Gunderson v. State: The Indiana Supreme Court Strengthens the Public Trust Doctrine's Potential for Conservation in the Great Lakes

by Jeffrey B. Hyman

Jeffrey B. Hyman is Staff Attorney at the Conservation Law Center in Bloomington, Indiana, and Adjunct Professor of Law at Indiana University Maurer School of Law.

Summary

The Indiana Supreme Court recently delivered a landmark public trust decision, *Gunderson v. State,* ruling that the state acquired and still owns Indiana's bed of Lake Michigan below the ordinary high water mark, including exposed shores, and that it holds that bed in an inalienable trust for public uses. This is a unique decision for the Great Lakes region. This Article examines the legal background for the case, the conflicts and contradictory rulings that emerged as it travelled upward through the court system, and the ultimate resolution by Indiana's high court. The Article also places the decision in the larger context of environmental conservation and public trust advocacy.

In April 2014, Don and Bobbie Gunderson, who owned a house abutting the shore of Lake Michigan at Long Beach, Indiana, initiated a declaratory judgment action against the state of Indiana, claiming exclusive title to the exposed sandy beach between their house and the water. The Gundersons argued that the boundary of their private property was the instant water's edge of the lake—where the edge of the water stands at any given moment. The conservation groups Alliance for the Great Lakes and Save the Dunes, as well as an association of Long Beach homeowners, quickly intervened on the side of the state. The state and intervenors countered that under the equal footing and public trust doctrines, at statehood Indiana acquired title to the disputed beach to hold in trust for public uses, and the state still owns the beach.

Until *Gunderson v. State*,[1] Indiana's courts had not yet decided the very basic questions raised by the lawsuit: who owns the shores[2] of Indiana's portion of Lake Michigan[3] when the shore is not covered by water; whether the public has any right to use those shores; and, if so, for what purposes. That these were still questions of first impression in 2014 may seem surprising, especially in West Coast states with substantial public trust precedent. After all, the legal doctrines relevant to deciding these basic questions have been articulated by the U.S. Supreme Court since the 19th century. Moreover, Indiana courts recognized these doctrines more than 50 years ago.

This Valentine's Day, the Indiana Supreme Court (with four sitting justices and one recusal) delivered a landmark and unanimous decision in *Gunderson*, ruling that the state owns Indiana's bed of Lake Michigan below the common-law "natural" ordinary high water mark (OHWM), including exposed shores, and that the state specifically holds the shores in an inalienable trust for, at minimum, public uses such as walking and fishing. This decision is unique in the Great Lakes region, where most states have relinquished their shores to private ownership.

This Article describes the litigation in *Gunderson*, examines the key issues and rulings of the courts involved, and considers the importance of the case for the Great Lakes region and the nation. Part I examines the legal background for the case. Part II looks at the missteps of the trial court and intermediate appellate court in applying the

Author's Note: The Conservation Law Center, including the author, represented intervenors Alliance for the Great Lakes and Save the Dunes in all stages of the Gunderson v. State *litigation.*

1. 90 N.E.3d 1171 (Ind. 2018).
2. The "shore," as that term was used in *Gunderson*, is the space between the ordinary high and ordinary low water marks.
3. The northern border of the state of Indiana is "ten miles north of the southern extreme of Lake Michigan." Ind. Const. art. 14, §1. The location of this border was not at issue in *Gunderson*.

relevant equal footing and public trust law to the case. Part III focuses on the Indiana Supreme Court's opinion and describes how it fixed the major errors committed by the lower courts. Part IV explains why *Gunderson* is important in the larger context of conservation and public trust advocacy. Part V concludes.

I. The Legal Background for *Gunderson*

The scholarship and court decisions on the public trust doctrine and equal footing doctrine cover a vast territory; I will not attempt a general review of the doctrines. Rather, this section discusses a limited set of issues important in *Gunderson* and that tend to be overlooked or inadequately represented in the public trust literature. It also examines the case in light of recent public trust decisions in other Great Lakes states.

A. *The Relationship Between the Equal Footing and Public Trust Doctrines*

In *Gunderson*, the Indiana Supreme Court helpfully clarified the relationship between the "core" public trust doctrine and the equal footing doctrine. The core public trust doctrine, which applies to navigable-in-fact water bodies[4] like the Great Lakes, has two components: sovereign (e.g., state) ownership title, and public rights of use.[5] The sovereign is the owner/trustee of the public trust resource and holds that resource in trust for the beneficiary public. According to the core public trust doctrine, upon winning the Revolutionary War, each of the original 13 states acquired title (previously held by the sovereign in England) to the beds of its navigable water bodies to hold in trust for its citizens.[6]

To ensure that each new state subsequently carved out of the territories is admitted to the Union on an "equal footing" with the original states, the equal footing doctrine constitutionally mandates that each new state automatically receive at statehood the same right of title to the beds of its navigable water bodies as that held by the original states.[7] In short, the equal footing doctrine simply delivers the core public trust doctrine to each new state joining the Union. The initial boundaries of state title and of public rights acquired at statehood are thus necessarily the same. And unless state law changes one or both of those boundaries, they remain as originally defined.

