

It's a Shore Thing: Applying the Public Trust Doctrine to Indiana's Great Lake Shores in *Gunderson v. State*

I. INTRODUCTION & BACKGROUND

Who owns the shore of Indiana's section of Lake Michigan when it is not covered in water—a private landowner or the public? In February 2018, the Indiana Supreme Court held that the state of Indiana retains exclusive title up to the natural ordinary high water mark (OHWM) of Lake Michigan. In addition, the court determined the state holds the shores in an inalienable trust for, at minimum, public uses such as walking and fishing.¹ This ruling expands the access rights of the general public to traverse Indiana's portion of Lake Michigan's shores.

Environmentalists and public trust advocates hailed the decision as a milestone public trust precedent which provides a legal foundation for future environmental advocacy in Indiana.² This decision is further notable because other Great Lakes states have not been consistent in addressing the question about state title and public rights on the shores of navigable water bodies. Given that the water levels of the Great Lakes already vary significantly and are expected to vary even more because of the impacts of climate change, the *Gunderson* decision best supports adaptive shore management. Ultimately, Great Lakes states with flexible and broad public trust doctrines, such as Indiana post-*Gunderson*, will be best able to manage increasing water-level variability on their shores.

DOI: <https://doi.org/10.15779/Z386H4CR21>

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1. *Gunderson v. State*, 90 N.E.3d 1171, 1173 (Ind. 2018). In February 2019, the Supreme Court of the United States denied the petition for writ of certiorari and therefore let stand the decision that found a public access right to the state's forty-five miles of Lake Michigan beach. See *Gunderson v. Indiana*, 139 S. Ct. 1167, *cert. denied*, 203 L. Ed. 2d 256 (Feb. 19, 2019) (No. 18-462).

2. Jeffrey B. Hyman, *Gunderson v. State: The Indiana Supreme Court Strengthens the Public Trust Doctrine's Potential for Conservation in the Great Lakes*, 48 ENVTL. L. REP. 10394 (May 2018).

A. *Great Lakes Access: Public Trust and Equal Footing Doctrine*

The United States' public trust doctrine applies to navigable waters, including the Great Lakes.³ This doctrine has roots in English common law.⁴ English citizens had the right to use navigable water for purposes of navigation, commerce, and fishing.⁵ American colonists subsequently enjoyed these same common law rights.⁶ After the American Revolution, each of the original thirteen states acquired title (previously held by the Crown) to the navigable waters and the soils under them for their own common use.⁷ The U.S. Supreme Court expanded the definition of navigable waters beyond England's application to include tidal waters and navigable-in-fact inland waterways.⁸

States subsequently admitted to the Union likewise acquired title to the land underlying the waters within their boundaries so they might be on "equal footing" with the original thirteen states.⁹ So, when Indiana joined the Union in 1816, the state acquired title to the shores and submerged lands of all navigable waters within its borders, including Indiana's portion of Lake Michigan.¹⁰ Similarly, all other "equal footing" Great Lakes states acquired title to the submerged lands of their sections of the Great Lakes.¹¹

B. *Gunderson Litigation*

In *Gunderson*, all parties agreed that Indiana owned the underlying lands of Indiana's portion of Lake Michigan.¹² However, the parties disagreed over at what point the state-owned underlying land ends and the privately-owned uplands begin.

The basic question in *Gunderson* was whether the state holds exclusive title to Lake Michigan's temporarily exposed shores up to the common law OHWM or whether riparian property owners hold title to the water's instant edge—where the water stands at any given moment. If the boundary is at the OHWM, then the public has access to exposed shores and private landowners cannot erect walls or barriers that prevent people from walking along the shoreline. The OHWM is

3. Ill. Cent. R.R. v. Illinois, 146 U.S. 187, 452 (1892) (holding Illinois's ownership of its portion of the lakebed was "in trust for the people . . . that they may enjoy the navigation of the waters, carry on commerce over them, and have a liberty of fishing therein freed from the obstruction or interference of private parties"). In so holding, the Supreme Court made clear the public trust applied to inland waterways, not just tidal waters, as had been the case in England.

4. *Gunderson*, 90 N.E.3d at 1176.

5. *Id.*

6. *Id.*

7. *Id.*

8. See *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1851). What defines the term "navigable waters" is still a litigated issue. See *Rapanos v. United States*, 547 U.S. 715 (2006).

9. *Pollard v. Hagen*, 44 U.S. 212, 228–29 (1845) (applying the state ownership doctrine of navigable waters to the new states of the West under the equal footing doctrine).

10. *Gunderson*, 90 N.E.3d at 1177.

