordinary High Watermark (OHW), the State does regulate part of the dry beach.



While the elevation of the OHW does not change, the physical location of the OHW moves with the erosion and deposit (called "accretion") of sand along the shoreline due to natural causes. Regulatory jurisdiction can move as the line moves.

Movement of Location of "Ordinary High Watermark" (OHW)





OLSON BZDOK & HOWARD

www.envlaw.com

October 16, 2012

Long Beach Town Council Members
2400 Oriole Trail
Long Beach, Indiana, 46360

Re: Town Resolution 10-002
Our File No. 5877.00

Dear Long Beach Town Council Members:

On behalf of our client, the Long Beach Community Alliance and its members, we are submitting this letter to update you on the changes to the Indiana Department of Natural Resources ("DNR") non-binding guideline on its webpage and to encourage you to affirm the principles of Town Resolution No 10-002, Concerning Property Adjacent to Lake Michigan in Long Beach, Indiana ("Resolution").

As you are aware, your current ordinance provides that the Long Beach Police Department shall only enforce Public Property Ordinances along the shores of Lake Michigan above the ordinary high water mark on publicly owned beach accesses and on lots owned by the Town. It relies on the DNR's position "as reflected in its publications including, but not limited to, its website" stating that the state of Indiana holds title to the beds of Lake Michigan up to the ordinary high water mark. As indicated in our previous correspondence with you, this position reflects well-established legal principles of the "equal footing" doctrine and the public trust doctrine.

The changes made to the DNR's website did not change this position and do not require you to change your Resolution. To begin with, the website still states that the ordinary high watermark is used "to determine where public use and ownership begins and/or ends." The main change in the website is that the DNR states that the ordinary high water mark is the dividing line for public use as well as public ownership. This is not a position that you need to address in your Resolution because your Resolution is addressing the title issue, not the public use issue, and it is not necessary for you to take a position on the boundary of public use for purposes of the Resolution. Moreover, the purpose of your Resolution is to give direction to the Police Department whether it has to enforce its ordinance which does not determine ownership or use, but guides the department and Town regarding its regulatory enforcement of certain ordinances.

Further, not only has the substance of the website not changed, the DNR did not change its other publications where the DNR explains that it holds title to the ordinary high watermark, and you also reference those in your existing Resolution. Therefore, you could rely on your

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James M. Olson | Christopher M. Bzdok | Scott W. Howard | Jeffrey L. Jocks | Ross A. Hammersley
Katherine E. Redman | William Rastetter, Of Counsel | Michael H. Dettmer, Of Counsel

PENGAD 800-631-6988

EXHIBIT

N

existing resolution without making changes and still be consistent with the DNR. However, if you would prefer, you could also update your Resolution to mirror the exact language used on the website. A draft "redlined" Resolution to that effect is attached.

We understand that you received a letter from Mr. Michael Knight indicating that the DNR changed its position and that you must as well. This is simply incorrect. The website still identifies the ordinary high water mark as the boundary for state title. For your convenience, here is a "redlined" version of the relevant portions of the changes to the website:

~~The dividing line on Lake Michigan and other navigable waterways between public and private ownership is~~ The ordinary high watermark is the line on Lake Michigan and other navigable waterways used to designate where regulatory jurisdiction lies and in certain instances to determine where public use and ownership begins and/or ends. In general terms, "ordinary high watermark" (OHW) has been defined to be the line on the shore of a waterway that is

1. established by the Fluctuations of water; and
2. indicated by 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.

For Lake Michigan, both the U.S. Army Corps of Engineers and the Indiana Natural Resources Commission have recognized the ordinary high watermark to be at elevation 581.5 feet, International Great Lakes Datum (1985). The Commission has established the elevation of the OHW for the Indiana shoreline of Lake Michigan by rule at 312 IAC 1-1-26.

Although the actual elevation of Lake Michigan fluctuates, the elevation of the ordinary high watermark is fixed. The OHW is significant to many permitting activities, and in certain respects to questions of ownership, and commercial and recreational boating usage. Regulatory authority may be referenced to the OWM, but there are instances when authority extends outside the OHW. For example, boating laws and fishing laws are enforced outside the boundaries of the OHW when the lake is high.

As noted, the main change is the indication that the ordinary high watermark is the boundary for public use as well as state title. In addition, the modifier "in certain instances" was added. This modification was probably appropriate because there could be a few, rare instances where the state has passed title to a private party through legislation for proper public purposes, such that the transfer would be valid.

However, the Long Beach shoreline is not one of these instances. Title along Long Beach remains in the hands of the state of Indiana to the ordinary high water mark. It would be Mr. Knight's burden to show otherwise, and he has not presented anything suggesting that the state has divested itself of any title to land, let alone that such divestment was done properly through legislation and for a public purpose, as it must be.

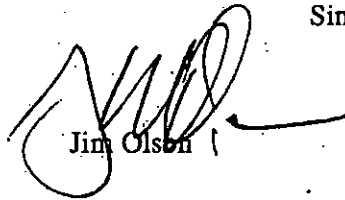
In addition, as noted above, the purpose of the Resolution is to guide the enforcement of an ordinance, not determine ownership or use. The Town is on solid grounds to provide a directive to its departments regarding non application or enforcement of regulatory ordinances.

Therefore, your Resolution remains accurate, as does its reliance on the website and other documents published by the state.

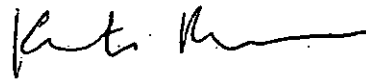
Accordingly, we respectfully submit that you could simply keep your current Resolution or adopt the attached version, which incorporates the state's changes verbatim, even though the meaning is the same for purposes of Long Beach. We hope that you find this letter and proposed modification pursuant to the DNR's website changes helpful and look forward to your or your Town attorney's thoughts and questions.

Thank you for your consideration.

Sincerely,



Jim Olson



Kate Redman

JMO:KER:djs

xc: Clients

William deFuniak, Clerk-Treasurer, Long Beach

Jeff Thorne

Robert Sulkowski, Chief Marshal, Long Beach Police Dept.

Long Beach Police Commission

Resolution No. _____
Resolution Amending Resolution No. 10-002
Concerning Property Adjacent to Lake Michigan in Long Beach, Indiana

WHEREAS, there exists in the Town of Long Beach, Indiana, publicly owned property and privately owned property adjacent to Lake Michigan which is a navigable waterway; and,

WHEREAS, there are a number of local Ordinances contained in the Code of Ordinances of the Town of Long Beach, Indiana, which are designed to regulate or prohibit activity on public and/or Town property (hereinafter referred to as "PUBLIC PROPERTY ORDINANCES"); and,

WHEREAS, the bed of Lake Michigan adjacent to Long Beach, Indiana, is owned by the State of Indiana; and,

WHEREAS, these disputes can create issues regarding the enforcement by the Long Beach Police Department of PUBLIC PROPERTY ORDINANCES; and,

WHEREAS, it is desirable that a clear policy be established relative to the enforcement of PUBLIC PROPERTY ORDINANCES on properties adjacent to Lake Michigan in the Town of Long Beach, Indiana, both for the benefit of private property owners, the general public and law enforcement officials; and,

NOW THEREFORE BE IT RESOLVED, by the TOWN COUNCIL of the Town of Long Beach, Indiana, that the following policy be and is hereby adopted:

1. The Town of Long Beach, Indiana, recognizes and accepts the Indiana Department of Natural Resources' position as reflected in its publications including, but not limited to, its website, the ordinary high watermark is the line on Lake Michigan used to designate where the state's regulatory jurisdiction lies and to determine where public ownership or use begins and/or ends that the dividing line on Lake Michigan between the state and non-state ownership is the ordinary high water mark.

2. That the ordinary high watermark is an elevation of 581.5 feet, as adopted by the U.S. Army Corps of Engineers, and the Indiana Natural Resources Commission found at 312 IAC 1-1-26.

3. The Long Beach Police Department shall only enforce the PRIVATE PROPERTY ORDINANCES between Lake Shore Drive and Lake Michigan in the following locations:

A. The entire length and width of all publicly owned beach accesses above the elevation of 581.5 feet.

B. The entire length and width of all lots owned by the Town of Long Beach, Indiana, above the elevation of 581.5 feet.

4. The Long Beach Police Department shall continue to enforce all state and local statutes, Ordinances, rules and regulations within its jurisdiction subject to the specific provisions of this policy.

ALL OF WHICH IS APPROVED AND ADOPTED this ____ day of ____.

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

IN THE LAPORTE CIRCUIT COURT
SITTING AT LAPORTE, INDIANA
2013 CONTINUOUS TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,
and DON H. GUNDERSON,

Plaintiffs

and

TOWN OF LONG BEACH, INDIANA,
Defendant

LONG BEACH COMMUNITY ALLIANCE,
Intervenor

PROPOSED ANSWER TO COMPLAINT

Intervenor-Defendants Long Beach Community Alliance (LBCA), Patrick Cannon, David Oei, Roger Gansauer, Joan Smith, and Bernard Rabinowitz ("Intervenors"), through their attorneys, Olson, Bzdok & Howard, P.C., state the following answer to the Complaint of Plaintiffs LCLHA, LLC, Margaret L. West, and Don H. Gunderson ("Plaintiffs"):

GENERAL DENIAL

Unless specifically admitted in this Answer, Intervenors deny each and every allegation in the Complaint.



PARTIES

1. Admitted that this is an action for declaratory judgment and that Plaintiffs seek the described relief. To the extent the paragraph states a legal conclusion, not response is required but Intervenor deny the merits of Plaintiffs' claims.

2. Intervenor neither admit nor deny the allegations contained in this paragraph because of lack of knowledge or information sufficient to form a belief about the truth of the allegations.

3. Intervenor neither admit nor deny the allegations contained in this paragraph because of lack of knowledge or information sufficient to form a belief about the truth of the allegations. Without making any admissions as to its authenticity, accuracy or relevance, Exhibit 1 speaks for itself.

4. Intervenor neither admit nor deny the allegations contained in this paragraph because of lack of knowledge or information sufficient to form a belief about the truth of the allegations.

5. Intervenor neither admit nor deny the allegations contained in this paragraph because of lack of knowledge or information sufficient to form a belief about the truth of the allegations. Without making any admissions as to its authenticity, accuracy or relevance, Exhibit 2 speaks for itself.

6. Intervenor neither admit nor deny the allegations contained in this paragraph because of lack of knowledge or information sufficient to form a belief about the truth of the allegations.

7. The platting of the Long Beach Addition is a matter of public record that is neither admitted nor denied. Without making any admissions as to its authenticity, accuracy or relevance, Exhibit 3 speaks for itself.

8. The incorporation of the Long Beach Addition is a matter of public record that is neither admitted nor denied. Admitted, except to the extent this allegation states a legal conclusion for which a response is not required.

9. This paragraph states a legal conclusion for which no answer is necessary.

JURISDICTION AND VENUE

10. Denied. The Town does not “claim” public rights. It has adopted a Resolution within its discretionary authority not to enforce its ordinances in certain areas of the Town. While the Town’s Resolution explains this decision by stating that it recognizes and accepts the states’ declaration of the ordinary high water mark as the line where the public ownership or use begins and/or ends, the Resolution does not itself claim or establish any right or interest, public or otherwise, in any land. It is merely describes the Town’s discretionary decision to exclude some areas from enforcement of local ordinances.

11. Denied. The allegation lacks specificity as to the “certain property” it is referencing, but Intervenors maintain that there are public rights in the beds of Lake Michigan in Long Beach to the ordinary high water mark, as well as other public rights derived from the plat and historical public use of the beach.

12. Subject to claims and defenses, including but not limited to subject matter jurisdiction, standing, ripeness and/or immunity, admitted that this Court has jurisdiction to decide the claims presented in this lawsuit.

13. Admitted.

COMMON BACKGROUND

14. Admitted that the Town passed a resolution that the Town would not enforce its ordinances in the area of the shore to which the state claims ownership. Otherwise, all allegations in this paragraph are denied. To the extent the allegations contain legal conclusions, no response is required, however Intervenor deny that the IDNR's claim of ownership or public trust rights was "unconstitutional" or "arbitrary"; that the IDNR has "backed down and retracted" its claim of ownership and public rights; that the Town has "asserted" public ownership through the Resolution; and that such a claim, if it existed, would be unsupported by law or unconstitutional.

15. Without making any admissions as to its authenticity, accuracy or relevance, the Constitution speaks for itself.

16. Without making any admissions as to its authenticity, accuracy or relevance, the Constitution speaks for itself.

17. Without making any admissions as to its authenticity, accuracy or relevance, the Constitution speaks for itself.

18. Denied. The State of Indiana holds title of the beds of Lake Michigan to the ordinary high water mark, consistent with the equal footing doctrine. Moreover, even to the extent title was transferred to private ownership, it would remain subject to public use rights under the public trust doctrine.

19. This paragraph states a legal conclusion for which no answer is necessary, and without making any admissions as to its authenticity, accuracy or relevance, the case speaks for itself, and not as selectively or misquoted by Plaintiffs. However, Intervenor deny that the cited

case, which addresses ownership of the shore of a river, is relevant or controlling with regard to ownership of the bed of Lake Michigan.

20. This paragraph states a legal conclusion for which no answer is necessary, and without making any admissions as to its authenticity, accuracy or relevance, the case speaks for itself. However, Intervenor deny that the cited stands for the proposition for which it is cited by Plaintiffs, and, regardless, a case addressing whether tidal laws apply to the ownership of the shore of a river, is not relevant or controlling with regard to ownership of the bed of Lake Michigan.

21. This paragraph states a legal conclusion for which no answer is necessary, and without making any admissions as to its authenticity, accuracy or relevance, the case speaks for itself. However, Intervenor deny that the cited case stands for the proposition for which it is cited by Plaintiffs, and, regardless, a case addressing accretion and erosion in the context of an inland lake is not relevant or controlling with regard to ownership of the bed of Lake Michigan.

22. This paragraph states a legal conclusion for which no answer is necessary, and without making any admissions as to its authenticity, accuracy or relevance, the statute speaks for itself. However, Intervenor deny the relevancy of Indiana Code Section 14-26-2 because it does not apply to Lake Michigan.

23. Without making any admissions as to its authenticity, accuracy or relevance, the statute speaks for itself.

24. This paragraph states a legal conclusion for which no answer is necessary, and without making any admissions as to its authenticity, accuracy or relevance, the statute speaks for itself. However, Intervenor deny the relevancy of Indiana Code Section 14-26-2; the statute

does not address the beds of Lake Michigan and the state cannot alienate its public trust responsibilities with regard to public ownership and use by implication.

25. Intervenors neither admit nor deny the allegations contained in this paragraph because of lack of knowledge or information sufficient to form a belief about the truth of the allegations. Without making any admissions as to its authenticity, accuracy or relevance, Exhibit 4 speaks for itself.

26. Intervenors neither admit nor deny the allegations contained in this paragraph because of lack of knowledge or information sufficient to form a belief about the truth of the allegations. Without making any admissions as to its authenticity, accuracy or relevance, Exhibit 5 speaks for itself.

27. Intervenors neither admit nor deny the allegations regarding the date the website was changed because of lack of knowledge or information sufficient to form a belief about the truth of the allegations, but the website speaks for itself as to its current content.

28. Intervenors neither admit nor deny the allegations regarding the date the website was changed because of lack of knowledge or information sufficient to form a belief about the truth of the allegations, but the website speaks for itself as to its current content.

29. Denied. Intervenors deny that the IDNR made such a concession in any way or form, and further deny that the IDNR would have the authority to abandon the State of Indiana's responsibility hold title to the beds of Lake Michigan up to the ordinary high water mark, even if it wanted to do so.

30. Denied. Intervenors deny that the IDNR made such a concession in any way or form, and further deny that the IDNR would have the authority to abandon the State of Indiana's

responsibility hold title to the beds of Lake Michigan up to the ordinary high water mark, even if it wanted to do so.

31. Admitted that the Town Council adopted a Resolution on November 12, 2012. Intervenor deny that Town made a claim of public ownership of property. The Resolution speaks for itself.

32. Intervenor neither admit nor deny the allegations regarding the date the website was changed because of lack of knowledge or information sufficient to form a belief about the truth of the allegations.