The terms *jus privatum* and *jus publicum* are typically used to represent the two components of the public trust—sovereign title and public rights. Each state acquires *jus privatum* title to the beds of its navigable water bodies at statehood—the sovereign's right of ownership—encumbered by the *jus publicum*—the public's right of use.[8] The sovereign may convey its *jus privatum* title to private owners, but typically not the *jus publicum* encumbrance on the title.[9]

An alternative interpretation of *jus privatum* and *jus publicum* (one possibly influencing the *Gunderson* trial court) is

4. The equal footing and core public trust doctrines apply to water bodies that are navigable in fact, tidally influenced, or both. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484, 18 ELR 20483 (1988).
5. *See*, *e.g.*, PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1235, 42 ELR 20045 (2012) (explaining that "the State takes title to the navigable waters and their beds in trust for the public" (citing the seminal public trust case *Shively v. Bowlby*, 152 U.S. 1 (1894))); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 283, 27 ELR 21227 (1997) (explaining that equal footing beds are "lands with a unique status in the law and infused with a public trust the State itself is bound to respect"); Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (explaining that equal footing title to beds of navigable water bodies "is a title different in character from that which the state holds in lands intended for sale" and that this title is "held in trust for the people of the state"); State v. Longyear Holding Co., 29 N.W.2d 657, 669 (Minn. 1947) ("[U]nder the common law applicable at the time Minnesota was admitted to statehood it held absolute title, both sovereign and proprietary, to all the beds of navigable waters within its boundaries, in trust for the people of the state . . . .").
6. *See Phillips Petroleum*, 484 U.S. at 473-74, 476; Shively v. Bowlby, 152 U.S. 1, 12-13, 57 (1894); Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1166 (R.I. 2003) ("After the American Revolution, the original colonies, including Rhode Island, incorporated the public trust doctrine into their law and assumed ownership over tidal lands and the concurrent responsibility for managing them to benefit the public."); Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 4-5, 26-28 (2010).
7. *See Shively*, 152 U.S. at 57-58; Pollard's Lessee v. Hagan, 44 U.S. 212, 230 (1845); North Carolina v. Alcoa Power Generating, Inc., 853 F.3d 140, 147 (4th Cir. 2017), *cert. denied*, __ S. Ct. __, No. 17-683, 2018 WL 942461 (Feb. 20, 2018).
8. *See* United States v. Robertson Terminal Warehouse, Inc., 575 F. Supp. 2d 210, 216 (D.D.C. 2008) (before independence "the King of England held fee title to all the navigable waters in the American territories, and this fee title was known as the '*jus privatum*'"), *aff'd sub nom.* United States v. Old Dominion Boat Club, 630 F.3d 1039 (D.C. Cir. 2011); *Champlin's Realty Assocs.*, 823 A.2d at 1166:

   > Like the King's title, the state's title over the pond before the 1887 transfer similarly was characterized by at least two separate, yet tightly interwoven interests: the *jus privatum* and the *jus publicum*. The *jus privatum* relates to the state's title to tidal lands. That ownership interest, however, is subject to a public right or *jus publicum*. These two characteristics form the basis of the public trust doctrine . . . .

   (Citations omitted.)
9. *Robertson Terminal Warehouse*, 575 F. Supp. 2d at 216-17 ("Although the King was empowered to convey the fee title/*jus privatum* to others, this title was always subject to the public right of navigation and fishery/*jus publicum*."); Glass v. Goeckel, 703 N.W.2d 58, 65-66 (Mich. 2005) ("At common law, our courts articulated a distinction between *jus privatum* and *jus publicum*. . . . [W]hen a private party acquires littoral property from the sovereign, it acquires only the *jus privatum*."), *reh'g denied*, 703 N.W.2d 188 (Table) (Mich. 2005), *cert. denied*, 546 U.S. 1174 (2006); Kilbert, *supra* note 6, at 4-5:

   > While legal title to the lands under navigable waters (*jus privatum*) could be transferred by the crown to a private party, the crown would continue to hold the public's interest in using the lands (*jus publicum*) in trust for the people. . . . While a state could transfer title (*jus privatum*) of lands underlying navigable waters to a private party, the underlying lands nevertheless remained subject to the public's rights to use the waters and underlying land (*jus publicum*) held by the state.

that the sovereign holds "dual title": a *jus privatum* or "proprietary title," and a *jus publicum* or encumbered title.[10] In this view, *jus privatum* is unencumbered by public rights of use; only the *jus publicum* title is so encumbered. The California Supreme Court rejected this interpretation in *City of Long Beach v. Marshall* as inconsistent with ordinary rules of property law.[11] Under either interpretation, however, the Gundersons could not have obtained *jus privatum* unless the state conveyed it to them or their predecessors in interest.

The relationship between the equal footing doctrine and core public trust doctrine is often underplayed.[12] One possible reason is that sovereign title and public trust uses are typically analyzed and discussed separately.[13] The equal footing doctrine is invoked to analyze the sovereign title component of the public trust, whereas the term "public trust" is often used to refer only to the public rights encumbrance on that title. The extension and application of the public trust concept separate from the core doctrine and sovereign title might be partly responsible for this separation.[14]

A second reason for the perceived separation between equal footing and public trust is that in any given case, courts are mostly focused on *either* sovereign title or public rights, and find no need to explicitly consider the relationship between the two. For example, the Supreme Court obscured this relationship when it stated in *PPL Montana, LLC v. Montana*, "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."[15]

PPL Montana considered whether the state initially acquired the title component of the public trust for a particular water body. That question is decided by federal constitutional law—specifically, the equal footing doctrine. But because sovereign title acquired under the constitutional equal footing doctrine is to be held in trust for the public,[16] the public trust encumbrance itself also has constitutional dimension. The Supreme Court did not need to consider what public rights might have been *initially* imprinted on that title because, after statehood, the law of the state determines the scope of those rights.