11. *Id.*

12. *Id.* at 1175.

defined as the line on the shore established by the fluctuations of water and indicated by physical characteristics, such as a clear and natural line on the bank, shelving, or changes in the soil's character.¹³ However, if the boundary is at the water's edge, the riparian owners hold exclusive use of the beach and can prevent the public from walking along the exposed shore.¹⁴ In other words, if the boundary was at the water's edge, the public would have to keep their feet in the water at all times to access that section of shore.

Don and Bonnie Gunderson owned land abutting the shore of Lake Michigan in Long Beach, Indiana.¹⁵ By their theory, the water's edge is the legal boundary separating public trust lands and private property, and therefore the public does not have access to the exposed beach.¹⁶ They argued their deed gave them exclusive ownership up to the water's edge at any given moment. At the root of the Gunderson's deed is an 1837 federal land patent conveying land from the federal government to the first private owner of the Gundersons' property.¹⁷ This land patent originates from an 1829 federal survey indicating that the boundary extends to Lake Michigan.¹⁸ So, the Gundersons argued their boundary extended to the water's instant edge.¹⁹

However, in 2010, Long Beach, Indiana passed an ordinance to recognize the state's ownership of the shores of Lake Michigan as public trust land.²⁰ In response, the Gundersons challenged the ordinance at an administrative level as an unconstitutional taking.²¹ After unsuccessful attempts to change the ordinance, in 2014, the Gundersons initiated a declaratory judgment action against the state of Indiana and claimed exclusive title to the beach up to the instant water's edge of Lake Michigan.²² The conservation groups Alliance for the Great Lakes and Save the Dunes as well as the Long Beach Community Alliance (collectively, "Intervenors") intervened on the side of the state.²³ The state of Indiana and Intervenors countered and argued the state acquired and retained title to the submerged lands of all navigable waters within its borders, up to the common law OHWM.²⁴

13. *Id.* at 1185.

14. *Id.* at 1173.

15. *Id.*

16. *Id.* at 1175.

17. *Id.* at 1173.

18. *Id.*

19. *Id.*

20. *Id.*; City Long Beach, Ind., Code of Ordinances § 34.30 (amended 2012); Ind. Admin. Code § 312, 1-1-26(2) (2017).

21. *Gunderson*, 90 N.E.3d at 1174.

22. *Id.*

23. *Id.*

24. *Id.* at 1173–79 (quoting *Howard v. Ingersoll*, 54 U.S. 381 (1851) (Curtis, J., concurring)). The state and Intervenors invoked the American common law definition of the OHWM as the point “where the presence and action of water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.”

The trial court ruled in favor of the state and Intervenor. The court held that, under the public trust and equal footing doctrines, Indiana obtained title to all land along Lake Michigan below the OHWM when it became a state in 1816.²⁵ Therefore, the 1837 federal patent at the root of the Gundersons' deed did not convey title because the land was already held in public trust and not eligible for conveyance.²⁶ The trial court adopted a fixed-elevation boundary used by Indiana's Department of Natural Resources (DNR)²⁷ which left most of the beach for private ownership.²⁸ The court explained that the administrative fixed-elevation definition of the OHWM would "provide clearer notice to both the landowners and the public."²⁹ Both parties appealed the trial court's ruling.

The Indiana Court of Appeals affirmed in part and reversed in part. The Court of Appeals affirmed the trial court's ruling that the state holds the title below the OHWM³⁰ but rejected the administrative fixed-elevation definition of the OHWM.³¹ Instead, the court adopted the common law OHWM.³² Next, the Court of Appeals determined the Gundersons owned the disputed beach down to the ordinary *low* water mark.³³ This holding surprised the state and Intervenor because it appeared to be a judicial relinquishment of public trust land between the ordinary high and low water mark.³⁴ Such a conveyance is contrary to Indiana precedent holding that the state cannot part with equal footing title "except by an act of the Legislature."³⁵ All parties sought discretionary review by the Indiana Supreme Court.

The Indiana Supreme Court held that Indiana holds title below the OHWM and rejected the Court of Appeals' low water mark holding. The Indiana Supreme Court adopted a two-step approach in *Gunderson*.³⁶ The court first determined

25. *Gunderson v. Indiana*, No. 46S03-1706-PL-423, slip op. at 73 § 28 (Ind. Feb. 14, 2018).

26. *Id.* at 82 § 53.

27. *Id.* at 89; 312 Ind. Admin. Code 1-1-26(2). The boundary is used by DNR for administering regulatory programs by the DNR and U.S. Army Corps of Engineers. Although the trial court held that DNR's set elevation provides a "clearer notice," it is disputed whether establishing a boundary at fixed elevation is any clearer than setting the property line at the natural OHWM. "Rather than being a purely objective standard, their approach to discerning the EOHWM is necessarily subjective because it requires judgement on the appropriate base survey to use." Richard K. Norton et al., *The Deceptively Complicated "Elevation Ordinary High Water Mark" and the Problem with Using It on a Laurentian Great Lakes Shore*, 39 J. GREAT LAKES RSCH. 527, 535 (2013).