33. Denied. The Town Resolution, on its face, makes no such assertion, and the Resolution speaks for itself.

34. Denied that the IDNR withdrew its claim of state ownership, and denied that the Town Resolution is somehow contrary to the position that has been taken by the IDNR. Otherwise, the Resolution speaks for itself.

35. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that the Town Resolution suggests the Town is making this "claim", or that such a claim would be false, unconstitutional, arbitrary, or capricious if the Town were to make it.

36. This paragraph states a legal conclusion for which no answer is necessary, however Intervenor deny that the Town's Resolution has the effect of failing to enforce "private property rights" on the Lakefront, and deny that the Resolution is arbitrary, capricious, or contrary to law in any fashion.

37. Intervenor deny that the Town has failed "to enforce private property rights" and otherwise neither admit nor deny the allegations contained in this paragraph to the extent they

make claims about the minds and thoughts of the Town or its residents in their entirety because Intervenor's lack knowledge or information sufficient to form a belief about the truth of the allegations. Further, individual Intervenor's believed they had a right to use the beach, and had been using the beach, well before the Town Resolution was adopted such that there was no need for additional encouragement.

38. Denied. Intervenor's deny that Plaintiffs have title to beds of Lake Michigan to the ordinary high water mark, and deny that Plaintiffs were ever granted title to the water on the face of their deeds, such that Plaintiffs do not hold any title that could be affected by the Town Resolution. Moreover, the Town Resolution merely relies on the state's position with regard to title and regulatory jurisdiction, so if there any "doubt" cast on the title of Plaintiffs, it is cast by the state, not the Town. Finally, Intervenor's have personally used the beach and believed in their right to do so long before the Resolution was adopted, such that it cannot be the Town's action that have created any "doubt."

39. Denied. Intervenor's deny that Plaintiffs have title to beds of Lake Michigan to the ordinary high water mark, and deny that Plaintiffs were ever granted title to the water on the face of their deeds, such that Plaintiffs do not hold any title that could be affected by the Town Resolution. Moreover, the Town Resolution merely relies on the state's position with regard to title and regulatory jurisdiction, so if there any "doubt" cast on the title of Plaintiffs, it is cast by the state, not the Town. Finally, Intervenor's have personally used the beach and believed in their right to do so long before the Resolution was adopted, such that it cannot be the Town's action that have created any "doubt." To the extent they are have knowledge or information on these matters, Intervenor's deny that the Town action has caused confrontation; however, otherwise Intervenor's neither admit nor deny the allegations to the extent they do not contain information

or knowledge sufficient to form an opinion on the what has caused confrontations or what confrontations have occurred.

40. This paragraph states a legal conclusion for which no answer is necessary, however to the extent that Intervenor have information or knowledge on this subject, they deny that Plaintiffs have suffered damages that were caused by the Town's actions.

COUNT I – DECLARATORY JUDGMENT

41. Intervenor adopt their previous answers.

42. Denied. Plaintiffs have not provided any factual basis for the allegation that the Town has made this claim.

43. Denied. Plaintiffs have not provided any factual basis for the allegation that the Town has made this claim.

44. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor vigorously deny that there is no public right in the Lakefront under law, as the rights are well established.

45. Denied. Plaintiffs have not provided any factual basis for the allegation that the Town has made this claim or assertion of rights. Otherwise, this paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that the Town has acted unlawfully or unconstitutionally.

46. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that the Town has made any claims that are erroneous, arbitrary, capricious, or contrary to law.

47. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that declaratory relief is proper in this case.

48. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that there is a justiciable controversy.

COUNT II – COLOR OF STATE LAW

49. Intervenor adopt their previous answers.

50. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that the Town deprived Plaintiffs of their real property or that damages are owed.

51. Intervenor neither admit nor deny the allegations regarding whether Plaintiffs have incurred attorney fees due to a lack of knowledge or information sufficient to form a belief about the truth of the allegations, but Intervenor deny that Plaintiffs' rights have been infringed such that defense was necessary.

COUNT III – MANDAMUS/INVERSE TAKING

52. Intervenor adopt their previous answers.

53. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that the Town has asserted ownership or public trusts rights that would constitute a taking of Plaintiffs' property rights for which just compensation is due.

54. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny Plaintiffs have property rights that have been taken such that they would be entitled to just compensation under the United States Constitution, and further deny

that the public right to use the shore of Lake Michigan to the ordinary high water mark could form the basis for a just compensation claim under law..

55. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny Plaintiffs have property rights that have been taken such that they would be entitled to just compensation under due process or due course of law.

56. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny the Town has undertaken any action that would constitute an uncompensated taking of their property rights and deny that there would be no plain adequate remedy at law even if they had.

57. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that any criteria in Indiana Code Section 32-24-1-16 are present that would create a clear duty for the Town commence appropriate proceedings or award just compensation.

COUNT IV – MANDAMUS-INVERSE TAKING

58. Intervenor adopt their previous answers.

59. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that the Town has taken action that would constitute appropriation of any private property, and deny that the public right to use the shore of Lake Michigan to the ordinary high water mark could form the basis for a just compensation claim under law.

60. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny due process or due course of law mandate any payment to the Plaintiffs here.

61. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that there has been any taking of Plaintiffs' property by the Town and deny that Plaintiffs' would have no plain and adequate remedy at law if there had been.

62. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that any criteria in Indiana Code Section 32-24-1-16 are present that would create a clear duty for the Town commence appropriate proceedings or award just compensation or damages incurred.

COUNT V – HOME RULE VIOLATIONS

63. Intervenor adopt their previous answers.

64. This paragraph states a legal conclusion for which no answer is necessary.

65. This paragraph states a legal conclusion for which no answer is necessary, and without making any admissions as to its authenticity, accuracy or relevance, the statute speaks for itself.

66. This paragraph states a legal conclusion for which no answer is necessary, and Intervenor neither admit nor deny the allegations because of lack of knowledge or information sufficient to form a belief about the truth of the allegations.

67. Denied. The Resolution does not purport to define State ownership of real property or regulatory authority; it relies on the state's own definition.

68. This paragraph states a legal conclusion for which no answer is necessary, however, Intervenor deny that the Town has undertaken any action that would constitute an exercise of power withheld by the General Assembly or violate the Home Rule Act.

69. Denied that Plaintiffs are entitled to any relief, injunction, or declaratory judgment.

DEFENSES AND AFFIRMATIVE DEFENSES

Intervenor-Defendants Long Beach Community Alliance (LBCA), Patrick Cannon, David Oei, Roger Gansauer, and Bernard Rabinowitz ("Intervenors"), through their attorneys, Olson, Bzdok & Howard, P.C., state the following defenses to the Complaint of Plaintiffs LCLHA, LLC, Margaret L. West, and Don H. Gunderson ("Plaintiffs"):

1. Plaintiff has failed to state a sufficient cause of action and have failed to name the real party in interest.
2. Plaintiffs' claims fail as a matter of law.
3. Plaintiffs have not established standing to raise their claims. Regardless of where the boundary of state ownership or regulatory jurisdiction is located, Plaintiffs have not established that their title extends to even the ordinary high water mark of Lake Michigan or that they hold riparian rights. On the face of the plat, their title does not extend to Lake Michigan.
4. The Town Resolution is a valid exercise of the Town's power and authority.
 - a. The Resolution does not "claim" or "assert" any interest in private property; it merely adopts a policy as to where the Town will enforce some of its ordinance within the Town.
 - b. The Resolution's rationale relies on the state's recognition of its ownership and regulatory jurisdiction, but even if there were no public rights in the shore up to the ordinary high water mark, it would not render the Town's discretionary decision to decline to enforce its ordinances invalid.

c. The Town Resolution is with the Town's authority and has not preempted by state law and does not violate the Home Rule Act.

d. The Town is immune from suit under laws and constitution.

5. The Town Resolution does not effect a taking; Plaintiffs do not hold the exclusive title rights they claim, and, regardless, the Resolution cannot be a state action forming the basis of a taking claim because it does not affect, and does not purport to affect, the boundaries of private title or interest or arise to the level of a regulatory taking.

6. Plaintiffs cannot claim exclusive title to the shores of Lake Michigan between the ordinary low and high water marks.

a. There are public rights in the shore of Lake Michigan to the ordinary high water mark. Under the equal footing and public trust doctrine, and under Indiana common law, long-held principles of law establish that at the time of statehood, Indiana took title to the beds of Lake Michigan to the ordinary high watermark, in order to hold the waters and the beds in trust for the public, and because the State of Indiana has not and cannot alienate its duty to hold the property for the public trust, the public has the right to use the shore of Lake Michigan to the ordinary high water mark.

b. There are public riparian rights at the end of the platted right-of-ways in the Long Beach plat such that Plaintiffs cannot claim there are no public rights in the shore of Lake Michigan to the ordinary high water mark.

c. The public and/or Intervenors as individuals and their predecessors in title have established prescriptive easements over the shore of Lake Michigan to the ordinary high water mark, under the common law and Ind. Code 32-23-1-1.

d. Plaintiffs have acquiesced to public and individual use of the shore of Lake Michigan to the ordinary high water mark.

e. Intervenor who own property in the same plat Plaintiffs' property have rights to access the shore under the plat.

7. The public rights derived from the equal footing doctrine and the public trust cannot be the basis for a just compensation claim.

8. The claims, including takings and due process claims under federal constitution, are premature, not ripe for review, and otherwise not subject to this Court's jurisdiction.

9. Plaintiffs are estopped from raising the claim that there are no public rights in the shore of Long Beach of their own conduct allowing the public to use the beach; on which Intervenor relied in purchasing their homes and using the beaches and will be injured and suffer damages if Plaintiffs are granted the relief they seek.

OLSON, BZDOK & HOWARD, P.C.
Attorneys for Intervening Defendants

Date: March 22, 2013

By: _____
James M. Olson (P18485)
Katherine E. Redman (P74030)

EXHIBIT A

PROPOSED JOINT ANSWER BY APPLICANT
INTERVENORS

Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES

LBLHA et al. v. Town of Long Beach, Indiana
CASE NO. 46C01-1212-PL-001941

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,)
and DON H. GUNDERSON)
)
 Plaintiffs,)
)
 v.)
)
TOWN OF LONG BEACH, INDIANA)
)
 Defendant,)
)
ALLIANCE FOR THE GREAT LAKES)
and SAVE THE DUNES,)
)
 Applicants for Intervention)
 as Defendants.)

**PROPOSED JOINT ANSWER BY APPLICANT INTERVENORS ALLIANCE FOR THE
GREAT LAKES AND SAVE THE DUNES TO THE COMPLAINT OF PLAINTIFFS**

Applicants for Intervention as Defendants Alliance for the Great Lakes and Save the Dunes
("Applicants"), by counsel, file their proposed answer and defenses to Plaintiffs' Complaint as
follows:

GENERAL DENIAL

Unless specifically admitted below, Applicants deny each and every allegation contained in the
Complaint.

ANSWERS TO COMPLAINT

Parties

COMPLAINT ¶1. This is an action for declaratory judgment to declare unconstitutional the Resolution passed on November 12, 2012 by the Town Council of the Town of Long Beach claiming an alleged public right binding the property of the Plaintiffs and for which the Plaintiffs are damaged.

ANSWER TO ¶1: Applicants admit in part and deny in part the allegations in ¶1 of the Complaint. Applicants admit that this is an action for declaratory judgment regarding a Resolution passed on November 12, 2012 by the Town Council of Long Beach, Indiana. The remainder of ¶1 represents conclusions of law; Applicants deny that the Resolution is unconstitutional, that the Resolution claims an alleged public right binding the property of the Plaintiffs, and that Plaintiffs are damaged.

COMPLAINT ¶2. The LBLHA, LLC (the "Association") is an Indiana limited liability company with its principal place of business in Long Beach, Indiana. The Association is comprised of private property owners of real property abutting Lake Michigan in the Town of Long Beach, Indiana.

ANSWER TO ¶2: Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶2 of the Complaint and on that basis deny these allegations.

COMPLAINT ¶3. Margaret L. West ("Ms. West") is an individual and a property owner in

Long Beach, Indiana. She owns or has rights in property commonly known as 2036 Lake Shore Drive, Long Beach, Indiana. A true and accurate copy of Ms. West's deed is attached hereto as Exhibit 1.

ANSWER TO ¶3: Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶3 of the Complaint and on that basis deny these allegations.

COMPLAINT ¶4: Ms. West is a member of the Association.

ANSWER TO ¶4: Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶4 of the Complaint and on that basis deny these allegations.

COMPLAINT ¶5: Don H. Gunderson ("Mr. Gunderson") is an individual and a property owner in Long Beach, Indiana. He owns or has rights in property commonly known as 2120 Lake Shore Drive, Long Beach, Indiana. A true and accurate copy of Mr. Gunderson's deed is attached hereto as Exhibit 2.

ANSWER TO ¶5: Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶5 of the Complaint and on that basis deny these allegations.

COMPLAINT ¶6: Mr. Gunderson is a member of the Association.

ANSWER TO ¶6: Applicants are without knowledge or information sufficient to form a

ANSWER TO ¶10: Applicants deny that the Town claims a public right to any particular unnamed property, wherever it may be located. The Resolution in controversy indicates that the Town recognizes and accepts the published position of the Indiana Department of Natural Resources regarding the definition and significance of the IGLD ordinary high water mark on Lake Michigan and uses that IGLD line to set enforcement policy for some public beach accesses and Town-owned lots within Town limits.

COMPLAINT ¶11: There is no public right to this certain property.

ANSWER TO ¶11: Applicants deny the allegations in ¶11 in its entirety. Applicants deny that there is no public right to any particular unnamed property.

COMPLAINT ¶12: This Court has jurisdiction to determine the Town's lack of any public right.

ANSWER TO ¶12: Applicants admit that this Court has "subject matter jurisdiction" to hear this case, but otherwise deny jurisdiction with respect to any other type or definition of jurisdiction that might be recognized under Indiana law.

COMPLAINT ¶13: Venue is appropriate in LaPorte County as the real property at issue is located in LaPorte County, Long Beach, Indiana.

ANSWER TO ¶13: Applicants admit that LaPorte County is the proper venue for this case.

Common Background

GENERAL DENIAL: Applicants generally deny Plaintiffs' Common Background because it does not represent or reflect Applicants' version of the background to this case.

COMPLAINT ¶14[s1]: This matter arises from the Town's actions and the actions by the Indiana Department of Natural Resources ("IDNR").

ANSWER TO ¶14[s1]: Applicants deny the allegations in ¶14, sentence 1, in its entirety. The Town's actions do not give rise to an actionable claim for relief. Plaintiffs' claims are based on their incorrect interpretation of the Town's actions, which adopt IDNR's position on the ordinary high water mark and set forth an enforcement policy using that mark as a reference. Furthermore, the Complaint does not specify any IDNR or State actions that would give rise to an actionable claim for relief. In any event, neither IDNR nor the State is named as a party defendant in this case. The Complaint fails to state a claim for relief such that the Town could be held liable for actions of IDNR or the State.

COMPLAINT ¶14[s2]: At one point, the IDNR unconstitutionally and arbitrarily claimed the State of Indiana "owned" and or held in trust for the citizens of Indiana, property abutting Lake Michigan in Long Beach.

ANSWER TO ¶14[s2]: Applicants deny the allegations in ¶14, sentence 2, in its entirety. Any claim by the State of Indiana that it "owned" and/or held in trust for the citizens of Indiana property lakeward of the ordinary high water mark of Lake Michigan in Long Beach would not be unconstitutional or arbitrary. Applicants also deny that such property would be "abutting

Lake Michigan”; rather, property lakeward of the ordinary high water mark of Lake Michigan is within the bed of Lake Michigan.

COMPLAINT ¶14[s3]: Based on the IDNR’s claim, the Town passed an unconstitutional and arbitrary resolution claiming that certain property in Long Beach abutting Lake Michigan was “public” or held in trust for the citizens of Indiana so that all may use it; that the Town supported the public use; and that the Town would not enforce private property rights in the claimed public area.