B. *The Regional Setup for* Gunderson

The roots of *Gunderson* run deeper than a local dispute over beach property. *Gunderson* was logically the next case in a legal strategy that pits private property rights against public land in general and the public trust doctrine in particular. The Gundersons' claim of exclusive title to the beach was teed up, and undoubtedly encouraged, by recent public trust cases in Michigan and Ohio.

In 2005, the Michigan Supreme Court in *Glass v. Goeckel* considered "whether the public has a right to walk along the shores of the Great Lakes where a private landowner ostensibly holds title to the water's edge."[17] The majority in *Glass* held that the public had at least the right to walk along the exposed shore below the natural OHWM.[18] But the dissent in *Glass* was long and biting, and would have limited state title and public rights to lakebed that was covered by water at any given moment, forcing the public to keep their feet wet.[19]

In 2011, the Ohio Supreme Court in *State ex rel. Merrill v. Ohio Dep't of Natural Res.* similarly considered the boundary of state title and public rights on its Great Lakes shores.[20] Unlike the majority decision in *Glass*, the Ohio high court held that the bed of Lake Erie held in trust by the state extends to the "natural shoreline," which is "the line at which the water usually stands when free from disturbing causes."[21] This line, the court noted, had been adopted into Ohio common law in the 1800s based on the law in Illinois.[22] Although the *Merrill* court did not explain this line in terms of water marks, we know that in Ohio this line is neither the instant water's edge[23] nor the OHWM.[24]

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10. *See, e.g.*, Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979):
    > After Magna Charta, the competing interests were accommodated by a legal theory that divided the Crown's rights to shore land below high water mark into two categories: a proprietary *jus privatum*, or ownership interest, and a governmental *jus publicum*, by which the king held the land in his sovereign capacity as a representative of all the people. . . . The *jus publicum* was eventually understood to be under the control of Parliament, while the *jus privatum* belonged to the king.
11. 82 P.2d 362, 364 (Cal. 1938):
    > The state propounds the theory that there is a "dual title" or "split fee" in tidelands, consisting of the *jus privatum*, or proprietary right, and the *jus publicum*, or governmental right. . . . There is neither logic in, nor practical necessity for the "double fee" doctrine. It is established law that the state became the owner of tidelands in fee simple upon its admission to the union, holding them subject to the public trusts for navigation, commerce and fishing . . . .
12. *See, e.g.*, James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 Land & Water L. Rev. 1 (1997).
13. *See, e.g.*, Robert W. Adler et al., Modern Water Law (2013) (discussing in Chapter 6 the control and ownership of navigable waters, including equal footing doctrine, and discussing in Chapter 7 the public rights in water: the public trust doctrine, including *Illinois Central* and public uses).
14. *See, e.g.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 477 (1970).
15. 132 S. Ct. 1215, 1235, 42 ELR 20045 (2012) (citations omitted).
16. *See supra* note 5.
17. 703 N.W.2d 58, 61 (Mich. 2005).
18. *Id.* at 78.
19. *Id.* at 79-107.
20. 955 N.E.2d 935 (Ohio 2011).
21. *Id.* at 939.
22. *Id.* at 947:
    > More than 130 years ago, in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, we determined that when a real estate conveyance calls for Lake Erie as the boundary, the littoral owner's property interest "extends to the line at which the water usually stands when free from disturbing causes." . . . In our analysis, we adopted the position taken by the Supreme Court of Illinois in *Seaman v. Smith* . . . .

    See also Seaman v. Smith, 24 Ill. 521, 525 (Ill. 1860).
23. *Merrill*, 955 N.E.2d at 949 ("The boundary of the public trust does not, however, as the court of appeals concluded in affirming the trial court, change from moment to moment as the water rises and falls; rather, it is at the location where the water usually stands when free from disturbing causes.").
24. *Id.* at 947:
    > Contrary to the position advanced by the state, although *Sloan* quoted language from *Seaman* that referred to "the usual high-water mark," which is synonymous with the ordinary high-water

The Gundersons explicitly asked the Indiana courts to follow the majority opinion in *Merrill* and the dissenting opinion in *Glass*. But as the Indiana Supreme Court would recognize, public trust decisions from even sister states were of very limited use for deciding *Gunderson*. The Indiana courts were in a unique legal position. Unlike Michigan and Ohio, Indiana has no judicial precedent that relinquished its Great Lakes shores to private ownership.[25]

In Indiana, therefore, the questions of ownership and public rights on the lakeshore could be framed as a two-step problem. First, did Indiana acquire the lakeshore at statehood under the equal footing and public trust doctrines? Unlike in many other states, the *initial* boundary of state title and public rights still mattered. Second, if the answer to the first question is yes, did the state convey the disputed shore to private ownership or does the state still own it? If the state acquired the shore at statehood, the only way the Gundersons could have come to own the exposed beach below their house was if the state conveyed its shoreland title to them or their predecessors in interest through judicial, administrative, or legislative action.[26]

Indiana's legal position going into *Gunderson* was unique in another way. Indiana already had precedent that recognized the equal footing and public trust doctrines in their relatively modern incarnation.[27] This precedent referred to the "beds" of navigable water bodies received by the state and held in trust for the public, but it did not define the boundaries of those beds. Unlike many other states in the region and the nation, Indiana had a unique opportunity to address questions about state title and public rights on shores of navigable water bodies based on our modern understanding of the public trust doctrine.