28. Hyman, *supra* note 2, at 10397.

29. *Gunderson v. Indiana*, No. 46S03-1706-PL-423, at 83–84.

30. *Gunderson v. State*, 67 N.E.3d 1050, 1056 (Ind. Ct. App. 2016).

31. *Id.* at 1059.

32. *Id.*

33. *Id.* at 1060.

34. Hyman, *supra* note 2, at 10398.

35. *State ex rel. Ind. Dep't of Conservation v. Kivett*, 95 N.E.2d 145, 148 (Ind. 1950); *see also* Hyman, *supra* note 2, at 10398.

36. *Gunderson v. State*, 90 N.E.3d 1171, 1176 (Ind. 2018).

the boundary of the bed at Lake Michigan to be the OHWM,³⁷ and second, determined that Indiana had not relinquished title to land within that boundary.³⁸

The court held Indiana acquired exclusive title to the bed of Lake Michigan up to the natural OHWM, including temporarily exposed shores, at statehood.³⁹ The federal land patent at the root of the Gundersons' deed conveyed no land below the OHWM because, absent evidence of an express federal grant before 1816 (the Gundersons' patent dates from 1837), the shore lands below Lake Michigan's OHWM "were not available for conveyance to private parties."⁴⁰ The court rejected the DNR's fixed-elevation boundary to define property rights.⁴¹ The court held that while the boundary remained a useful administrative tool for regulatory programs, it is not proper for defining property rights.⁴²

Next, the court held that Indiana retained exclusive title up to the natural common law OHWM of Lake Michigan and reversed the appellate court's *low water mark* ruling.⁴³ Further, the court held that absent any authorized legislative conveyance, Indiana may not relinquish its public trust lands.⁴⁴ As such, Indiana holds the shores in an inalienable trust for, at minimum, public uses such as walking and fishing.⁴⁵ Finally, the court held that any enlargement of public rights beyond the traditional common law rights should be determined by the state legislature.⁴⁶ The court's holding was a win for public trust advocates in the state.

II. DISCUSSION

The *Gunderson* ruling is a landmark public trust ruling in Indiana for two reasons. First, Indiana is the final Great Lakes state admitted under the equal footing doctrine to articulate the scope of the public trust doctrine on its shores. The inconsistencies of other Great Lake states' applications did not provide a clear path for *Gunderson*.⁴⁷ Some states applied broad public trust rights up to the OHWM, while others held that public trust rights end at the water's edge. Second, the location of the boundary will impact how states respond to the impacts of increased water-level variability due to climate change. Climate

37. *Id.*; see also *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 22 (1935) ("[T]he boundary between the upland and the tideland, is necessarily a federal question.").

38. *Gunderson*, 90 N.E.3d at 1176.

39. *Id.* at 1177.

40. *Id.*

41. *Id.* at 1186.

42. *Id.*

43. *Id.* at 1187.

44. *Id.* at 1181.

45. *Id.* at 1188.

46. *Id.* As for the Gundersons, they sold their lakefront property in March 2015, though they neglected to formally notify the court of the transfer in ownership until March 2017. The Indiana Supreme Court acknowledged the mootness issue created by the sale of the property, but nevertheless issued a ruling because the case involved "questions of great public interest." *Id.* at 1176 n.3.

47. Hyman, *supra* note 2, at 10396; see generally Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1, 40 (2010).

change models predict more frequent and drastic variability in water levels of the Great Lakes. Therefore, the use of the OHWM as the boundary provides the most common-sense solution to ensure continued public access.

A. Inconsistent Application of the Public Trust Doctrine in the Great Lakes States

Indiana was the latest state to weigh in on the issue. Other Great Lakes state supreme courts have reached inconsistent results when determining the rights of the public to enjoy their shores.⁴⁸ These decisions have substantial effects on public access along the shores of the Great Lakes. The Great Lakes coastline along the U.S. border is approximately 4,500 miles long—longer than the U.S. coastlines along either the Atlantic Ocean or Pacific Ocean.⁴⁹ While all Great Lakes states recognize public trust rights in the submerged lakebeds of the Great Lakes,⁵⁰ some states recognize public trust rights up to the OHWM, whereas others maintain that the public trust rights end at the water's edge.⁵¹ As a result, the rights of the public to walk the Great Lakes' shores differ depending on the state. For example, the public might have to keep their feet in the water to walk along Lake Erie in Ohio, but not in Michigan, where the public can walk along exposed shores.