ANSWER TO ¶14[s3]: Applicants deny the allegations in ¶14, sentence 3, in its entirety. The Resolution in controversy is not unconstitutional and arbitrary. The Resolution in controversy does not claim that certain property in Long Beach was “public” or held in trust for the citizens of Indiana so that all may use it. The Resolution indicates that the Town recognizes and accepts the published position of the Indiana Department of Natural Resources regarding the definition and significance of the IGLD ordinary high water mark on Lake Michigan and uses that IGLD line to set enforcement policy for some public beach accesses and Town-owned lots within Town limits.

COMPLAINT ¶14[s4]: However, based upon the law as shown by the Plaintiffs, the IDNR backed down and retracted its claim of State ownership of property abutting Lake Michigan in Long Beach, Indiana.

ANSWER TO ¶14[s4]: Applicants deny the allegations in ¶14, sentence 4, in its entirety. Applicants deny that IDNR backed down or retracted a claim of State ownership of any property,

including property lakeward of the ordinary high water mark of Lake Michigan in Long Beach. Applicants also deny that such property would be “abutting Lake Michigan”; rather, property lakeward of the ordinary high water mark of Lake Michigan is within the bed of Lake Michigan.

COMPLAINT ¶14[s5]: Unfortunately, the Town has not backed off its claim asserting public ownership of land abutting Lake Michigan necessitating the Plaintiffs to file this lawsuit to prove by declaratory judgment that the Town's assertion and reliance on a public right to land abutting Lake Michigan in Long Beach, Indiana is unsupported by law, unconstitutional and cannot stand.

ANSWER TO ¶14[s5]: Applicants deny the allegations in ¶14, sentence 5, in its entirety. Applicants deny that the Town made a claim asserting public ownership or public rights on any land, including property lakeward of the ordinary high water mark of Lake Michigan in Long Beach. The Resolution in controversy indicates that the Town recognizes and accepts the published position of the Indiana Department of Natural Resources regarding the definition and significance of the IGLD ordinary high water mark on Lake Michigan and uses that IGLD line to set enforcement policy for some public beach accesses and Town-owned lots within Town limits. Applicants also deny that such property would be “abutting Lake Michigan”; rather, property lakeward of the ordinary high water mark of Lake Michigan is within the bed of Lake Michigan. The Town's actions did not necessitate this lawsuit.

COMPLAINT ¶15: Indiana Constitution Article 1, Section 21 states: . . . No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such

compensation first assessed and tendered.

ANSWER TO ¶15: Applicants admit that Indiana Constitution Article 1, Section 21 states what Plaintiffs say it states in ¶15.

COMPLAINT ¶16: Indiana Constitution Article 1, Section 24 states: No ex post facto law, or law impairing the obligation of contracts, shall ever be passed.

ANSWER TO ¶16: Applicants admit that Indiana Constitution Article 1, Section 24 states what Plaintiffs say it states in ¶16.

COMPLAINT ¶17: The Fifth Amendment to the United States Constitution states: “No person ... shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

ANSWER TO ¶17: Applicants admit that the Fifth Amendment to the United States Constitution states what Plaintiffs say it states in ¶17.

COMPLAINT ¶18: Legal title to the parcels of real property abutting Lake Michigan in Long Beach, Indiana has been in private ownership since before the Town was incorporated in 1921.

ANSWER TO ¶18: Applicants deny the allegations in ¶18 in its entirety. Applicants deny that any property lakeward of the ordinary high water mark of Lake Michigan in Long Beach is or has ever been in private ownership. Applicants also deny that such property would be “abutting Lake Michigan”; rather, property lakeward of the ordinary high water mark of Lake Michigan is within the bed of Lake Michigan.

COMPLAINT ¶19: Indiana recognized that title to the uplands, shore, beach, and bank abutting navigable waters belong to the riparian/littoral owner. See, *Bainbridge v. Sherlock*, 29 Ind. 364, 367 (1868). The Indiana Supreme Court explained:

The inquiry that meets us at the threshold is, what are the rights of the navigator of this [navigable waterway], to use its banks and margins? The [water] is a great navigable highway between states, and the public have all the rights that by law appertain to public [lake] as against the riparian owner. But 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. The banks belong to the riparian owner, and he owns an absolute fee down to the low water mark. *Bainbridge v. Sherlock*, 29 Ind. 364, 367 (1868) (emphasis added).

The right to the use of the river as a highway for passage is distinct from the right to land for the purpose of receiving or discharging freight and passengers. The former is secured to the public; the latter must be exercised with reference to the rights of the riparian owner. *Bainbridge v. Sherlock*, 29 Ind. 364, 369 (1868)

ANSWER TO ¶19: Applicants deny the allegations in ¶19 in its entirety. Applicants deny that Indiana has recognized that title to the uplands, shore, beach, and bank abutting navigable waters belong to the riparian/littoral owner. Rather, *Bainbridge v. Sherlock*, 29 Ind. 364, 367 (1868), at its most favorable for Plaintiffs, applies to the Ohio River only. *Bainbridge v. Sherlock* does not control the resolution of Plaintiffs' claims for Lake Michigan. Applicants also deny that the purported quotation accurately quotes the text in *Bainbridge v. Sherlock*. First, Plaintiffs' substitution of the phrases and words "navigable water," "water" and "lake" within brackets for the Court's actual phrases and words "river," "Ohio River," and "rivers," respectively, is incorrect as a matter of law. Second, the purported quotation in ¶19 contains several copy errors.

COMPLAINT ¶20: Indiana is not a tidal state. Indiana's Supreme Court has stated that rules regarding tidal seas do not apply in Indiana. *Stinson v. Butler*, 4 Blackf. 285 (Ind. 1837).

ANSWER TO ¶20: Applicants deny that Indiana's Supreme Court has stated that rules regarding tidal seas do not apply in Indiana. *Stinson v. Butler*, 4 Blackf. 285 (Ind. 1837) does not control the resolution of Plaintiffs' claims for Lake Michigan. Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶20 that "Indiana is not a tidal state," and on that basis deny this allegation.

COMPLAINT ¶21[s1]: Although Indiana recognized that even non-tidal water moves, the common law doctrines of erosion and accretion apply to determine ownership rights when the waters move.

ANSWER TO ¶21[s1]: Applicants deny the allegations in ¶21, sentence 1 in its entirety. Applicants deny that the doctrines of erosion and accretion apply to determine ownership rights when waters move. Rather, the doctrines of accretion, reliction, and erosion influence ownership rights on Lake Michigan when the ordinary high water mark moves gradually and imperceptibly due to natural processes such as long-term changes in water levels. Moreover, the common law doctrines of erosion and accretion are not the sole determinates of ownership rights when water moves.

COMPLAINT ¶21[s2]: When the water moves naturally, the title of the owner does not change. *Parkinson v. McCue*, 831 N.E. 2d 118, 130 (Ind. Ct. App. 2005).

ANSWER TO ¶21[s2]: Applicants deny the allegations in ¶21, sentence 2 in its entirety. Applicants deny that when the water moves naturally, the title of the owner does not change, and further deny that *Parkinson v. McCue* states or stands for such a proposition.

COMPLAINT ¶22: Any concept of “trust” ownership regarding the public waters of Indiana is codified at Indiana Code § 14-26-2 *et seq.*

ANSWER TO ¶22: Applicants deny the allegations in ¶22 in its entirety. Applicants deny Indiana Code § 14-26-2 *et seq.* codifies every common law concept of trust ownership. Rather, the statute codifies the concept for only a subset of Indiana’s waters.

COMPLAINT ¶23: Indiana Code § 14-26-2-1 expressly “does not apply to ... (1) Lake Michigan; (2) Land under the waters of Lake Michigan; (3) Any part of the land in Indiana that borders on Lake Michigan.” (emphasis added).

ANSWER TO ¶23: Applicants admit that the stated quotation in ¶23 is from Indiana Code § 14-26-2-1.

COMPLAINT ¶24: As a result of Indiana Code § 14-26-2-1, there is no public right regarding (1) Lake Michigan; (2) Land under the waters of Lake Michigan; (3) Any part of the land in Indiana that borders on Lake Michigan.

ANSWER TO ¶24: Applicants deny the allegations in ¶24 in its entirety. Applicants deny that Indiana Code § 14-26-2-1 controls the public rights for Lake Michigan. Section 14-26-2-1, by Plaintiffs’ own admission, does not apply to Lake Michigan, so it does not speak to the rights referenced in ¶24.

COMPLAINT ¶25: Prior to October 10, 2012, the Indiana Department of Natural Resources (“IDNR”) maintained on a web posting found at <http://www.in.gov/dnr/water/3658.htm> that

claimed: "The dividing line on Lake Michigan and other navigable waterways between public and private ownership is the ordinary high watermark;" and, claimed that the "State 'does' own part of the dry beach [below the ordinary high water mark]." A true and accurate copy of the web posting as it was before October 10, 2012 is attached as Exhibit 4.

ANSWER TO ¶25: Applicants are without knowledge or information sufficient to form a belief as to the truth of whether this quote was on the web site prior to October 10, 2012, and on that basis deny this allegation. Exhibit 4 speaks for itself.

COMPLAINT ¶26: However, on October 10, 2012 the IDNR changed its web posting found at <http://www.in.gov/dnr/water/3658.htm>. A true and accurate copy of the post October 10, 2012 web posting is attached as Exhibit 5.

ANSWER TO ¶26: Applicants are without knowledge or information sufficient to form a belief as to the truth of whether the web posting was changed on October 10, 2012, and on that basis deny this allegation. Exhibit 5 speaks for itself.

COMPLAINT ¶27: Since October 10, 2012, the IDNR's web posting found at <http://www.in.gov/dnr/water/3658.htm>, states: "The ordinary high watermark is the line on Lake Michigan and other navigable waterways used to designate where regulatory jurisdiction lies and in *certain instances* to determine where public use and ownership begins and/or ends." (emphasis added).

ANSWER TO ¶27: Applicants admit that the stated quotation can currently be found at the web site <http://www.in.gov/dnr/water/3658.htm>. Applicants are without knowledge or

information sufficient to form a belief as to the truth of whether the web posting was changed on October 10, 2012, and on that basis deny this allegation.

COMPLAINT ¶28: In addition, the post October 10, 2012 web posting sketches no longer include the claim that the “State ‘does’ own part of the dry land [below the ordinary high water mark].” The IDNR replaced its claim of ownership with the statement that “State ‘does’ regulate part of the dry beach [below the ordinary high water mark]”. Exhibit 5 (emphasis added).

ANSWER TO ¶28: Applicants admit in part and deny in part the allegations in ¶28 of the Complaint. Applicants deny that the IDNR “replaced its claim of ownership” on the web posting at <http://www.in.gov/dnr/water/3658.htm>. As Plaintiffs acknowledge in ¶27, the IDNR’s web posting at <http://www.in.gov/dnr/water/3658.htm> also states that the ordinary high water mark is used to “designate where regulatory jurisdiction lies and in certain instances to determine where public use and ownership begins and/or ends.” *See also* Compl. Ex. 5, at 1. Applicants admit that the web posting’s “sketch” at <http://www.in.gov/dnr/water/3658.htm> currently states, “State does regulate part of the dry beach,” but the phrase Plaintiffs have added in brackets does not appear in the sketch. Applicants are without knowledge or information sufficient to form a belief as to the truth of whether the web posting was changed on October 10, 2012, and on that basis deny this allegation.

COMPLAINT ¶29: The IDNR conceded that the State does not own the area below the ordinary high watermark (“OHWM”) in Long Beach, Indiana.

ANSWER TO ¶29: Applicants deny the allegations in ¶29 in its entirety. Applicants deny that

IDNR has conceded that the State does not own the area below the ordinary high watermark ("OHWM") in Long Beach, Indiana. The web posting at <http://www.in.gov/dnr/water/3658.htm> continues to refer to the ordinary high water mark as a boundary of public use and ownership, and other IDNR publications do so as well.

COMPLAINT ¶30: The IDNR acknowledged that the OHWM is merely a line marking its regulatory jurisdiction.

ANSWER TO ¶30: Applicants deny the allegations in ¶30 in its entirety. Applicants deny that IDNR has acknowledged that the OHWM is merely a line marking its regulatory jurisdiction. The IDNR's posting at <http://www.in.gov/dnr/water/3658.htm> states that the ordinary high water mark is used to "designate where regulatory jurisdiction lies and in certain instances to determine where public use and ownership begins and/or ends." *See also* Compl. Ex. 5, at 1.

COMPLAINT ¶31: On November 12, 2012, the Town Council adopted a resolution regarding its claim of public ownership of property in Long Beach abutting Lake Michigan. A true and accurate copy of the unsigned Resolution is attached as Exhibit 6.

ANSWER TO ¶31: Applicants deny that the Resolution claims public ownership of property in Long Beach, including property lakeward of the ordinary high water mark of Lake Michigan in Long Beach. The Resolution in controversy indicates that the Town recognizes and accepts the published position of the Indiana Department of Natural Resources regarding the definition and significance of the IGLD ordinary high water mark on Lake Michigan and uses that IGLD line to set enforcement policy for some public beach accesses and Town-owned lots within Town

limits. Although the Resolution refers to enforcement of “private property ordinances,” this is likely a drafting error and is intended to read “public property ordinances.” Applicants also deny that such property would be “abutting Lake Michigan”; rather, property lakeward of the ordinary high water mark of Lake Michigan is within the bed of Lake Michigan. Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegation about Exhibit 6 and on that basis deny these allegations. Applicants admit that the Resolution was passed by the Town Council on November 12, 2012.

COMPLAINT ¶32: The Town has a copy of the signed Resolution.

ANSWER TO ¶32: Applicants are without knowledge or information sufficient to form a belief as to the truth of these allegations in ¶32, and on that basis deny these allegations.

COMPLAINT ¶33: In its Resolution, the Town asserted that the dry land – land not covered by the waters of Lake Michigan – below the ordinary high water mark, 581.5 feet, in Long Beach is public property, held in trust and free for all citizens to use.

ANSWER TO ¶33: Applicants deny the allegations in ¶33 in its entirety. Applicants deny that the Town, in its Resolution, asserts that any land is public property, held in trust and free for all citizens to use. Applicants deny that land not at any particular moment covered by the waters of Lake Michigan is “dry land.”

COMPLAINT ¶34: Despite the withdrawal of the IDNR’s claim of State ownership, the Town, by its Town Council and the adoption of the Resolution, adopted a practice that the Town,

by its Police Department, will not enforce private property rights below an administratively set ordinary high water mark, found at 312 IAC§ 1-1-26, which for Lake Michigan in Indiana is set at 581.5 feet above sea level (the “OHWM”).

ANSWER TO ¶34: Applicants deny the allegations in ¶34 in its entirety. Applicants deny that there was any withdrawal of the IDNR’s claim of State ownership. Applicants deny that the Resolution adopts a practice that the Town police will not enforce private property rights below the OHWM. The Resolution in controversy indicates that the Town recognizes and accepts the published position of the Indiana Department of Natural Resources regarding the definition and significance of the IGLD ordinary high water mark on Lake Michigan and uses that IGLD line to set enforcement policy for some public beach accesses and Town-owned lots within Town limits. Although the Resolution refers to enforcement of “private property ordinances,” this is likely a drafting error and is intended to read “public property ordinances.”

COMPLAINT ¶35: The Town’s claim that the property abutting Lake Michigan in Long Beach Indiana below the OHWM (the “Lakefront”) is public or held in trust by the State for the use of the citizens of Indiana is false, unconstitutional, arbitrary and capricious.

ANSWER TO ¶35: Applicants deny the allegations in ¶35 in its entirety. Applicants deny that the Town claims in its Resolution that the property abutting Lake Michigan in Long Beach, Indiana below the OHWM is public or held in trust by the State for the use of the citizens of Indiana. The Resolution in controversy indicates that the Town recognizes and accepts the published position of the Indiana Department of Natural Resources regarding the definition and significance of the IGLD ordinary high water mark on Lake Michigan and uses that IGLD line to

set enforcement policy for some public beach accesses and Town-owned lots within Town limits. Even if the Town had made such a statement, it would not be false, unconstitutional, arbitrary or capricious.