II. The Bumpy Road to the Indiana Supreme Court

Gunderson traveled a rocky but inevitable path from the trial court, to the intermediate court of appeals, and finally to the Indiana Supreme Court. Each court came to a different conclusion about who owned the shore, what rights of use the public had in the shore, and even how to define the OHWM. The missteps of the lower courts appear to have stemmed in large part from the failure to properly map the relationship between the equal footing doctrine and the public trust doctrine, and possibly also from an ultimately unsuccessful attempt to satisfy everyone.

A. *The Trial Court*

The trial court denied the Gundersons' motion for summary judgment with three basic rulings: that at statehood Indiana acquired the disputed beach, and thus the federal patent at the root of the Gundersons' deed did not convey shoreland title[28]; that the state had not relinquished its title to the disputed beach[29]; and that the public enjoyed a wide range of uses of the beach.[30] At first blush, the trial court's decision seemed a total win for the public trust. But the trial court made two additional rulings that turned out to be highly controversial.

In a ruling that pitted the state against the intervenors for the remainder of the case, the trial court concluded that the OHWM boundary of the public trust is not the common-law natural OHWM, but rather is a line on the shore corresponding to a fixed elevation adopted by the state as a regulatory boundary.[31] As shown by the state's own documents, however, in some places on the shore this regulatory line was within a few feet of the water, leaving most of the beach for private ownership. The intervenors argued that the public trust boundary was originally the common-law OHWM, and that to now change the legal boundary would be inconsistent with Indiana precedent declaring that the state could not convey or curtail public rights in the bed of Lake Michigan.[32]

The trial court also ruled that the Gundersons' deed conveyed *jus privatum* title to their property bordered on the north by the boundary of federal survey Section 15.[33]

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mark, neither *Sloan* nor *Seaman* adopted that as the boundary or defined "the line at which the water usually stands when free from disturbing causes" to mean "the usual high-water mark."

(Citing Brundage v. Knox, 279 Ill. 450, 471, 117 N.E. 123 (Ill. 1917).)

25. These Michigan and Ohio decisions reflect the early and idiosyncratic development of the law in most states to deal with inevitable disputes over shoreline property. By the time the Supreme Court explained in 1876 that the equal footing doctrine applies to inland navigable water bodies such as Lake Michigan (*see* Barney v. Keokuk, 94 U.S. 324 (1876)), several states had already relinquished what would later be recognized as public trust shores.
26. *See* Kilbert, *supra* note 6, at 17-39 (setting forth a proposed framework for analyzing and applying the public trust doctrine).
27. The Indiana Supreme Court in *State ex rel. Ind. Dep't of Conservation v. Kivett*, 95 N.E.2d 145 (Ind. 1950), considered whether a stretch of the White River was navigable for title under the equal footing doctrine; if it was, the bed was owned by the state. The court explained that Indiana "acquired title to the beds of the navigable waters of the state when Indiana, in fact became a state" and that "the state could not part with title to such real estate, except by an act of the Legislature," affirming the fundamental tenet of equal footing. *Id*. at 148. The Indiana Court of Appeals embraced the public trust encumbrance on sovereign title and the inalienability of public rights in *Lake Sand Co. v. State ex rel. Attorney Gen.*, 120 N.E. 714 (Ind. Ct. App. 1918). The *Lake Sand* court sought to determine "the nature of the title of the state to the bed of Lake Michigan lying within its border." *Id*. at 715. After considering several public trust cases from around the nation, the court adopted the traditional view that public trust rights are an inherent attribute of state sovereignty and are inalienable, stating, "The state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan." *Id*. at 716.
28. Gunderson v. State, No. 46D02-1404-PL-606, 2015 WL 11145128, at *7 ¶¶ 47, 48, 51 (Ind. Super. Ct. July 24, 2015); *see also id*. at *10 ¶ 66.
29. *Id*. at *7 ¶¶ 49, 51.
30. *Id*. at *10 ¶ 66.
31. *Id*. at *8 ¶ 56, *10.
32. *See Lake Sand*, 120 N.E. at 716.
33. *Gunderson*, 2015 WL 11145128, at *7 ¶ 52:

> The Gundersons' deed, the plat to which the deed refers, and a survey of the plats reference no northern dimension other than that the lots are within Section 15. As a matter of interpretation, and common sense, if a lot is carved from within a section, the boundaries of that lot can be no greater than those of the section from which it was carved.

See also id. at *8 ¶ 55 ("This Court finds it beneficial to repeat that the Gundersons' deed conveyed the legal title, the *jus privatum*, to their lot within Section 15 and that the state holds *jus publicum* title, in public trust, to the land below the OHWM.").

The court did not define or identify the northern boundary of Section 15.[34] This ruling is particularly noteworthy, not simply because the court misused the term *jus privatum*,[35] but also because the court then contemplated that the private title held by the Gundersons and the "*jus publicum* title" held by the state could overlap in space.[36] In other words, according to the court, the regulatory line held to be the boundary of the public trust could cross the northern boundary of Section 15, the Gundersons' property line. The trial court advanced no law to support its hypothesis of overlap.

B. The Court of Appeals

Like the trial court, the Indiana Court of Appeals ruled that when Indiana entered the Union in 1816 on an equal footing with other states, Indiana acquired ownership title to the beds of its navigable water bodies below the OHWM.[37] But the appellate court departed from the trial court in three key rulings. First, it ruled that the shore below the OHWM is open only to limited public uses, such as gaining access to the public waterway or walking along the beach, and not to the full scope of recreational uses the trial court recognized.[38] Second, the appellate court ruled that the *common-law* natural OHWM remains the boundary of public rights and the boundary cannot be changed to the regulatory line set by the state.[39] Third, and most notably, the court ruled that the Gundersons owned the disputed beach down to the ordinary *low* water mark.[40]

This low water mark ruling was especially surprising. Given the appellate court's conclusion earlier in its opinion that at statehood Indiana acquired ownership of its bed of Lake Michigan below the natural OHWM, there are only two possible justifications for ruling that the Gundersons now owned the shore: either the Gundersons' deed somehow conveyed title to the shore, or the court was by judicial decree transferring the state's shoreland title to the Gundersons.

1. The Low Water Mark Ruling and the Gundersons' Deed

The Gundersons' deed could not have granted any part of the bed of Lake Michigan below the natural OHWM. First, it was undisputed that the Gundersons' chain of title stemmed from the 1837 federal land patent conveying land from the federal government to the first private owner of the Gundersons' property. Second, in 1837, the federal government did not hold and could not convey title to the shore of Lake Michigan below the OHWM because, as the court recognized, title to that shore had been acquired by Indiana in 1816 under the equal footing doctrine.[41] Third, it was undisputed that the state of Indiana had never conveyed its ownership of the disputed shore. At least up until the court of appeals' decision, these three premises pointed to a single conclusion: the state still owned the disputed shore below the OHWM.

2. The Low Water Mark Ruling, Indiana Law, and the Law of Other States

The court of appeals' low water mark ruling alternatively might have been explained as a judicial relinquishment of state-owned public trust land. But such a judicial conveyance would be contrary to Indiana precedent in *State ex rel. Indiana Department of Conservation v. Kivett*.[42] *Kivett* declared that the state cannot part with equal footing title, such as sovereign title to the shore, "except by an act of the Legislature."[43] By transferring ownership of the shore from the state to the Gundersons by judicial decree, the appellate court would have been conveying sovereign title outside the legislative process required by *Kivett*.

The court of appeals appeared to rely primarily on the Michigan Supreme Court's decision in *Glass v. Goeckel* to justify its low water mark ruling.[44] The Indiana court apparently assumed that the Gundersons, like the beachfront landowner in *Glass*, held *jus privatum* title to the shore.[45] But the court's ruling on ownership ignored a fundamental feature particular to *Glass*: Michigan courts had

34. *Id.* at *7 ¶ 53 ("Therefore, this Court finds that the Gundersons' deed conveyed no title north of Section 15's northern boundary. However, this Court notes that it is without evidence showing where the northern boundary of Section 15 currently lies in relation to the Gundersons' lots and the OHWM.").
35. The trial court appears to have based its ruling on a "dual title" theory in which the Gundersons obtained *jus privatum* without any conveyance from the state. *See supra* notes 8-11.
36. *Gunderson*, 2015 WL 11145128, at *8 ¶ 55 (stating that the *jus privatum* and *jus publicum* titles "convey different rights to their holders and these rights may, at times, overlap geographically"); *see also id.* at *8 ¶ 57 ("[T]his Court finds that the Gundersons cannot unduly impair the protected rights and uses of the public when the titles to the land overlap.").
37. Gunderson v. State, 67 N.E.3d 1050, 1054 ¶ 12 (Ind. Ct. App. 2016):
> When Indiana became a state in 1816 it acquired ownership of the beds of its navigable waters. That title, sometimes called "equal footing" title, is "different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state."

(Citation omitted.) (Citing Illinois Cent. R.R Co. v. Illinois, 146 U.S. 387, 452 (1892).)
38. *Id.* at 1058-59 ¶ 26.
39. *Id.* at 1059-60 ¶¶ 27-30, 34.
40. *Id.* at 1060 ¶¶ 31-32.
41. The U.S. Supreme Court has ruled that title to lakebed or riverbed already passed to a state under the equal footing doctrine could not be conveyed by the federal government. *See* Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71, 376-78, 7 ELR 20137 (1977) (stating that equal footing title vests in the state at statehood and is thereafter not subject to conveyance by the federal government); Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 17-21 (1935) (ruling that a federal patent purporting to convey tidelands would be invalid since the federal government has no power to convey lands that are rightfully the state's under the equal footing doctrine).
42. *See supra* note 27.
43. State ex rel. Ind. Dep't of Conservation v. Kivett, 95 N.E.2d 145, 148 (Ind. 1950).
44. *Gunderson*, 67 N.E.3d at 1060 ¶ 32 ("We held above, based on *Glass*, Gunderson's property rights overlap with those of the public trust. Therefore, the northern boundary of Gunderson's property is the ordinary low water mark, subject to the public's rights under the public trust doctrine up to the OHWM.").
45. *See id.* at 1052 ¶ 6, 1057 ¶ 22, 1060 ¶ 32.

ruled many years before that private title could extend to the low water mark on Michigan's Great Lakes shores.[46]

Those early Michigan courts did not acknowledge relinquishing the state's *jus privatum*, did not apply the equal footing doctrine, and apparently were not constrained by precedent such as *Kivett*. Thus, when Michigan's shoreland title was conveyed into private hands, the low water mark became the boundary of private title. But, as *Glass* concluded, because that title was conveyed subject to the *jus publicum* encumbrance, the boundary of *jus publicum* remained the natural OHWM. Thus, on Michigan's Great Lakes shores, private title overlaps with public rights of use.[47]