COMPLAINT ¶36: The Town's failure to enforce private property rights on the Lakefront is arbitrary, capricious and contrary to law.

ANSWER TO ¶36: Applicants deny the allegations in ¶36 in its entirety. Applicants deny that the Resolution states that the Town will not enforce private property rights below the OHWM. The Resolution in controversy indicates that the Town recognizes and accepts the published position of the Indiana Department of Natural Resources regarding the definition and significance of the IGLD ordinary high water mark on Lake Michigan and uses that IGLD line to set enforcement policy for some public beach accesses and Town-owned lots within Town limits. Although the Resolution refers to enforcement of "private property ordinances," this is likely a drafting error and is intended to read "public property ordinances."

COMPLAINT ¶37: The Town's failure to enforce private property rights on the Lakefront has encouraged the Town and other residents to claim and use the Lakefront as public in contravention to the Plaintiffs' deeds, grants and plat.

ANSWER TO ¶37: Applicants deny the allegations in ¶37 in its entirety. Applicants deny that the Town is failing to enforce private property rights on the Lakefront, as stated in Answer to ¶36. Applicants deny that Plaintiffs' deeds, grants, and plats convey ownership of any property below the ordinary high water mark of Lake Michigan because the State holds title to that land

and has not transferred title to Plaintiffs or their predecessors in interest. Applicants deny that any action by the Town has encouraged the Town and other residents to claim and use the Lakefront as public.

COMPLAINT ¶38: The Town's actions have cast doubt on the Plaintiffs' titles.

ANSWER TO ¶38: Applicants deny the allegations in ¶38 in its entirety. Applicants deny that any action by the Town has cast doubt on Plaintiffs' valid title to property.

COMPLAINT ¶39: The Town's actions have cast doubt on the Plaintiffs' titles and have caused confrontations regarding true ownership of the Lakefront.

ANSWER TO ¶39: Applicants deny the allegations in ¶39 in its entirety. Applicants deny that any action by the Town has cast doubt on Plaintiffs' valid title to property. Applicants deny that any action by the Town has caused confrontations regarding ownership of the lakefront.

COMPLAINT ¶40: The Town's actions have damaged the Plaintiffs.

ANSWER TO ¶40: Applicants deny the allegations in ¶40 in its entirety. Applicants deny that any action by the Town has damaged Plaintiffs.

Count I: Declaratory Judgment

COMPLAINT ¶41: Paragraphs 1- 40 are incorporated herein.

ANSWER TO ¶41: Applicants incorporate by reference their answers to paragraphs 1 through 40 of this Answer as if fully set forth herein.

COMPLAINT ¶42: An actual controversy exists regarding the Town's claimed public rights in the Lakefront.

ANSWER TO ¶42: Applicants deny the allegations in ¶42 in its entirety. The Town has not claimed general public rights in the Resolution in controversy, except that the Resolution refers to "publicly owned beach accesses."

COMPLAINT ¶43: The Town of Long Beach contends that the Lakefront is property held in trust and free for all citizens to use.

ANSWER TO ¶43: Applicants deny the allegations in ¶43 in its entirety. The Town has not claimed general public trust rights on the lakefront in the Resolution in controversy, except that the Resolution refers to "publicly owned beach accesses."

COMPLAINT ¶44: However, there is no public right burdening the Lakefront as shown by law, including the United States Constitution, the Indiana Constitution, Indiana property rights, case law, the Indiana Code and Indiana Administrative Code.

ANSWER TO ¶44: Applicants deny the allegations in ¶44 in its entirety. There are public trust rights burdening the shore of Lake Michigan below the ordinary high water mark as shown by Indiana law and federal law and as supported by the law of other states.

COMPLAINT ¶45: The Town is unlawfully and unconstitutionally claiming and asserting rights on the Lakefront which are not part of the public trust.

ANSWER TO ¶45: Applicants deny the allegations in ¶45 in its entirety. There are public trust rights burdening the shore of Lake Michigan below the ordinary high water mark as shown by Indiana law and federal law and as supported by the law of other states. However, the Town has not claimed or asserted such rights in its Resolution in controversy.

COMPLAINT ¶46: The Town's claims are erroneous, arbitrary, capricious and contrary to law.

ANSWER TO ¶46: Applicants deny the allegations in ¶46 in its entirety. There are public trust rights burdening the shore of Lake Michigan below the ordinary high water mark as shown by Indiana law and federal law and as supported by the law of other states. However, the Town has not claimed or asserted such rights in its Resolution in controversy. Even if the Town had made such claims, they would not be erroneous, arbitrary, capricious or contrary to law.

COMPLAINT ¶47: Determination of the Town's Lakefront claims is particularly well suited for declaratory relief.

ANSWER TO ¶47: Applicants deny the allegations in ¶47 in its entirety. Under Indiana law, Plaintiffs are not entitled to a declaratory judgment when they are claiming that the government has taken their property for a public use. Inverse condemnation is the sole claim available to Plaintiffs.

COMPLAINT ¶48: A justiciable controversy exists as to the invalidity of the Town's claims regarding the Lakefront in Long Beach, Indiana. THEREFORE, pursuant to Indiana Code § 34-

14-1 *et seq.*, the Indiana Declaratory Judgment Act, the Plaintiffs request this Court declare that there are no public rights on the Lakefront in Long Beach, Indiana and grant all other appropriate relief.

ANSWER TO ¶48: Applicants deny the allegations in ¶48 in its entirety. Under Indiana law, Plaintiffs are not entitled to a declaratory judgment when they are claiming that the government has taken their property for a public use. Inverse condemnation is the sole claim available to Plaintiffs. With respect to Plaintiffs' prayer for relief, Applicants deny that Plaintiffs are entitled to any relief whatsoever under the Indiana Declaratory Judgment Act or any other law, either as prayed for in the Complaint or otherwise. Moreover, Applicants deny that there are no public rights on the shore of Lake Michigan.

Count II: Color of State Law

COMPLAINT ¶49: Paragraphs 1- 48 are incorporated herein.

ANSWER TO ¶49: Applicants incorporate by reference their answers to paragraphs 1 through 48 of this Answer as if fully set forth herein.

COMPLAINT ¶50: The Town, by its duly elected Town Council, acted under color of state law and deprived the Plaintiffs of their real property secured by the Constitution and laws of this Country and State and for which damages are owed.

ANSWER TO ¶50: Applicants deny the allegations in ¶50 in its entirety. Applicants deny that Plaintiffs have been deprived of their real property by any action of the Town, including passage of the Resolution in controversy.

COMPLAINT ¶51: The Plaintiffs have incurred attorneys' fees and costs associated with defending their rights secured by the Constitution and laws of this Country and State.

THEREFORE, in addition to the relief sought in Count I, Plaintiffs request the Court award Plaintiffs their attorneys' fees and costs incurred defending their constitutionally secured property rights and grant all other appropriate relief.

ANSWER TO ¶51: Applicants deny the allegations in ¶51 in its entirety. Applicants deny that Plaintiffs have incurred attorney fees or costs "defending their rights" since their rights have not been infringed upon. With respect to Plaintiffs' prayer for relief, Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise.

Count III: Mandamus/Inverse Taking

COMPLAINT ¶52: Paragraphs 1- 51 are incorporated herein.

ANSWER TO ¶52: Applicants incorporate by reference their answers to paragraphs 1 through 51 of this Answer as if fully set forth herein.

COMPLAINT ¶53: Alternately, the Town's arbitrary and capricious assertion of ownership, public trust rights and exercise of ownership rights on the Lakefront is an unconstitutional temporary taking of Plaintiffs' property rights for which just compensation is due.

ANSWER TO ¶53: Applicants deny the allegations in ¶53 in its entirety. Applicants deny that the Town, through its Resolution, has asserted ownership, public trust rights and exercise of ownership rights on the lakefront. Applicants deny that even if the Town had made such an

assertion that it would be arbitrary and capricious or an unconstitutional temporary taking of Plaintiffs' property rights for which just compensation is due.

COMPLAINT ¶54: The Indiana Constitution, Article I, Section 21 and the Fifth Amendment to the United States Constitution, mandate that the Town pay Plaintiffs just compensation for their property rights.

ANSWER TO ¶54: Applicants deny the allegations in ¶54 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise. Plaintiffs' property rights have not been taken or appropriated by the Town or any other government entity.

COMPLAINT ¶55: Due process and due course of law mandate that the Town pay Plaintiffs just compensation for their property rights.

ANSWER TO ¶55: Applicants deny the allegations in ¶55 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise. Plaintiffs' property rights have not been taken or appropriated by the Town or any other government entity.

COMPLAINT ¶56: The Plaintiffs have no plain and adequate remedy at law due to the uncompensated taking of their property rights by the Town.

ANSWER TO ¶56: Applicants deny the allegations in ¶56 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the

Complaint or otherwise. Plaintiffs' property rights have not been taken by the Town or any other government entity.

COMPLAINT ¶57: The Town has a clear duty pursuant to Indiana Code § 32-24-1-16 to commence appropriate proceedings and determine just compensation for the property temporarily claimed and damages incurred. THEREFORE, and in the alternative, the Plaintiffs request a writ of mandamus compelling the Town to commence appropriate eminent domain proceedings to determine the amount of just compensation due each Plaintiff for the real property rights temporarily taken and resulting damages incurred and award all other appropriate relief.

ANSWER TO ¶57: Applicants deny the allegations in ¶57 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise. Plaintiffs' property rights have not been taken by the Town or any other government entity.

Count IV: Mandamus/Inverse Taking

COMPLAINT ¶58: Paragraphs 1- 57 are incorporated herein.

ANSWER TO ¶58: Applicants incorporate by reference their answers to paragraphs 1 through 57 of this Answer as if fully set forth herein.

COMPLAINT ¶59: Alternately, if the Town is entitled to appropriate the Lakefront for public use, the Plaintiffs have a clear right to receive just compensation from the Town pursuant to the Indiana Constitution, Article I, Section 21 and the Fifth Amendment to the United States

Constitution for their property.

ANSWER TO ¶59: Applicants deny the allegations in ¶59 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise. Plaintiffs' property has not been taken or appropriated by the Town or any other government entity.

COMPLAINT ¶60: Due process and due course of law mandate that the Town pay Plaintiffs just compensation for their property.

ANSWER TO ¶60: Applicants deny the allegations in ¶60 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise. Plaintiffs' property has not been taken or appropriated by the Town or any other government entity.

COMPLAINT ¶61: The Plaintiffs have no plain and adequate remedy at law due to the uncompensated taking their property by the Town.

ANSWER TO ¶61: Applicants deny the allegations in ¶61 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise. Plaintiffs' property has not been taken or appropriated by the Town or any other government entity.

COMPLAINT ¶62: The Town has a clear duty pursuant to Indiana Code § 32-24-1-16 to commence appropriate proceedings and determine just compensation for the property claimed

and damages incurred. THEREFORE, and in the alternative, the Plaintiffs request a writ of mandamus compelling the Town to commence appropriate eminent domain proceedings to determine the amount of just compensation due each Plaintiff for the real property taken and resulting damages incurred and award all other appropriate relief.

ANSWER TO ¶62: Applicants deny the allegations in ¶62 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise. Plaintiffs' property has not been taken by the Town or any other government entity.

Count V: Home Rule Violations

COMPLAINT ¶63: Paragraphs 1- 62 are incorporated herein.

ANSWER TO ¶63: Applicants incorporate by reference their answers to paragraphs 1 through 62 of this Answer as if fully set forth herein.

COMPLAINT ¶64: The Town is a "unit" as that term is used in the Indiana Home Rule Act, Ind. Code § 36-1-3-1, *et seq.*

ANSWER TO ¶64: Applicants admit that under Ind. Code § 36-1-2-23, Long Beach, Indiana is an incorporated Town and is thus a "unit" under Ind. Code § 36-1-2-23.

COMPLAINT ¶65: Under Ind. Code § 36-1-3-8 of the Home Rule Act, the General Assembly has specifically withheld from units of local government - including the Town - the power to "regulate conduct that is regulated by a state agency, except as expressly granted by statute."

ANSWER TO ¶65: Applicants admit that Ind. Code § 36-1-3-8(a)(7) contains the quotation as stated by Plaintiffs, and that subject to subsection (b) of the section, units do not have the power stated.

COMPLAINT ¶66: State ownership of real property and State regulatory authority held by State of Indiana is conduct regulated by the state and/or a state agency.

ANSWER TO ¶66: Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶66 of the Complaint and on that basis deny these allegations.

COMPLAINT ¶67: The Resolution purports to define State ownership of real property and State regulatory authority by asserting that the Lakefront is public property, held in trust and free for all citizens to use.

ANSWER TO ¶67: Applicants deny the allegations in ¶67 in its entirety. Applicants deny that the Resolution purports to define State ownership or State regulatory authority and deny that the Resolution asserts that any particular property on the lakefront is public property held in trust and free for all citizens to use. The Resolution only “recognizes and accepts” the position of IDNR, a State agency, and Indiana law. IDNR, as a State agency, can define and assert its position on State ownership and State regulatory authority.

COMPLAINT ¶68: By purporting to exercise a power withheld by the General Assembly, the Town has violated the Home Rule Act.

ANSWER TO ¶68: Applicants deny the allegations in ¶68 in its entirety. Applicants deny that the Town has exercised a power withheld by the General Assembly. Applicants deny that the Town has violated the Home Rule Act.

COMPLAINT ¶69: The Plaintiffs are entitled to a preliminary and permanent injunction preventing the Town from enforcing the Resolution and a declaratory judgment that the Resolution is invalid under the Home Rule Act. THEREFORE, and in the alternative, the Plaintiffs request the Court enjoin the Town from enforcing the Resolution and a declaratory judgment that the Resolution is invalid under the Home Rule Act and award all other appropriate relief.

ANSWER TO ¶69: Applicants deny the allegations in ¶69 in its entirety. Applicants deny that Plaintiffs are entitled to any relief whatsoever under any law, either as prayed for in the Complaint or otherwise. The Resolution in controversy does not violate the Home Rule Act.

DEFENSES AND AFFIRMATIVE DEFENSES

1. Plaintiffs are not entitled to relief because the State, not Plaintiffs, owns the disputed shore of Lake Michigan lakeward of the Ordinary High Water Mark. The State received absolute fee title to the bed of Lake Michigan up to the Ordinary High Water Mark at statehood to be held in trust for the public, and the State has not relinquished or transferred that title on the disputed Long Beach property. The Ohio River decisions cited in the Complaint – including *Stinson v. Butler*, 4 Blackf. 285, 1837 WL 1870 (Ind. 1837) and *Bainbridge v. Sherlock*, 29 Ind. 364, 1868 WL 2977 (Ind. 1868) – do not control current questions of title or public trust on the

shore of Lake Michigan. No entity except the Indiana Legislature has the power to convey those lands that rightfully belong to the State. *See State ex rel. Indiana Department of Conservation v. Kivett*, 228 Ind. 623, 95 N.E.2d 145, 148 (Ind. 1950) (“[T]he fee simple title to the beds of natural navigable streams passed to the State and the State could not part with title to such real estate, except by an act of the Legislature.”). Plaintiffs have not pleaded or shown that the State has patented the disputed property to them or their predecessors in interest.

2. Plaintiffs are not entitled to relief because ownership title to the shore of Lake Michigan lakeward of the Ordinary High Water Mark is subject to public rights of use under the Public Trust Doctrine. Moreover, “[t]he state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan.” *Lake Sand Co. v. State ex rel. Attorney General*, 68 Ind. App. 439, 120 N.E. 714, 716 (Ind. Ct. App. 1918).

3. Plaintiffs are not entitled to relief because the Town’s Resolution, by its language or adopted policy, is not a taking or appropriation of private property. First, Plaintiffs cannot displace the State’s claim to title on the Lake shore. Second, Plaintiffs have not alleged that the Resolution’s enforcement policy breaches any affirmative duty to act on the part of the Town. Third, the Resolution does not categorize land or declare the boundaries of State title or public trust; rather, it merely accepts what the State has already declared. Fourth, under background principles of law, Plaintiffs have never had a reasonable expectation that they own the shore of Lake Michigan below the OHWM.

4. Plaintiffs are not entitled to relief because the Resolution’s adopted policy likely does not apply to Plaintiffs’ claimed property. The reference to “private property ordinances” in the Resolution is inconsistent with the text as a whole and the drafters most likely intended to refer

to public property ordinances. If the shore below OHWM is really private property, the Resolution likely does not apply to Plaintiffs' claimed land, and Plaintiffs' standing to bring this action is in doubt. If the shore below OHWM is really public property, then Plaintiffs have no claim of inverse condemnation.

5. Plaintiffs' Declaratory Judgment Action is subject to dismissal under Trial Rule 12(b)(6) because under Indiana law, the sole allowable remedy for Plaintiffs' allegations is a claim for inverse condemnation.

6. Plaintiffs are not entitled to relief because the Town Resolution does not regulate conduct that is regulated by a state agency or exercise any power foreclosed to the Town, and thus does not violate the Home Rule Act. The Resolution simply adopts language found on IDNR's website and in Indiana law.

7. Plaintiffs are not entitled to relief because they do not have standing to bring this lawsuit. Plaintiffs are not injured in any way by the Town's actions, including its Resolution.

8. Plaintiffs are not entitled to collect attorney fees or costs from intervenors. Indiana Code § 32-24-1-14 does not provide for attorney fees or costs assessed on private individuals who are not seeking to acquire property through condemnation.

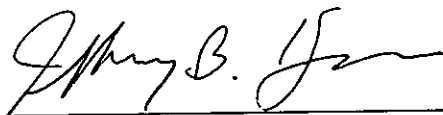
9. Applicants presently have insufficient knowledge or information on which to form a belief as to whether they may have additional, as yet unstated, defenses available. Applicants reserve the right to assert additional defenses that are revealed by further investigation or by discovery.

INTERVENOR DEFENDANTS' PRAYER FOR RELIEF

WHEREFORE, Alliance for the Great Lakes and Save the Dunes pray for judgment and relief against the Plaintiffs as follows:

1. That the Court enter judgment against Plaintiffs in favor of Intervenor Defendants with respect to Plaintiffs' Complaint and Intervenor Defendants' defenses;
2. That the Court deny all remedies sought by Plaintiffs in the Complaint;
3. That the Court award Intervenor Defendants their attorneys' fees, costs and disbursements incurred in defending this matter; and
4. Such other and further relief, including declaratory, equitable relief and damages, as this Court deems just and proper.

Respectfully submitted,



Jeffrey B. Hyman (Atty. No. 24625-89)
W. William Weeks (Atty. No. 1155-49)
Conservation Law Center
116 S. Indiana Ave.
Bloomington, Indiana 47408
812.856.5737 [Voice]
812.855.1828 [Fax]
jbhyman@indiana.edu
wwweeks@indiana.edu

Attorneys for Applicants for Intervention as Defendants, Alliance for the Great Lakes and Save the Dunes.

EXHIBIT B

**RESOLUTION NO. 12-003, PASSED ON NOVEMBER 12,
2012, BY LONG BEACH TOWN COUNCIL**

Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES

LBLHA et al. v. Town of Long Beach, Indiana
CASE NO. 46C01-1212-PL-001941

**RESOLUTION AMENDING RESOLUTION NO. 10-002 CONCERNING PROPERTY
ADJACENT TO LAKE MICHIGAN IN LONG BEACH, INDIANA**

WHEREAS, there exists in the Town of Long Beach, Indiana, publicly owned property and privately owned property adjacent to Lake Michigan which is a navigable waterway; and,

WHEREAS, there are a number of local Ordinances contained in the Code of Ordinances of the Town of Long Beach, Indiana, which are designed to regulate or prohibit activity on public and/or Town property (hereinafter referred to as "**PUBLIC PROPERTY ORDINANCES**"); and,

WHEREAS, the bed of Lake Michigan adjacent to Long Beach, Indiana, is owned by the State of Indiana; and,

WHEREAS, disputes have arisen relative to the location of boundary lines between private owners and the state of Indiana along the shores of Lake Michigan in Long Beach, Indiana; and,

WHEREAS, these disputes can create issues regarding the enforcement by the Long Beach Police Department of **PUBLIC PROPERTY ORDINANCES**; and,

WHEREAS, it is desirable that a clear policy be established relative to the enforcement of **PUBLIC PROPERTY ORDINANCES** on properties adjacent to Lake Michigan in the Town of Long Beach, Indiana, both for the benefit of private property owners, the general public and law enforcement officials; and,

NOW THEREFORE BE IT RESOLVED, by the TOWN COUNCIL of the Town of Long Beach, Indiana, that the following policy be and is hereby adopted:

1. The Town of Long Beach, Indiana, recognizes and accepts the Indiana Department of Natural Resources' position as reflected in its publications including, but not limited to, its website, the ordinary high watermark is the line on Lake Michigan used to designate where the state's regulatory jurisdiction lies and, in certain instances, to determine where public ownership or use begins and/or ends.

2. That the ordinary high watermark is an elevation of 581.5 feet, as adopted by the U.S. Army Corps of Engineers, and the Indiana Natural Resources Commission found at 312 IAC 1-1-26.

3. The Long Beach Police Department shall only enforce the **PRIVATE PROPERTY ORDINANCES** between Lake Shore Drive and Lake Michigan in the following locations:

- A. The entire lengthy and width of all publicly owned beach accesses above the elevation of 581.5 feet.
- B. The entire length and width of all lots owned by the Town of Long Beach, Indiana, above the elevation of 581.5 feet.

4. The Long Beach Police Department shall continue to enforce all state and local statutes, Ordinances, rules and regulations within its jurisdiction subject to the specific provisions of this policy.

ALL OF WHICH IS APPROVED AND ADOPTED this 12th day of November, 2012.

TOWN COUNCIL OF THE TOWN OF
LONG BEACH, INDIANA

Robert J. Schaefer
ROBERT J. SCHAEFER, President

Robert Angelo
ROBERT ANGELO

Patrick McDonald
PATRICK MCDONALD

Peter Byvoets 11.12.12
PETER BYVOETS

Jane Neulieb
JANE NEULIEB

Attest:

William A. Defuniak
BILL DEFUNIAK
Clerk-Treasurer

EXHIBIT C

AFFIDAVIT OF NICOLE BARKER

**Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES**

***LBLHA et al. v. Town of Long Beach, Indiana*
CASE NO. 46C01-1212-PL-001941**

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
 COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,
 and DON H. GUNDERSON

Plaintiffs,

v.

TOWN OF LONG BEACH, INDIANA

Defendant,

ALLIANCE FOR THE GREAT LAKES
 and SAVE THE DUNES,

*Applicants for Intervention
 as Defendants.*

AFFIDAVIT OF NICOLE BARKER

I, Nicole Barker, state the following on my own personal knowledge or information and belief:

1. I submit this affidavit in support of Save the Dunes' motion to intervene in the above-captioned case.
2. My name is Nicole Barker. I am over 18 years of age and competent to testify to the matters stated herein.
3. I personally reside at 6479 W 50S, LaPorte, Indiana 46350.

4. I am currently the Executive Director of Save the Dunes Conservation Fund, Inc. ("Save the Dunes"), a 501(c)(3) nonprofit corporation. I have served as Executive Director since September 1, 2010.

5. The offices of Save the Dunes are located at 444 Barker Road, Michigan City, Indiana 46360.

6. Save the Dunes is one of Indiana's oldest environmental groups, having formed in 1952 with the goal of permanently protecting the Indiana dunes for ecological preservation and public enjoyment for decades to come.

7. We succeeded in 1966, and in the years since, we have helped expand the Indiana Dunes National Lakeshore to over 15,000 acres.

8. We also own or manage over 500 acres of land throughout Northwest Indiana. Save the Dunes is focused on protecting various habitat types within the Lake Michigan Basin, including the Lake Michigan shoreline, dunes, wetlands, forests, and prairies. In the interest of water quality protection, we are also newly focused on pursuing opportunities for conservation easements or acquisitions along the waterways that flow into Lake Michigan.

9. The mission of Save the Dunes is "to preserve, protect and restore the Indiana Dunes and all natural resources in Northwest Indiana's Lake Michigan Watershed for an enhanced quality of life."

10. According to our bylaws, the objectives of Save the Dunes are to "maintain and restore the integrity and quality of the natural environment of the Indiana Dunes country and adjacent or nearby ecosystems in the Lake Michigan Watershed of Lake, Porter and La Porte Counties."

Our bylaws also state, "The prime concern of Save the Dunes...is the vitality and use of the Indiana Dunes National Lakeshore, and adjacent or nearby ecosystems of similar natural worth located in the Lake Michigan Watershed of Lake, Porter, and La Porte Counties in Indiana."

11. The bylaws clearly express our organization's concern with use of the National Lakeshore itself and similarly important nearby ecosystems. We assert that the entirety of Indiana's Lake Michigan shoreline is an important nearby ecosystem.

12. According to our bylaws, activities the organization will initiate and carry on to achieve these objectives include, "Identify and work toward the acquisition, preservation, and conservation of additional land and resources required to enhance and preserve the vitality of areas and ecosystems in the Lake Michigan Watershed of Lake, Porter and La Porte Counties" and "Promote the protection of Great Lakes water quality and quantity, and the Lake Michigan shoreline."

13. Save the Dunes' top strategic priorities for 2012-2015 include managing and protecting the natural resources of the Indiana Dunes National Lakeshore and buffer areas.

14. The shore within the Town of Long Beach is considered to be a buffer area for the Indiana Dunes National Lakeshore. The straight-line distance (as the crow flies) between Long Beach and the Indiana Dunes National Lakeshore is about 2.8 miles.

15. Save the Dunes is a membership organization. According to our bylaws, every membership is open to any person supportive of the objective of Save the Dunes and every member in good standing will have voting rights at membership meetings.

16. As of February 1, 2013, the total membership of Save the Dunes numbers 532. Of those, the membership living in Indiana numbers 366. Membership residing in counties bordering Lake

Michigan numbers 330 and is distributed as follows: Lake Co.-103; Porter Co.-153; LaPorte Co.-74. Membership is distributed in the following Lakeshore communities as follows: Beverly Shores-31; Dune Acres-9; Duneland Beach-2; Gary (Miller)-46; Long Beach-11; Michiana Shores-2; Ogden Dunes-22.

17. While the protection of natural resources has been our primary goal, we have prioritized broad public access to the shoreline and dunes in the past; in particular, we have fought efforts to privatize the lakefront and exclude the public.

18. Our strongest example is the battle over which we coalesced as an organization in the 1950s. Save the Dunes emerged after developers, elected officials and business interests pressed to erect a port, a steel mill (Bethlehem), and a power plant along the lakefront in Porter County. Our message was the desire to not only protect the incredible Central Dunes as a globally significant natural resource, but also to prevent private interests from taking our lakefront and excluding the public.

19. In January 1953, the Nature Conservancy's national newsletter highlighted the national interest in the effort to preserve the Indiana dunes. The article stated:

A new Indiana organization, the Save the Dunes Council, has appeared on the stage...[they and others] may direct the play in place of those whose only goal in life may be industrial production and real estate development without adequate protection of natural areas for science, art and recreation.

George Fell, "Dunes in Danger," Nature Conservation News, Vol. 3, No. 1 (January 1953), p.1.

20. At the hearings before the Subcommittee on National Parks and Recreation in the 89th Congress, for the purpose of the establishment of the Indiana Dunes National Lakeshore, our founder and then president, Ms. Dorothy Buell, testified. She was asked whether her community, Ogden Dunes, was slated to be within the national park boundary. She replied that

it was not, and when asked whether she would support it being added to the park, she said she would, and that Save the Dunes would as well. She specified that she/Save the Dunes would want the beach area to be protected as well, and pointed out that she and several residents had offered up their houses too. Congress, U.S House of Representatives, Committee on Interior and Insular Affairs, Subcommittee on National Parks and Recreation, "Hearings, 89th Congress, First Session, H.R. 51, H.R. 4412 and Related Bills To Provide for the Establishment of the Indiana Dunes National Lakeshore and for Other Purposes" (Washington, D.C.: GPO, 1966), p.98.

21. The organization has also long supported the Marquette Plan, which calls for recapturing 75% of the lakefront for public use. In a 2006 newspaper opinion piece, our former Executive Director Tom Anderson stated, "We need to connect green places to everyone's lives. We need to implement the Marquette Plan to provide more access to Lake Michigan." "Preserving Land is Just the Beginning," Northwest Indiana Times (May 14, 2006).

22. Today, we are not only concerned about protecting the public's right to use the lakefront in Long Beach, but also throughout Northwest Indiana. We currently sit on a committee in Sheridan Beach (Michigan City, Indiana) as an environmental representative. The committee is working to plan for the future of Sheridan Beach and the Esplanade, an area that the public has long enjoyed for recreation. There, certain private shoreline landowners have stated their desire to create access paths in front of their houses to the beach that would include the ability to lower the dunes. Save the Dunes is involved in that situation to ensure that public interests are part of the discussion and that ecological impacts are considered. Part of that effort also involves making sure that the broader public of the Michigan City area – not only the shoreline landowners – can continue to reach this public open space for recreation.

23. In addition, to further the organization's mission and strategic priorities in protecting Lake Michigan natural resources, ecosystems, and open space, Save the Dunes recently acquired and now owns a lakefront parcel of land in Long Beach.

24. The parcel was acquired on March 21, 2012, and it is known as Lot 328 in Long Beach Addition to the Town of Long Beach, as per plat thereof, recorded in Plat Book 5 pages 34 and 35, in the Office of the Recorder of LaPorte County, Indiana. The parcel sits immediately north of Lake Shore Drive in front of the residence at 2425 Lake Shore Drive, Beverly Shores, Indiana 46360. The parcel number is: 46-01-12-152-011.000-023. The total size of the parcel is approximately 0.137 acres.

25. In acquiring the parcel, Save the Dunes files contain notes that state, "There is increasing pressure to reduce access to Lake Michigan, so this will help us preserve access for future generations." "Save the Dunes, "Save the Dunes Conservation Fund Acquisition Questionnaire [for Rakowski Parcel]," Form prepared per organizational requirements for land acquisition, February 2012. p. 1.

26. Save the Dunes also is in the process of helping to acquire a remnant dune area called the Moon Valley property, a particular site of importance located in Michigan City, Indiana. The Moon Valley property is one of the last undeveloped dune properties in Indiana. It consists of 57 acres of globally rare remnant dune habitat that remains biologically important, even after years of disturbance. In fact, the site is home to six plant species of statewide concern, both rare and endangered. Various habitat types can be seen there, including high dune remnants, sand prairie, black oak savanna, and pannes.

27. For nearly two years, Save the Dunes and other conservation organizations have been collaborating on means to acquire the property. The goal is to preserve the site as open space for generations to come, and the site is at risk of conversion to residential or commercial use.

28. This parcel is important to us because we believe that Indiana's critical dune areas near the Lake Michigan shoreline are unique, irreplaceable, and fragile resources. They provide significant economic, scientific, educational, ecological and recreational benefits to Hoosiers and to visitors.

29. Save the Dunes and volunteers mounted an exciting campaign to raise \$150,000 in pledges towards the parcel's protection in 2011. This included pledges from individual residents, conservation organizations, towns and businesses. These pledges reflect the extent of location enthusiasm for the parcel. We are still actively pursuing opportunities for the site's protection.

30. The Moon Valley property is located six-tenths of a mile from the shore, and is considered by Save the Dunes to be within what we consider to be an important buffer area for the Indiana Dunes National Lakeshore.

31. I consider the public trust doctrine to be a valuable tool and asset that our organization can use to facilitate preserving and protecting the natural resources, ecosystems, and open space on the Lake Michigan shoreline. I also consider that ownership of the shore by the State of Indiana helps us to achieve Save the Dunes' mission and objectives by adding another layer of protection for the shoreline.

I affirm, under the penalties for perjury, that the foregoing representations are true.

Nicole Barker
Nicole Barker

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

BEFORE ME, the undersigned Notary Public in and for said County and State, on this 14th
day of February, 2013, personally appeared Nicole Barker, who being by me first duly sworn, on
her oath, deposes the facts above.