In contrast to Michigan, Indiana, at least until the court of appeals' ruling, had not sought a blanket transfer of sovereign *jus privatum* in the lakeshore either expressly or sub silentio. And *Kivett* prohibited such an action absent a legislatively sanctioned conveyance. With respect to the disputed shore, private title thus stops where *jus privatum* and *jus publicum* begin—at the natural OHWM; there is no overlap of private title and sovereign title. The overlap doctrine relied on in *Glass* can only be used to justify why shoreland title already transferred into private hands is still subject to the *jus publicum* encumbrance. The doctrine could not justify transferring shoreland title into private hands in the first instance.[48]

III. Resolution in the Indiana Supreme Court

The Indiana Supreme Court unraveled the tangle created by the lower courts. The court adopted a logical two-step approach to answer the question, "What is the precise boundary at which the state's ownership interest ends and private property interests begin?"[49] The court first sought to determine the boundary of the bed of Lake Michigan that originally passed to Indiana at statehood in 1816. Then the court sought to decide whether the state has since relinquished title to land within that boundary. The former question is a matter of federal law, whereas the latter inquiry is a matter of state law.[50]

At the first step, the court upheld the core result of the equal footing and public trust doctrines, ruling that at statehood Indiana acquired exclusive title to its bed of Lake Michigan up to the OHWM, including the temporarily exposed shores, to hold in trust for its citizens.[51] The court also held that the boundary of sovereign title and public rights in the lakebed is the common-law natural OHWM.[52] The court further recognized that as a matter of law, the federal land patent at the root of the Gundersons' deed conveyed no land below the natural OHWM.[53]

At step two, the court ruled that Indiana had not relinquished title to the disputed beach. Thus, absent an authorized legislative conveyance, the state retains exclusive title to the shore up to the natural OHWM of Lake Michigan.[54]

The court then addressed the scope of public trust uses allowed on the lakeshore below the OHWM. The court ruled that the public had, at a minimum, the right to walk along the shore as well as conduct the traditional public trust uses of fishing, navigation, and commerce.[55] The court expressly stated that it was the task of the Indiana Legislature to expand the set of public trust uses beyond those basic uses.[56]

The justices' questions during oral argument as well as the court's opinion showed that the court was concerned with balancing public and private rights.[57] This same concern was likely a motivating force for the trial court and intermediate appellate court. But unlike the lower courts, the high court was able to merge this policy concern with the law of public trust and equal footing in a way that is internally consistent and legally supportable.

IV. The Importance of *Gunderson* for Conservation and Public Trust Advocacy

The Gundersons did not challenge the notion that the state owned the *permanently* submerged bed of Lake Michigan in trust for the public—that is, the bed lakeward of the low water mark. The issue in *Gunderson* was whether the shore between the ordinary high and low water marks is part of

46. *See* Glass v. Goeckel, 703 N.W.2d 58, 69-70 n.16 (Mich. 2005) (citing Michigan cases relinquishing shores to low water mark).
47. *See id*. at 64-70.
48. The court of appeals also cited court decisions from other states that have relinquished sovereign title to all or part of the shores of navigable water bodies. For example, the court cited to *Bess v. County of Humboldt*, 5 Cal. Rptr. 2d 399, 401 (Cal. Ct. App. 1992), which noted that California state statute set the boundary between state and private ownership on nontidal navigable water bodies in California at the low water mark. But the California Supreme Court has also made clear in *State of California v. Superior Court (Lyon)*, 625 P.2d 239, 246-48 (Cal. 1981), that the state initially acquired ownership of the beds of its navigable water bodies below the OHWM and that the legislature subsequently gave away the state's equal footing title to the portion of those beds between high and low water mark; *see also* Cal. Civ. Code §830 (West, enacted in 1872; amended 1873/1874).
49. Gunderson v. State, 90 N.E.3d 1171, 1173 (Ind. 2018); *see also id*. at 1175 ("The basic controversy here is whether the state holds exclusive title to the exposed shore of Lake Michigan up to the OHWM, or whether the Gundersons, as riparian property owners, hold title to the water's edge, thus excluding public use of the beach.").
50. *See* Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 376-77, 7 ELR 20137 (1977).
51. *Gunderson*, 90 N.E.3d at 1177-81.
52. *Id*. at 1185-87.
53. *Id*. at 1178-79.
54. *Id*. at 1181-85.
55. *Id*. at 1187-88.
56. *Id*. at 1188.
57. *See id*. at 1188:

> The waters and public trust lands of Lake Michigan are subject to a multitude of competing public and private interests: commercial transportation, riparian use, onshore industrial operations, and a vibrant tourism industry. "Indiana courts have tried to balance the[se] interests." Waite, Public Rights in Indiana Waters, 37 Ind. L.J. at 468. "Where the law tips too far in favor of the littoral landowners, important public resources effectively are monopolized by a few. Where the law tilts too far in favor of the public, valuable private property rights get trampled by the many."

(Citing Kilbert, *supra* note 6, at 16.)

the public trust lakebed. This raises the question, why did the state and intervenors fight so hard to get the court to recognize that the public trust also applies to the exposed shore? The answer is not simply to attempt to preserve recreational use of the beach.

From a conservation perspective, the shore below the OHWM is a buffer between upland development and the water. The shore also provides habitat for wildlife. Maintaining strong state rather than private control over the shore, with the state as trustee for the public, is an important strategy for protecting both the shores and the waters of Lake Michigan. The ability of the public to walk uninterrupted along the lakeshore is also important for citizen conservation efforts, such as citizen monitoring of beach erosion and of unlawful discharges into the lake.