Subscribed and sworn to before me, this 14th day of February, 2013.

Julie A. Muller
NOTARY PUBLIC
Residing in LaPorte County, IN

My commission expires:

Oct 14, 2016.

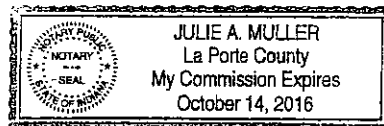


EXHIBIT D

AFFIDAVIT OF JOEL BRAMMEIER

Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES

LBLHA et al. v. Town of Long Beach, Indiana
CASE NO. 46C01-1212-PL-001941

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,
and DON H. GUNDERSON

Plaintiffs,

v.

TOWN OF LONG BEACH, INDIANA

Defendant,

ALLIANCE FOR THE GREAT LAKES
and SAVE THE DUNES,

*Applicants for Intervention
as Defendants.*

AFFIDAVIT OF JOEL BRAMMEIER

I, Joel Brammeier, state the following on my own personal knowledge or information and belief:

1. I submit this affidavit in support of Alliance for the Great Lakes' motion to intervene in the above-captioned case.
2. My name is Joel Brammeier. I am over 18 years of age and competent to testify to the matters stated herein.
3. I personally reside at 4950 N. Winchester #1, Chicago, IL 60640.
4. I am currently the President and CEO of the Alliance for the Great Lakes (Alliance), a 501(c)(3) nonprofit corporation. I have served as President & CEO since January 1, 2010.

5. The main offices of the Alliance are located at 17 N. State St., Suite 1390, Chicago, IL 60602. We maintain offices in five other locations around the Great Lakes basin, including Milwaukee, WI; Grand Haven, MI; southeast MI; Cleveland, OH; and Buffalo, NY.
6. The Alliance is the oldest independent organization devoted exclusively to the protection of the Great Lakes. The Alliance's mission is to conserve and restore the world's largest freshwater resource using policy, education and local efforts, ensuring a healthy Great Lakes and clean water for generations of people and wildlife.
7. The Alliance formed as the Lake Michigan Federation (LMF) in 1970 and became the Alliance for the Great Lakes in 2005.
8. The bylaws of the Alliance state that the Alliance will "take part in the resolution of public issues that pertain to the protection of the Great Lakes-St. Lawrence River watershed in accordance with policy positions established by the Board of Directors."
9. The Alliance has a particular interest in the protection and restoration of Great Lakes beach resources for the benefit of the public. Through our "Adopt-a-Beach" and water quality programs, we enhance and protect coastal beach resources with the help of more than 10,000 volunteers annually. "Adopt-a-Beach" is the Alliance's primary volunteer program and includes individuals, families, civic organizations, schools and businesses. Our volunteers monitor and remove litter and large debris and scientifically assess a spectrum of beach health indicators. The Alliance has conducted water testing and beach clean-ups in LaPorte County since 2006. Information collected by volunteer teams is entered into an online system and is used to educate the public, share with local beach authorities, and improve the beaches with on-the-ground projects.

10. The Alliance's Board of Directors has set "Restored Ecosystem Integrity" as one of the organization's key goals in its strategic plan. As part of this work, the Alliance seeks to "create and improve sustainable relationships between coastal communities and the Great Lakes."
11. The Great Lakes coastal ecosystem is made up of a combination of the land, water and air resources in and around the point where Great Lakes water contacts land. This ecosystem is historically, regularly and significantly impacted by natural fluctuations of lake level over time.
12. My personal belief is that, due to the constantly fluctuating and interconnected nature of this ecosystem, the states are best equipped to protect Great Lakes coastal natural resources lakeward of the Ordinary High Water Mark. Conversely, fragmentation of this responsibility across thousands of different property owners represents a significant threat to coastal ecosystem integrity.
13. The Alliance has a significant history of ensuring that Great Lakes states discharge their obligations to safeguard the public trust governing lands in and around the Great Lakes coastal ecosystem.
14. In 1990, the Alliance's predecessor organization LMF successfully challenged an attempt by the state of Illinois to transfer title of Lake Michigan lakebottom land to a private entity, Loyola University. LMF contended that the sale of the lakebottom land was illegal. A federal court, on review of an U.S. Army Corps of Engineers permit, found in favor of LMF.
15. Between 2005 and 2008 I, as associate director of the Alliance for the Great Lakes, offered substantial contributions to the Illinois Department of Natural Resources in its development of guidance for construction of private Lake Michigan shoreline protection

projects. As a result, several changes were made to the guidance ensuring that the state of Illinois fulfilled its public trust obligations.

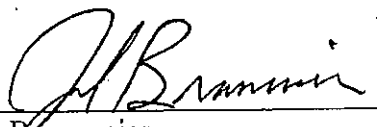
16. I and my family have personally benefited from the availability of Indiana's Lake Michigan coastal resources and used them at multiple locations for the purposes of swimming, hiking, picnicking, and enjoyment of nature.

17. I am personally and professionally concerned that if the state of Indiana's obligation to protect and nurture Lake Michigan coastal lands is eroded in any way, degradation of Lake Michigan coastal resources will be unavoidable.

18. I consider the public trust doctrine to be a valuable tool and asset that the Alliance has relied on and will continue to rely on to facilitate preserving and protecting the natural resources, ecosystems, and open space on the Lake Michigan shoreline. I also consider that ownership of the shore by the state of Indiana helps me to achieve the Alliance's mission and goals by adding another layer of protection for the shoreline.

19. The Alliance is a membership organization with 1782 organizational and individual members in total and 42 organizational and individual members in Indiana. Each of these members donates annually to the Alliance.

I affirm, under the penalties for perjury, that the foregoing representations are true.



Joel Brammeier

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

BEFORE ME, the undersigned Notary Public in and for said County and State, on this 25th
day of February, 2013, personally appeared Joel Brammeier, who being by me first duly sworn,
on her oath, deposes the facts above.

Subscribed and sworn to before me, this 25th day of February, 2013.



Winnette P. Willis
NOTARY PUBLIC
Residing in Cook County, IL

My commission expires:

10-16-2016.

EXHIBIT E

AFFIDAVIT OF DEBORAH CHUBB

**Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES**

***LBLHA et al. v. Town of Long Beach, Indiana*
CASE NO. 46C01-1212-PL-001941**

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
 COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,
 and DON H. GUNDERSON

Plaintiffs,

v.

TOWN OF LONG BEACH, INDIANA

Defendant,

ALLIANCE FOR THE GREAT LAKES
 and SAVE THE DUNES,

*Applicants for Intervention
 as Defendants.*

AFFIDAVIT OF DEBORAH CHUBB

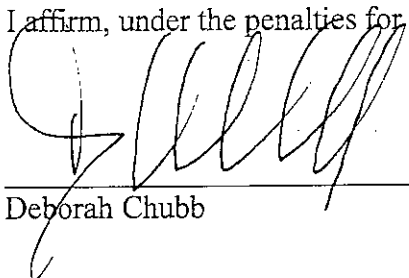
I, Deborah Chubb, state the following on my own personal knowledge or information and belief:

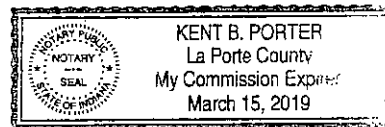
1. I submit this affidavit in support of Save the Dunes' motion to intervene.
2. My name is Deborah Chubb. I am over 18 years of age and competent to testify to the matters stated herein.
3. I am currently an active member of Save the Dunes, and have been a member of Save the Dunes since August of 2000. I have never lapsed in my membership since then.
4. I reside at 3630 Birchwood Trail, Michigan City, Indiana 46360. This is my primary residence.
5. I have been accessing the beach at Long Beach for 17 years.

6. I use the beach for hiking, swimming, kayaking, and sailing.
7. I use the beach at least three times per week all year round.
8. I use sections of the beach abutting shoreline residential properties.
9. I have picked up garbage almost every time that I visit the beach.
10. I grew up enjoying the Lake Michigan beach and want my grandchildren and all children to have the same beautiful experience.
11. I supervised two Adopt-A-Beach events in Michigan City, sponsored by the Alliance for the Great Lakes, and I have also participated in other organized clean-ups.
12. As a member of Save the Dunes, I advocated for the protection of both the water quality and quantity of Lake Michigan at the local, State and Federal legislatures.
13. As a member of Save the Dunes, I participated in the Dunes Creek, Salt Creek and Trail Creek Watershed Management Plans, which impact the water quality of Lake Michigan.
14. As a member of Save the Dunes, I provided public comment on industrial storm water management plans and other discharge permits regulating flow into Lake Michigan as well as the Indiana Department of Environmental Management 303d Impaired Waters Listing.
15. As a member of Save the Dunes, I participated in oversight of land use permits regulating waste storage near Lake Michigan.
16. I participated in Sierra Club's Beyond Coal campaign to reduce toxic particulate matter that is emitted in the coal burning process and lands in Lake Michigan.
17. I intend to continue using the lake and the beach in the future at the same frequency I do now.

18. My psyche and mental health depend on free access to the beach and Lake Michigan; it would be devastating to me if my use of the lakeshore were to be impeded or impaired.

I affirm, under the penalties for perjury, that the foregoing representations are true.

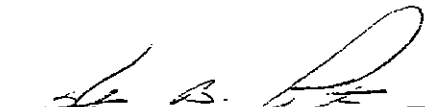

Deborah Chubb



STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

BEFORE ME, the undersigned Notary Public in and for said County and State, on this 13th day of February, 2013, personally appeared Deborah Chubb, who being by me first duly sworn, on her oath, deposes the facts above.

Subscribed and sworn to before me, this 13 day of February, 2013.



NOTARY PUBLIC
Residing in La Porte County, IN

My commission expires:

3/15/19

EXHIBIT F

AFFIDAVIT OF CAROLYN SUE SPITLER

**Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES**

***LBLHA et al. v. Town of Long Beach, Indiana*
CASE NO. 46C01-1212-PL-001941**

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,)
and DON H. GUNDERSON)
)
 Plaintiffs,)
)
 v.)
)
TOWN OF LONG BEACH, INDIANA)
)
 Defendant,)
)
ALLIANCE FOR THE GREAT LAKES)
and SAVE THE DUNES,)
)
 Applicants for Intervention)
 as Defendants.)

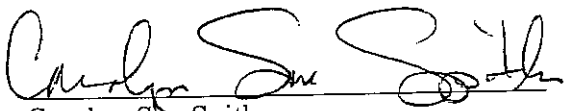
AFFIDAVIT OF CAROLYN SUE SPITLER

I, Carolyn Sue Spitler, state the following on my own personal knowledge or information and belief:

1. I submit this affidavit in support of Save the Dunes' motion to intervene.
2. My name is Carolyn Sue Spitler. I am over 18 years of age and competent to testify to the matters stated herein.
3. I am currently an active member of Save the Dunes, and have been a member of Save the Dunes since 2008.
4. I reside at 2107 Avondale Drive, Long Beach, Indiana 46360. This is my primary residence.

5. I have been walking the beach in the Town of Long Beach for recreation for 25 years, including walking on the sand, and, when the water is warm, in the water. I traverse one mile normally on my walks.
6. I enjoy searching for beach glass in the sand as well.
7. I have also sunbathed and sat in the sand to read in my earlier years here.
8. During the summer months, I walk the beach daily; during other seasons I am normally at the beach four days a week, except during winter when there is snow and ice.
9. My use of the beach in Long Beach includes sections of shoreline abutting residential properties.
10. I have participated in beach clean-ups at Stop 21.
11. Over the years, I have answered questions of those visiting the beach such as "When is high tide?" and "What is shelf ice; where does it come from?"
12. I believe in the importance of everyone being able to partake of this beautiful resource.
13. I intend to continue to use the shoreline of Lake Michigan in Long Beach for years to come.
14. I will be harmed if my use of the lakeshore is impeded or impaired.

I affirm, under the penalties for perjury, that the foregoing representations are true.


Carolyn Sue Spitler

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

BEFORE ME, the undersigned Notary Public in and for said County and State, on this _____ day of February, 2013, personally appeared Carolyn Sue Spitler, who being by me first duly sworn, on her oath, deposes the facts above.

Subscribed and sworn to before me, this 14 day of February, 2013.



Sandra K Schroeder

NOTARY PUBLIC
Residing in La Porte County, IN

My commission expires:

9-13-18.

EXHIBIT G

AFFIDAVIT OF JUDE RAKOWSKI

**Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES**

***LBLHA et al. v. Town of Long Beach, Indiana*
CASE NO. 46C01-1212-PL-001941**

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,
and DON H. GUNDERSON

Plaintiffs,

v.

TOWN OF LONG BEACH, INDIANA

Defendant,

ALLIANCE FOR THE GREAT LAKES
and SAVE THE DUNES,

*Applicants for Intervention
as Defendants.*

AFFIDAVIT OF JUDE RAKOWSKI

I, Jude C. Rakowski, state the following on my own personal knowledge or information and belief:

1. I submit this affidavit in support of Save the Dunes' motion to intervene.
2. My name is Jude C. Rakowski. I am over 18 years of age and competent to testify to the matters stated herein.
3. I am currently an active member of Save the Dunes, am a past board member, and have been a member of Save the Dunes since September 1981. I have been a steady member since that date.
4. I reside at 2425 Lake Shore Drive, Long Beach, Indiana 46360. This is my primary

residence, and I have lived here for 35 years.

5. I have been accessing the beach at Long Beach for 35 years.

6. I engage in many activities at the beach, including swimming, canoeing, kayaking, stargazing, overnight camping, dog walking, hiking, reading, and cross-country skiing.

7. I use sections of the beach abutting shoreline residential properties.

8. Each year, I go to the beach with a frequency ranging from daily to once a week during spring, summer and fall and frequently during winter.

9. I have engaged in discussions with my neighbors regarding public access and use of the shoreline.

10. I donated our lot north of Lake Shore Drive to Save the Dunes with the purpose of protecting it as open space and preserving public access to Lake Michigan for generations to come.

11. I have participated in organized beach clean-ups, and remove trash from the beach regularly while I am there.

12. I have monitored bird species at the beach, and have always been interested in information about the beach, such as the federally-listed Piping Plover habitat near Cowles Bog.

13. I have helped remove invasive species, particularly garlic mustard, in the shoreline area because I want to help maintain native biodiversity and habitat for native species.

14. I enjoy "singing its praises" and discussing the ecological importance of the beach, the dunes and Lake Michigan with friends, family, others in my community, and while I am away on my travels.

15. In the future, as always, I will use the beach for as long as I am physically able.

16. I would feel harmed if my access or use of the lakeshore were impeded or impaired in any way.

I affirm, under the penalties for perjury, that the foregoing representations are true.

Jude C. Rakowski
Jude C. Rakowski

STATE OF INDIANA)
COUNTY OF LAPORTE) SS:



BEFORE ME, the undersigned Notary Public in and for said County and State, on this 13th day of February, 2013, personally appeared Jude C. Rakowski, who being by me first duly sworn, on her oath, deposes the facts above.

Subscribed and sworn to before me, this 13th day of February, 2013.

KRG
NOTARY PUBLIC
Residing in La Porte County, IN

My commission expires:

6/29/14,

EXHIBIT H

AFFIDAVIT OF MARTHA MAUST

**Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES**

***LBLHA et al. v. Town of Long Beach, Indiana*
CASE NO. 46C01-1212-PL-001941**

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,
and DON H. GUNDERSON

Plaintiffs,

v.

TOWN OF LONG BEACH, INDIANA

Defendant,

ALLIANCE FOR THE GREAT LAKES
and SAVE THE DUNES,

*Applicants for Intervention
as Defendants.*

AFFIDAVIT OF MARTHA MAUST

I, Martha Maust, state the following on my own personal knowledge or information and belief:

1. I submit this affidavit in support of Save the Dunes' motion to intervene.
2. My name is Martha Maust. I am over 18 years of age and competent to testify to the matters stated herein.
3. I am currently an active member of Save the Dunes, and have been a member of Save the Dunes since 2008. We have not lapsed in our membership since then, and have increased the amount we donate every year. My husband has also submitted for a matching donation from his very generous employer, ArcelorMittal.