The ruling delivered by the Indiana Supreme Court in this case also adds to the legal foundation for future environmental advocacy. Although detractors of a broad application of the public trust concept see it as a threat to private property rights and separation of powers,[58] its champions contemplate the public trust as a potential common-law tool for protecting natural resources—for example, wetlands, groundwater, wildlife, the oceans, and the atmosphere—by underpinning, guiding, and filling gaps in existing environmental laws.[59]

The gap-filling role of the common-law public trust doctrine is sometimes framed and advocated in a top-down approach, in which the concept of a public trust is applied directly to resources not necessarily connected to navigable water bodies. This approach may be best portrayed not as an expansion of the core public trust doctrine inherited from English law, but rather as a direct tapping into the ancient roots of the doctrine and its common-law development in many states. A top-down approach might be the best strategy in states that have strong precedent applying the public trust to non-water resources, or for resources facing serious and urgent threats and that remain largely unprotected by traditional environmental laws.

In states with a strong core public trust doctrine applied to navigable water bodies, an alternative but complementary bottom-up approach builds precedent on a foundation of the core doctrine.[60] Under this approach, the public trust as a conservation tool will rest on four pillars built from precedent and rooted in this foundation.[61] These pillars relate to the public trust resource, the connection of the resource to a navigable water body, the scope of public trust uses of the resource, and the affirmative duties imposed on the sovereign trustee. A strong core public trust foundation begins with a relatively modest set of findings: that the state owns the beds of navigable water bodies; that exposed shores below the natural OHWM are included in the public trust bed; that uses incidental to the traditional uses of fishing, navigation, and commerce are protected; and that the sovereign has an affirmative duty to not substantially impair the water body or the designated public uses it supports. *Gunderson* adds to and solidifies this foundation.

Upon this foundation, each pillar of precedent may be built step-by-step. First, the public trust resource can be extended from the navigable water body itself to other resources, such as non-navigable water bodies,[62] wildlife,[63] upland parks,[64] and ecosystems.[65] Second, the connectivity of the protected resource to a navigable water body and its uses can be gradually loosened; for example, from a direct connection between aquatic wildlife and public uses such as fishing, to a less direct connection between ecosystem function within the water body and public uses, to an even less direct connection between upland areas and the navigable water body that those areas ultimately impact.

58. *See*, *e.g.*, James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 Envtl. L. 337, 339 (2015).

59. *See*, *e.g.*, Michael C. Blumm & Mary Christina Wood, *No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. U. L. Rev. 1 (2017); Serena L. Liss, *Shoreline Armoring and the Public Trust Doctrine: Balancing Public and Private Interests as Seas Rise*, 46 ELR 10033 (Jan. 2016); Mary Christina Wood, Natures Trust (2014); James Olson, *All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine*, 15 Vt. J. Envtl. L. 361 (2014); Elise C. Pautler, *Defending Florida's Marine Treasures: An Argument to Expand the Public Trust Doctrine and Reinforce Florida's Role in Coral Reef Protection*, 43 Stetson L. Rev. 151 (2013); Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. Rev. 393 (2007).

60. The constitutional foundation of the core public trust doctrine is comforting to some courts, which may be reluctant to ground government regulation in a source of authority other than the traditional police power or the core public trust. *See*, *e.g.*, Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 833 N.W.2d 800, 816-19 (Wis. 2013) (declining to recognize public trust authority, as opposed to police power, as the basis for protecting wetlands above OHWM); Bushby v. Washington County Conservation Bd., 654 N.W.2d 494, 498 (Iowa 2002) (affirming a lower court's refusal to enjoin a tree-clearing project as contrary to the public trust, stating:

> In Iowa this doctrine was originally applied to the beds of navigable waters and has been expanded to include the recreational use of lakes and rivers. Nevertheless, the scope of the public-trust doctrine in Iowa is narrow. . . . We are convinced that [the public trust doctrine] does not serve as an impediment to legally sanctioned management of forested areas by the public bodies entrusted by law with their care.

(Citation omitted.)

61. *See* Alexis Andiman, *Shoring Up the Shore: The Value and Vulnerability of the Traditional Public Trust Doctrine*, 93 U. Det. Mercy L. Rev. 215, 236-37 (2016) (arguing that solidifying the core public trust doctrine in state law could provide a foundation for the doctrine's further development).

62. In Indiana's Lake Preservation Act, *Indiana Code* §§14-26-2-1 et seq., which expressly does not apply to Lake Michigan, the legislature applied the public trust concept to small non-navigable lakes throughout the state. The Act applies to "public freshwater lakes," which the Act defines as lakes that have been "used by public with acquiescence of a riparian owner." Ind. Code §§14-26-2-1.2, 14-26-2-3, 14-26-2-14.5 (West 2018).

63. *See* Center for Biological Diversity v. FPL Group, 166 Cal. App. 4th 1349, 1359-64 (Cal. Ct. App. 2008) (recognizing public trust applies to wildlife); Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437 (2013); Susan Morath Horner, *Embryo, Not Fossil: Breathing New Life Into the Public Trust in Wildlife*, 35 Land & Water L. Rev. 23 (2000).

64. *See* Paepcke v. Public Bldg. Comm'n of Chi., 263 N.E.2d 11, 1 ELR 20172 (Ill. 1970); Mackenzie S. Keith, *Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above High Water Mark*, 16 Hastings W.-Nw. J. Envtl. L. & Pol'y 165 (2010).

65. *See* Olson, *supra* note 59, at 416-17 (suggesting recognition of a public trust in the hydrologic cycle); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 80-91 (2010) (describing emerging ecological trust doctrines); Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 Harv. Envtl. L. Rev. 393, 395 (1991) (considering theories for including ecological integrity as a public trust right).