4. I reside at 3005 Loma Portal Way, Long Beach, Indiana. This has been my permanent residence since 1986. Prior to this address, I resided in Michiana, Indiana.
5. I have been enjoying the beach in Long Beach for many years, including my time at my current address and at my previous residence in Michiana.
6. I primarily use the beach at Stop 30 today, whereas I primarily used to use the beach at Stop 37 when I resided in Michiana.
7. Because of my love of Lake Michigan, my husband and I bought into the Shoreland Hills Association because we always wanted access to the lake. There are many communities along the lake that have signs saying "private beach" and have been known for posting a guard and making people who are walking the beach leave. So we did not want access for us and our family to be restricted if there was something we could do to prevent that.
8. I live in Long Beach because of my love of the lake and the activities that are a vital part of my life. I have very little useable yard, so I always considered Lake Michigan and the beach to be an extension of our yard. I have always taken great pride in protecting this wonderful asset.
9. My current boat is a kayak. I am able to keep my kayak parked on the beach for easy use.
10. I love to walk the beach, pick up beautiful stones and sand glass. My husband likes to pick up beach trash, and he and our three sons like to skip stones.
11. One of my sons has a summer birthday, and I have held birthday parties for him on the beach over the years.
12. I also have used the beach over the years for family gatherings, graduation parties, or just allowing friends to park at our house and go to the beach.

13. When I walk with my family on the beach, it is for family togetherness, relaxation and exercise.
14. The beach is also a great place to see neighbors and catch up on the latest activities of their family.
15. When my children were younger, I spent more time on the beach during summer. We would swim, dig holes, bury someone in the sand, build sandcastles, lay on the beach towel and relax, read, take a nap, and eat snacks.
16. There are also many games my family and I have played on the beach and in the water over the years. Some of them are: frisbee, wiffle ball, bean bag toss and frozen tag.
17. In the past, there were huge amounts of dead alewives washed up on the beach, so I raked them into piles and buried them deep in the sand.
18. I allow others on the beach to use our kayaks, often for their first time. I instruct them about the use of safe boat use with a life jacket and proper safety equipment. I instruct visitors who may not know our lake and beach as well as I do. I make sure people are aware of water safety and rip currents.
19. I use the beach at all times of the year except when it is raining or a very cold wind.
20. In spring, summer and fall, I or someone in my family is at the beach 3 to 4 times per week.
21. When these residents would go before the zoning board to ask for a variance to construct structures along the public right-of-way, I would go with my neighbor to speak up against these permanent structures. Since they have built so many structures along the public right-of-way, the

beach access feels more like a tunnel to the beach. When one arrives on the beach, we also feel unwelcome because the high seawall is adorned with "private property" signs.

22. I support other groups of people who are fighting to maintain access to and use of the beach and the lake.

23. I would feel a great sense of loss if my physical or visual access to the beach is impaired, or if my ability to use the beach is impeded.

24. There was a beautiful cottage I once visited at Stop 29, and the resident's home was filled with paintings of horses. The artist was her husband and the small home and paintings were some of the memories she had left from their rich life together. That small home is now occupied by a "McMansion" that is only occupied for short periods of time in the summer. So I find it hard to understand why this type of landowner would want to deprive the rest of us so much enjoyment.

25. My husband and I both grew up near lakes, so activities on the beach and in the water are part of our soul. It is such a vital part of our life.

26. My quality of life would be greatly diminished if my access to the lakeshore and use of the beach would be impaired.

27. I intend to continue using the lake and the beach in the future at the same frequency I do now.

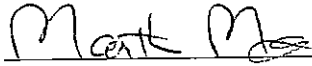
28. I have written to our state representative, Scott Pelath, about my concern for decreasing public access to the lake and beach. Access and use of the lake and beach, both physically and visually, are extremely important to our quality of life in Long Beach.

29. As a dues paying member of NWIPA (Northwest Indiana Paddling Association), I support the efforts they are making to create a kayaking center at the beach at Stop 24. They are seeking grant funding to provide lockers for kayaks on the beach and public parking areas in Long Beach town center.

30. I am a strong advocate of clean and safe water and shoreline for our family and the greater society, and my husband and I have raised three boys to value our natural resources.

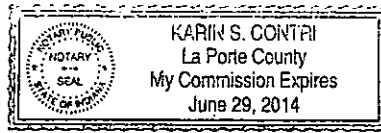
31. I have participated in the organized beach clean-ups, but on my beach walks, I usually carry a bag to collect trash along the way. So the landowners along the shore should appreciate my presence there. I try to be an asset to the beach.

I affirm, under the penalties for perjury, that the foregoing representations are true.

A handwritten signature in cursive script, appearing to read 'Martha Maust', is written over a horizontal line.

Martha Maust

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)



BEFORE ME, the undersigned Notary Public in and for said County and State, on this 13th day of February, 2013, personally appeared Martha Maust, who being by me first duly sworn, on her oath, deposes the facts above.

Subscribed and sworn to before me, this 13th day of February, 2013.

NOTARY PUBLIC
Residing in La Porte County, IN

My commission expires:

6/29/14,

EXHIBIT I

AFFIDAVIT OF SUSAN WOLZ

Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES

LBLHA et al. v. Town of Long Beach, Indiana
CASE NO. 46C01-1212-PL-001941

STATE OF INDIANA) IN THE LAPORTE COUNTY CIRCUIT COURT
) SS:
COUNTY OF LAPORTE) CASE NO. 46C01-1212-PL-001941

LBLHA, LLC., MARGARET L. WEST,
and DON H. GUNDERSON

Plaintiffs,

v.

TOWN OF LONG BEACH, INDIANA

Defendant,

ALLIANCE FOR THE GREAT LAKES
and SAVE THE DUNES,

Applicants for Intervention.

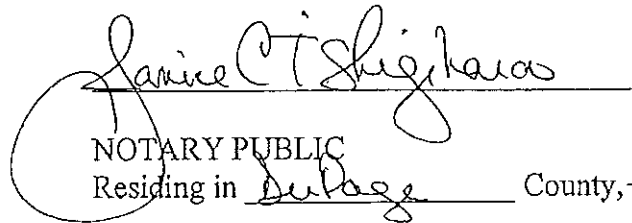
AFFIDAVIT OF SUSAN WOLZ

I, Susan Wolz, state the following on my own personal knowledge or information and belief:

1. I submit this affidavit in support of Alliance for the Great Lakes' (Alliance) motion to intervene in the above-captioned case.
2. My name is Susan Wolz. I am over 18 years of age and competent to testify to the matters stated herein.
3. I reside at 440 W. Aldine Ave, 1E Chicago, IL 60657.
4. I am currently an active member of the Alliance, and have been a member of the Alliance since December 2006, and have never lapsed in my membership since that time.

BEFORE ME, the undersigned Notary Public in and for said County and State, on this 21st
day of February, 2013, personally appeared Sue Spitler, who being by me first duly sworn, on
her oath, deposes the facts above.

Subscribed and sworn to before me, this 21st day of February, 2013.


NOTARY PUBLIC
Residing in Dubuque County, IN

My commission expires:

10/8/16.



EXHIBIT J

AFFIDAVIT OF CHERYL CHAPMAN

**Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES**

***LBLHA et al. v. Town of Long Beach, Indiana*
CASE NO. 46C01-1212-PL-001941**

LBLHA, LLC., MARGARET L. WEST,
and DON H. GUNDERSON

Plaintiffs,

v.

TOWN OF LONG BEACH, INDIANA

Defendant,


ALLIANCE FOR THE GREAT LAKES
and SAVE THE DUNES,

Applicants for Intervention.

1

5. I am a member of the Alliance because I support their mission to protect and ensure a healthy Great Lakes for generations of people and wildlife, educate children, and restore beaches for the benefit of the public.
6. Since 2007, over 6 (six) years, I have accessed and used the beach in Long Beach.
7. My family and I use the beach, weather permitting, an average of three times a week.
8. I use the beach for walking, swimming, hiking, relaxing, wildlife watching, and as inspiration for my profession as a writer.
9. I regularly clean up the beach, and also help publicize events to clean-up the beach.
10. I regularly use access points all along Lakeshore Drive, which provide pedestrian access from Lakeshore Drive down to Lake Michigan, in order to get to the beach and Lake Michigan.
11. I intend to continue using the lake and the beaches in the future at the same frequency I do now.

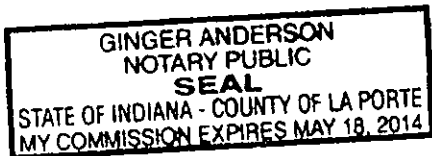
I affirm, under the penalties for perjury, that the foregoing representations are true.


Cheryl Chapman

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

BEFORE ME, the undersigned Notary Public in and for said County and State, on this 26 day of February, 2013, personally appeared Cheryl Chapman, who being by me first duly sworn, on her oath, deposes the facts above.

Subscribed and sworn to before me, this 26 day of February, 2013.



A handwritten signature in cursive script, appearing to read "Ginger Anderson", written over a horizontal line.

NOTARY PUBLIC
Residing in La Porte County, IN

My commission expires:

May 18, 2014

EXHIBIT K

INDIANA NATURAL RESOURCES COMMISSION, NOVEMBER 15, 2011, MEETING MINUTES

available at <http://www.in.gov/nrc/2350.htm>

**Attachment to
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS BY
ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES**

***LBLHA et al. v. Town of Long Beach, Indiana*
CASE NO. 46C01-1212-PL-001941**

NATURAL RESOURCES COMMISSION
November 15, 2011 Meeting Minutes

MEMBERS PRESENT

Bryan Poynter, Chair
Jane Ann Stautz, Vice Chair
Robert Carter, Jr., Secretary
Michael Cline
Brian Blackford
Thomas Easterly
Phil French
Doug Grant
R. T. Green
Donald Ruch
Robert Wright

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

John Davis	Executive Office
Chris Smith	Executive Office
Cameron Clark	Executive Office
Cheryl Hampton	Executive Office
John Bergman	State Parks and Reservoirs
Lisa Johnloz	State Parks and Reservoirs
Vicki Basman	State Parks and Reservoirs
Jason Hickman	State Parks and Reservoirs
Ginger Murphy	State Parks and Reservoirs
Mark Basch	Water
Terri Price	Water
Phil Bloom	Communications
Scotty Wilson	Law Enforcement
Bill Browne	Law Enforcement
Mark Reiter	Fish and Wildlife
Mitch Marcus	Fish and Wildlife
John Bacone	Nature Preserves

GUESTS PRESENT

Michael Knight	Pat Doughty
Mike Doughty	John Btinius, Jr.
Jason Stoots	Roger Radue
Peter Foley	Dean Roberson

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:03 a.m., EST, on November 15, 2011, at The Garrison, Fort Harrison State Park, 6002 North Post Road, Ballroom, Indianapolis, Indiana. With the presence of eleven members, he observed a quorum.

Thomas Easterly moved to approve the minutes for the meeting held on September 20, 2011. R. T. Green seconded the motion. Upon a voice vote, the motion carried. Steve Lucas also indicated corrections would be made to misspelled surnames.

Reports of the Director, Deputies Director, and Advisory Council

Director Robert E. Carter, Jr. provided his report. He said the Department initiated a major effort to reduce the deer population, with a goal to reduce the deer population by at least 25% in the next five years. The Director said the Division of Fish and Wildlife staff has done a great job of creating programs and spearheading rule amendments regarding the taking of deer. "We are trying our best to manage a population that grows and grows." He said the new program GiveIN matches hunters with individuals who want low fat high protein venison. The Director said the program has worked out very well, and over 400 people have signed up. "This has been a successful program. It has actually taken off like wildfire. We didn't expect it to be this successful this quickly." He said the program will continue to expand, and the Department will continue its outreach.

The Chair said, "I want to echo those comments as well, that the Division of Fish and Wildlife has heard the Commission. We're moving forward in terms of looking at access issues and finding the money and resources for the programs for the farmers and hunters, and those that are working towards getting that protein into hands. This is another great program."

John Davis, Deputy Director of the Bureau of Lands, Recreation, and Cultural Resources, provided his report. He noted that the State Park deer reduction program is scheduled for November 14 and 15 at Fort Harrison State Park and 20 other state parks and nature preserves. The deer reduction program will also occur on November 28 and 29. Davis said that he along with staff from the Divisions of State Parks and Reservoirs and Historic Preservation and Archaeology attended the 200th Anniversary of the Battle of Tippecanoe in Prophetstown. There was a symposium that was also well attended.

Davis said the Department is conducting additional Healthy Rivers initiative meetings. Yesterday's meeting was held at Muscatatuck, Austin, Indiana, and another meeting is scheduled

funding for projects to remove sediments, control exotic species, and remove logjams and obstructions on rivers. A Senate Joint Resolution for a constitutional right to hunt and fish passed, but it needs to be presented for vote again next year.

Smith reported the Natural Resources Summer Study Committee just concluded. "It wasn't a real action-packed Committee this year." Sedimentation concerns at Versailles Lake were discussed. The Invasive Species Council and the Historic Courthouse Preservation Commission provided updates. Steve Morris, Director of the Department's Division of Outdoor Recreation, gave a report on the State trails program. Jack Seifert, State Forester, provided an update on the Department's nursery program. The Committee recommended the use of revenue from CAGIT (County Adjusted Gross Income Tax) and C-EDIT (County Economic Development Income Tax) for historic courthouse preservation projects.

Smith said the Department also participates in other legislative summer study committees, such as the Environmental Quality Service Council ("EQSC"). Ron McAhron made a presentation regarding the Great Lakes Commission Compact. Mike Molnar and his staff provided updates from the Lake Michigan Coastal Program. The Water Resources Study Committee discussed water shortage and water distribution. Smith said he expects bills will address regional water planning during the next legislative session. The legislature's organization day is November 22.

Information Item: Consideration of recommendations with respect to use of the shoreline along Lake Michigan, generally, and Long Beach, particularly

Cameron Clark, the Department's Chief Legal Counsel, presented this information item. He provided an explanation of an issue centering on ownership and use of the shoreline of Lake Michigan, particularly at the Town of Long Beach. Clark provided an historical timeline. In 1787, the Northwest Ordinance was adopted. When regions in the Northwest Territory gained statehood, the new States obtained an interest ownership, sovereignty, and otherwise the state's particular territory, but more particularly the beds of the navigable waters within the state's territory. He said that navigability of waters has been litigated, but in this instance there is no argument that Lake Michigan is navigable.

Clark said there has not been a legal determination of what is the upper limit of the bed of Lake Michigan. In 1995, the Lakes Preservation Act established an elevation of 581.5 feet as the ordinary high water mark for Lake Michigan. "Where that falls on the beaches up there changes from season to season as the sand erodes and is put back." The State of Indiana has historically claimed ownership of what is below the ordinary high water mark; however, research has not produced evidence to support that claim. "All that is out there states that the beds of the navigable waters belong to the states, so what is the bed? Is it just what's under water or is it a distance beyond the water's edge? There is no legal guidance with regard to what we would actually own or hold in trust for the public, which is sort of issue number two here, is what are we, the State, holding in trust for the public use?"

Clark explained that at the Town of Long Beach there is an extensive beach area that did not exist 20 years ago. In 1911, the Town of Long Beach was platted, and the plat's legal

description identifies the lots as four rods by 20 rods. "The first question I had was, 'well, which prevails, the specific dimensions of these lots or what would be an arbitrary definition is of the low water mark?'" Clark said that a rule of surveying is "somehow the more arbitrary language prevails." The plats showed "the Town of Long Beach proper" goes to the water's edge. "Then the question became, 'Where did the person who platted [Long Beach] in 1911 get title to the water's edge?'—still holding onto the idea that the State owns the beaches?" He said that the research has not produced "sort of that golden point of origin, but what we have not found is something that I can say to you all here is a document that shows the State owns to a particular point on the beach. Points that we have to rely on are that unless we can produce a document that proves we have interests superior to somebody else we really can't come in and claim that we own these beaches.... Do we focus on ownership or do we focus on what the State holds in trust for the public use?"