Some courts appear unwilling to slacken the connection demanded between the protected resource and a navigable water body, due in part to a strict interpretation of public trust authority,[66] but other courts may be willing to protect resources only indirectly connected to a navigable water body or its uses.[67] Providing public trust protections to exposed shores because of their integral connection to the water, whether for public access[68] or ecological reasons, is an important first step in applying the public trust to places and activities that impact navigable waters from a distance.

Third, the public uses of the resource can be enriched with modern or evolving uses that might not have been contemplated by 19th-century courts.[69] Even courts that in the past have strictly construed the scope of public trust uses as limited to the traditional triad—fishing, navigation, and commerce—have more recently recognized uses incidental to these traditional uses.[70] A court that accepts such incidental uses may also eventually be willing to consider modern or evolving uses that are related to incidental uses, or that cannot realistically be differentiated from incidental uses for enforcement purposes.[71]

Finally, the scope of duties that the public trust doctrine imposes on the sovereign can range from the basic duty to consider public uses when regulating a public trust resource, to the duty to avoid substantial impairment of the resource and uses, to the duty to proactively protect the resource from degradation.[72] The *Gunderson* court, by reinvigorating the *Lake Sand* ruling that the state cannot convey or curtail citizens' public trust rights, secured a foundational public trust duty. But unlike several other states, such as Illinois, Indiana has not yet directly approved public enforcement of public trust duties.[73] Public enforcement of such duties, however, is a necessary building block in any future use of the public trust doctrine as a gap-filler for failures of environmental statutes and regulations.

V. Conclusion

The Indiana Supreme Court's recent decision in *Gunderson* is clearly important for protecting Indiana citizens' rights of access to the shores of Lake Michigan and to the shores of most other navigable water bodies of the state. But the case offers more. The story of the missteps and misinterpretations of public trust law by the lower courts in the case can be instructive for public trust litigators and judges. The decision provides guidance for how to protect public rights while accommodating private interests in a way that is consistent with the equal footing and public trust doctrines.

Moreover, *Gunderson* provides further persuasive precedent for the courts in the region and nationally that are still grappling with fundamental interpretations and applications of the core public trust doctrine. Ultimately, Indiana's *Gunderson* decision adds to and solidifies the doctrinal foundation that, at least in some states, might support further development of the common-law public trust doctrine as an effective tool for conservation of natural resources.

66. *See* Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 833 N.W.2d 800, 816-19 (Wis. 2013) (declining to recognize the public trust as authority for protecting wetlands adjacent to navigable waters but above the OHWM); Anne-Louise Mittal, *A Breach of Trust:* Rock-Koshkonong Lake District v. State Department of Natural Resources *and Wisconsin's Public Trust Doctrine*, 98 Marq. L. Rev. 1467 (2015). *See also* Purdie v. Attorney Gen., 732 A.2d 442, 446-47 (N.H. 1999) (legislature improperly extended public trust rights above mean "high water mark" boundary of public shore); Opinion of the Justices, 649 A.2d 604, 608, 609-11 (N.H. 1994) (same).

67. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1255-56 (D. Or. 2016), concluding:

> [I]t is not necessary at this stage to determine whether the atmosphere is a public trust asset because plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea. . . . Because a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets.

Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363-65 (N.J. 1984) (holding that public must have access to and use of privately owned upland dry sand areas in order to exercise rights to the foreshore below the mean high water mark guaranteed by public trust doctrine); National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 721, 13 ELR 20272 (Cal. 1983) (en banc) (concluding that "the public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries").

68. *See* Gunderson v. State, 90 N.E.3d 1171, 1188 (Ind. 2018):

> To the extent that we are asked to limit public use to the waters only, as the Gundersons suggest, such a restriction is impractical. There must necessarily be some degree of temporary, transitory occupation of the shore for the public to access the waters, whether for navigation, commerce, or fishing—the traditional triad of protected uses under the common-law public trust doctrine.

69. *See*, *e.g.*, Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 Pa. St. Envtl. L. Rev. 1 (2007).

70. *See* McGarvey v. Whittredge, 28 A.3d 620, 623, 631 (Me. 2011) (holding as a matter of Maine public trust law that the public has the right to walk across privately owned intertidal lands to reach the ocean for purposes of scuba diving; rejecting the cramped interpretation of public trust uses in *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989)).

71. *See*, *e.g.*, *Matthews*, 471 A.2d at 365 ("The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge."). If the incidental use of walking along the shore is accepted, enforcement against those walkers who pause to sit on the beach and eat a sandwich is likely not practicable. *See also* Craig, *supra* note 69, at 19:

> Current interest in the public trust doctrine often centers on "how far" the states will push public trust rights. Predicting answers requires some general sense of the particular state's "attitude" toward its public trust doctrine. For example, several states view the public trust doctrine as being primarily concerned with navigation and commerce—the hearts of the federal public trust doctrine. However, a state can also view its public trust doctrine as a comprehensive and evolving common-law protection of all public rights in waters. Given the private property rights usually involved, only states taking this view are likely to extend their public trust doctrines to uncommon applications, such as environmental protection.

72. *See* Liss, *supra* note 59, at 10045-47.

73. *See* People ex rel. Lee v. Kenroy, Inc., 370 N.E.2d 78 (Ill. App. Ct. 1977); Paepcke v. Public Bldg. Comm'n of Chi., 263 N.E.2d 11, 1 ELR 20172 (Ill. 1970).