Clark said this is an important issue that has to be settled in the event that we settle the ownership issue in favor of the private property owners. The ownership issue has been litigated extensively in the surrounding states. The Ohio Supreme Court issued an opinion favoring the private property owners, as did the States of Michigan, Illinois, and Wisconsin. "No court has yet to come out and say the state owns to a particular point or has really settled the issue in favor of the public.... What is the resolution here? I don't know." Clark summarized: "I would hope that we can work out something, in the event we come to the conclusion we don't own outside the water, which is acceptable to all parties involved. As you can imagine there are a lot of people used to using those beaches that don't live there. It will impact their use of the beach." He then introduced Michael Knight, attorney with Barnes and Thornburg—South Bend, who he said represents several Long Beach property owners.

Michael Knight provided to Commission members an information binder. He explained that under Tab 1 in the binder is a reprint of a Department webpage posted at <http://www.in.gov/dnr/water/3658.htm>, which contains the claim of ownership by the State of Indiana below the ordinary high water mark that is set in the Administrative Code. "This is really what my clients said they want changed; they want removed; they want extinguished because their deeds, their plats, their backyards if they will, all say...that it runs to the low water mark or the water's edge." Knight said a copy of the Long Beach plats are found at Tabs 11 (current plat) and 12 (former plat). He said the current plat, plat completed in 1921, contains a wavy line at the top edge of the Long Beach properties that border Lake Michigan. Knight said he canvassed surveyors from Purdue University and Purdue North Central regarding the meaning of the wavy line. "The best they could come up it means it runs to the water's edge. I showed them the former plat, and they said it runs down to the low water mark." Knight said the DNR website claims when the waters of Lake Michigan are below the ordinary high water mark, the State owns that property.

Knight noted that most of the Long Beach lots that border Lake Michigan are platted "40 wide and runs north to the lake. There's not a lot of room on everybody's own 40 foot plat." The Long Beach plat starts from Michigan City, Washington Park, where the DNR Law Enforcement Office is located, all the way to Michiana Shores, Michigan. He explained that Lake Shore Drive is numbered with Stops, and "that's how people up there relate to where they live.... The Stops, which are 40 feet wide, are publicly held." Those that live in the Town of Long Beach

have deeded beach rights at Stop 33. "If you own on the lake, you own to the lake, and you don't need the deeded beach right. And, it's not majority ownership, or it shouldn't be majority ownership; it should be property ownership. It should be what's in their deed records; what does your deed say; how long has it been there; do you have a valid deed; and if you have a valid deed and it says you run to the water, part of your private property rights is the ability to exclude others". Knight noted that some of Indiana's 41 miles of Lake Michigan lakefront is mostly privately owned. He said the residents in Long Beach "did pay a premium to live there.... The deeds for my clients go down to the low water mark."

Knight said his clients have submitted a petition ("Petition"), which is contained under Tab 5. He also noted that a full reprint of the Northwest Ordinance is under Tab 6. He said the top of page four of the Ordinance provides: "The navigable Waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free." Knight said this language is the language that the neighboring States of the Great Lakes have construed in order to determine where the public right is and what is the public right. He said that there have been different constructions from Michigan, Ohio, Illinois, and Wisconsin, "but none have—no Great Lakes State, no Northwest Ordinance State—has prevailed on a claim that it owns in fee, privately owns, to the water's edge." He said Michigan has an "expansive understanding of its public rights. It still says the riparian owner, or littoral owner for lakes, own in fee to the lakeshore. What Michigan had done is it set a definitional ordinary high water mark. Michigan's public right says for its citizens that its citizens may traverse its lake shore beneath the ordinary high water mark." Knight explained Ohio found that private property rights run down to the water's edge. "Wherever that edge it is today, that's where the private property rights are. If you are going to work on your public rights, my understanding is your toes needed to be wet, and then you are in the common highway." Michigan limited its public rights to just traversing only, and stopping on the beach to fish, sunbathe, or for any other activity was not allowed.

Knight said that the cases that have been decided by neighboring State Supreme Courts have not held that the public rights doctrine has trumped anybody's private deed. "We have checked the plats; we've checked the documents; we've checked the deeds, and they all say 'down to the low water mark or to the water's edge'. It is a private property issue, and it's a very important issue to my clients. They live there and they grew up there.... It's a beautiful beach, but it's a privately owned beach for the most part. And, that's why we would ask this Commission to take a look at the publication found on the [DNR] website, and we would like that changed."

Knight said that under Tab 15 is the resolution passed by Town of Long Beach, which states that it is no longer defending someone's private property right below the ordinary high water mark based on the website publication. "So everything from A to Z is now not defended by the Long Beach PD in Long Beach, Indiana. In addition, the Long Beach PD traverses the beachfront on ATVs." He noted portions of the beachfront, at the Stops, are public property, but "90% of the beachfront, if you buy my argument that this is private property, has the police trespassing on the private property". Knight referenced an incident where a person was ticketed for not having his dog leashed while on public property. "That's the kind of monkey wrench in this situation. Unfortunately, there are more people who do not own to the lake in Long Beach than there are people who own to the lake."

Knight said that all Long Beach lakefront property owners, except one, signed the Petition. "All these have this heartfelt interest in their property, some vacation homes and some permanent residences, and their property on southern shore of Lake Michigan.... There are public beaches in the area, but these people worked hard and own this private property beach." He noted that under Tab 16 (A through E) is Indiana case law. He said Indiana is not a tidal law State. "On the East Coast and on the West Coast, when the public right is talked about, they talk about the movement of the tides—the ability to clam digging, to remove the bounty from the sea beneath the tidal movement. Indiana has said it is not a tidal State." Knight said there is case law regarding public rights on the Ohio River. "If you want to come ashore on the Ohio River, you need to have the property owner's, riparian owner's permission or pay the wharfage or it's a trespass. There is private property to the water on the Ohio River."

Knight summarized, "Given these pieces of law that we have, we would like it consistently interpreted to the shore of Lake Michigan for the part about ownership." He said those that signed the Petition are "okay with somebody traversing the lake; somebody using the lake; somebody going back and forth. They are not okay with somebody stopping to settle; somebody taking their square footage on the lakefront and staying there. They are not in favor of that at all. They want to keep their private property rights for their enjoyment and for that property value. That's what's been deeded to them, and that's why we ask that this board take a look at the [website] publication, consider it, and withdraw it."

Director Carter asked, "What has been done in the past? Is this something that has been deteriorating for years?"

Knight said, "That's only anecdotal. The lakefront owners versus the non-lakefront owners, I think you can all imagine...as the population is growing there is getting to be more and more confrontation. There's no public parking to speak of in Long Beach, Indiana, anywhere just about. So, we don't have our 308 million people trying to use Long Beach beaches, but we do have just about everybody in Long Beach trying to get down to the beach. When the population was smaller, the Stops accommodated and any spillover was not a problem. Then the spillover started happening more on Saturday and Sunday, and often that's not a problem. Then the spillover now is also happening Monday through Friday. Especially for the folks that have 40 feet next to [a Stop], those areas get to be a problem".

John Davis asked about the current measurements of the lakefront lots in Long Beach. Knight said the 1921 plat does not contain a northerly depth measurement.

Davis indicated that he was referencing the 1894 plat, which notes the lots are 28 rods or 462 feet. He then asked what the measurement was to the water as of today. Knight said he did not know the measurement to the water's edge, but the beach is expansive. "I'm guessing from my client's house to the water, maybe 200 yards, 600 feet."

Davis said 28 rods is calculated to be 462 feet. "I wonder then kind of in theory what would happen if the low water mark was a mile out."

Knight said, "The law of accretion, that's the case behind Tab 16(D).... If you own that 428 feet, sir, and it would go to 430 feet or 440 feet, your property expands with that. On the contrary, if, in fact, that goes up higher, then your property declines with that. You don't lose it permanently, but the riparian owner will hold title under those documents."

Davis then asked, "And you think that happens even when there's a platted lot with a specific measurement of 40 rods by 20 rods, that you grow beyond that 20 yards, as opposed to the title being somewhat invested in the original platter? I don't need an answer. We talked about what comes in to play here. Does public policy come into play also? I realize that public policy doesn't get to decide what someone owns, but in deciding how to interpret what someone owns does public policy come into it? If it does, then it just seems like there is probably a myriad of different pieces of evidence".

Knight said that public policy will come into the interpretation of the public rights doctrine. "What's interesting is the State's public rights doctrine behind Tab 14, the General Assembly saw fit to create a public rights doctrine for every place, for all freshwater lakes, but Lake Michigan. So the General Assembly has not spoken. Lawyers, who some of us are here today, will argue that's what they meant to do. They meant to create a public right on A but not on B, because they know how create a public right on A, but they decided not to create the public right on B. I have no idea what the General Assembly intended."

Director Carter asked whether the incident of the unleashed dog is still being litigated.

Knight said, "Calmer heads prevailed. The \$25 fine was donated to the animal shelter."

Director Carter asked, "So, he paid the fine?"

Knight explained, "Well, it was now a charitable deduction, and people sort of walked away from it."

Director Carter then asked whether there were other fines or tickets issued.

Knight noted there is some adversity going on about sand movement. "Some people like to groom the sand in the spring to have a nice shallow slope from the back door to water's edge. Some people do it with bobcats coming through their own property, or some people have larger things coming through. There are local ordinances and permits that have to be gained before you can do any sand movement. That's a bit of an issue going on with folks that say, 'Don't move any sand'; and folks that say, 'Go ahead and move as much sand as you want.'"

Thomas Easterly asked, "Your position is, I think, the legislature could have decided this—you think they did in a certain way—and our policy is inconsistent with the law?"

Knight answered, "What I don't know is what Tab 1 is. Tab 1 is not the Indiana Code. Tab 1 is not the Indiana Administrative Code. Tab 1, that claim of ownership is not even a nonrule policy decision. It's a web posting for the best that a web posting can be to the worst that a web posting can be. It's just a web posting."

Easterly then asked, "If we went through regulations to do Tab 1, do you think we have that right as long as it is not inconsistent with whatever the underlying law is?"

Knight said the regulation is there and the support for navigation is there. "You can't let everybody—and we understand this—wharf out 300 feet to the navigability on Lake Michigan. You won't do that and you can't do that. That precludes everybody's enjoyment of the lake." He stated the Commission and the Department have the ability to regulate, control, and monitor activity on Lake Michigan. "Where they should draw the line in the sand is exactly what we are talking about. For regulation purposes, of course, for the navigational servitude, of course, for the Northwest Ordinance keeping that open for commerce and navigability, of course."

Easterly suggested the Commission could pursue rulemaking.

Director Carter asked, "Does that end all? Does that satisfy the town board, or the mayor, or the police chief, or whoever?"

Knight said, "I think the wind filling the Town's sails is the publication found on the DNR's website. I think if that publication was changed or withdrawn, things would become easier in the Town.... We hope and we are here to avoid litigation."

Director Carter noted the Department advocates for public recreation. "We are not here to keep people off the beaches. Is there some balance or agreement that we can come up with?"

Knight said his clients request that "there is no claim of ownership, and then the decision is where the location and scope of Indiana's public right for Lake Michigan. If it's something reasonable, I know my clients will not sue."

Easterly asked whether the situation at Long Beach is unique as compared to other lakefront communities such as Ogden Dunes, Dune Acres "where the perception is...that the beach is public even though there are property owners there."

Davis said, "I think that is a very good point... This is a microcosm..., but we are going to end up defining the bed of the lake. There is a part that we haven't talked about just to put it out there, is the carrying places in between seems important to me also. The idea that use comes with the carrying places in between. I know what the common thought would be 'portage' means between one place and another, but 'portage' also means getting out and walking around.... I just think this may be a lot more complex than just walking and recreating on the beach. I worry about U.S. Steel and everybody else up there."

The Chair asked Cameron Clark to summarize his perspectives and clarify any action he seeks from the Commission.

Clark explained that the ordinary high water mark, the 581.5 feet, sets the regulatory jurisdiction. "I don't look at it so much as a point below which it distinguishes ownership publicly versus ownership privately." He said the Department is not in the position to ask for recommendations

from the Commission today. "I am leaning on the ownership issue towards ownership in the private sector rather than the public sector. I'm not sure it's that important to the State to actually own it anyway. From my perspective, what's important is how much of that beach can the public use under the public trust doctrine and what can they do on it?" Clark said he welcomed additional comments from the Commission, but "setting some sort of agreeable set distance that the public can use. What I haven't quite figured out is, is this some sort of agreement we have to reach just with [Knight's] clients, or is this something that the Commission has to determine or set, or some nonrule policy to be established as it applies to all of the shores of Lake Michigan. I am not sure that this issue, if we just resolve it with Long Beach, is going to go away. My preference would be that we establish something that is reasonable to both sides, and something that is probably is a little bit more global than just Long Beach."

Easterly asked whether Clark had researched how a resolution would affect the steel mills and the Port of Burns Harbor, or any land created through lake fill. He said the State deeded ownership to those that filled the lake permitted under a government program.

Clark said the State can dispose of the beds of navigable waters, but only by legislative action.

Easterly asked, "But we have to own it first, right?"

Clark said, "If you fill in Lake Michigan, you are taking some of what is the bed. The State has to permit that and has to, by way of certain official act, transfer title to whoever that particular party is. That is part of the challenge here, if we reach some sort of agreement, how does that impact lands outside the Town of Long Beach?"

The Vice Chair stated, "This is a very complex. Having chaired the AOPA Committee and dealt with riparian rights and waterfront properties, and the challenges here, I don't think we are going to resolve it today, but I do think in the best interest of the citizens of the State and the land owners and adjacent property owners that I would recommend that we look at rulemaking to address this. This is not just—as I see this—just this area. I do think you need to really look at all along the shores of Lake Michigan given this unique situation and the history behind this. That way then all parties of interest could participate in the rulemaking process."

Clark said, "In the mean time, the web posting on DNR's website relative to what the State owns and the high water mark, will continue to be an issue. We have been contacted by the Long Beach Police Department.... I don't know who has the right to post on the DNR's website, whether it's determined by each division or the Commission. We might consider at least today what to do about that posting."

Easterly stated that postings on the Department's website should be the decision of the Department Director.

The Chair and Vice Chair agreed.

Davis said the posting is located on the Division of Water's portion of the Department's website. "I think it's just not saying that we are going to change it."

The Vice Chair said, "I think it's a recommendation for the Department, not the Commission because it's not our website, to explore the origin of this document, the basis for that, and how to proceed with regard to either revising it, leaving it as is, or whatever".

Director Carter said, "We'll talk more about that internally. I agree with what [Vice Chair Stautz] said about let's start a rulemaking process, or at least think about that." He noted the Department has also received letters regarding this issue from the Town of Long Beach residents, from the Town Manager, the Town Board, and the Long Beach Police Department. "They want to see this thing resolved."

The Chair said, "I think what I've heard, and what I think is a consensus.... We will consider taking this for rulemaking.... The website is a DNR internal matter and not something I want to talk about here today, because we really do not have any input as to what goes on the DNR website. I understand and I've heard what the thoughts are."

Davis said the Department would review the language on the website, and "at the same time, hopefully, in conjunction with the rulemaking process, so that when we consider making a change we make in anticipation of the next step. I just don't want to be too fast. I understand the issue."

The Chair thanked Cameron Clark and Michael Knight for their efforts and time invested in researching and presenting the issues.

PERSONNEL ITEMS

Permanent appointment of Lisa Johnloz, Assistant Manager at Pokagon State Park, Angola, Steuben County

John Bergman, Assistant Director of the Division of State Parks, presented this item. He said Lisa Johnloz was present at today's meeting, and noted that Johnloz is concluding her first year as Assistant Manager at Pokagon State Park. "She has been an exemplary employee, and has worked for us prior to even being the Assistant. She has been highly involved in all aspects of our operation up there, including developing the Trine Area." Bergman recommended permanent appointment of Lisa Johnloz.

The Chair thanked Johnloz for coming again before the Commission. He then asked whether there were any updates regarding Pokagon State Park.

Johnloz said, "We are busy that's for sure. We are getting ready to open the toboggan, which opens next weekend." She added the Trine State Recreation Area will open soon.