Similarly to Indiana, Michigan, Minnesota, and Wisconsin extend public trust rights up to the OHWM of navigable lakes.⁵² In 2005, the Michigan Supreme Court, in *Glass v. Goeckel*, held that the public trust doctrine protects the right of the public to walk even on privately owned property along the Great Lakes up to the common law OHWM.⁵³ Unlike Indiana, Michigan previously relinquished some of its shores to private ownership.⁵⁴ However, the court in *Glass* held that this private property is still subject to the conditions of the public trust and the public can still enjoy common law rights, such as walking, fishing, and navigation, up to the OHWM.⁵⁵ By holding that even private property remained subject to the public trust, the *Glass* decision was a victory of public rights.

The majority rule in *Glass* promotes public access, even at the expense of administrability concerns. For example, the OHWM is not always easily

48. See generally Kilbert, *supra* note 47, at 2.

49. Andrew D. Gronewold et al., *Coasts, Water Levels, and Climate Change: A Great Lakes perspective*, 120 CLIMATIC CHANGE 697, 699 (2013).

50. Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 U. MICH. J.L. REFORM 861, 894 (2007) (noting that the variations in precise placement of the boundary “do not affect core public usufructs”).

51. *Id.*

52. Kilbert, *supra* note 47, at 40–56.

53. *Glass v. Goeckel*, 703 N.W.2d 58, 62 (Mich. 2005).

54. *Id.* at 73.

55. *Id.*

identifiable or readily visible.⁵⁶ Because the property line is “obscure,” the dissent in *Glass* predicted that using the OHWM as a boundary would “almost certainly . . . lead to an escalation in the number of disputes between members of the public and property owners along the Great Lakes.”⁵⁷

Other states established more restrictive rules; Illinois and Ohio, for example, established public trust boundaries below the OHWM as matters of state law. In 2011, in *Merrill v. Ohio Department of Natural Resources*, the Ohio Supreme Court held the public has no right to use the shore of Lake Erie above the point “where the water usually stands.”⁵⁸ The court in *Merrill* held that Ohio owns the waters and beds of Lake Erie in trust for public use.⁵⁹ However, in determining the boundary, the court interpreted common law and a state statute utilizing the term “natural shoreline” to hold that the boundary exists where “the water usually stands.”⁶⁰ Ohio adopted a clearer boundary, but the public lost access to Ohio’s 262 miles of Lake Erie shore.⁶¹

B. Indiana Wades into the Public Trust Boundary Debate

The *Gunderson* litigation emerged against this inconsistent backdrop. The Gundersons explicitly asked the court to follow the *Merrill* decision and *Glass* dissent to hold that the Gundersons, as riparian property owners, could exclude the public from enjoying the shore.⁶² The Indiana court, though not bound by the decisions of other states, needed to balance the efficacy of a clear boundary and broad public trust rights.

Ultimately, the Indiana Supreme Court adopted a rule reflecting the majority in *Glass* and protected public trust rights. Citing the *Glass* majority, the Indiana Supreme Court held that the term OHWM “attempts to encapsulate the fact that water levels in the Great Lakes fluctuate” and therefore the shores below the OHWM, even if not presently submerged, “fall[] within the ambit of public trust.”⁶³ In recognizing that the public trust doctrine encapsulates lands not presently submerged, the Indiana Supreme Court created a strong public trust precedent that can be used to apply to the protection of other natural resources.⁶⁴

56. *Id.* at 82 (Young, J., dissenting) (“In place of a boundary that can be determined by simple observation, the majority’s new rules would require property owners and the public to bring ‘aerial photographs,’ a ‘government survey map’ and ‘stereo [three-dimensional] photographs’ in order to ‘determine where their rights begin and end’”).

57. *Id.* at 107.

58. *State v. Ohio Dep’t of Nat. Res.*, 130 Ohio St. 3d 30, 43 (2011).

59. *Id.* at 44.

60. *Id.* at 43.

61. Kilbert, *supra* note 47, at 48.

62. *Gunderson v. State*, 90 N.E.3d 1171, 1182 n.7 (Ind. 2018).

63. *Id.* at 1180 (citing *Glass v. Goeckel*, 703 N.W.2d 58, 73 (Mich. 2005)).

64. Hyman, *supra* note 2, at 10396. “Although detractors of a broad application of the public trust concept see it as a threat to private property rights and separation of powers, 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.” *Id.* at 10400.

Conservation advocates suggest this strong public trust precedent can be applied to wetlands, groundwater, and even the atmosphere by filling gaps in existing environmental laws.⁶⁵ Moreover, the *Glass* decision sparked calls for Great Lakes states to adopt a uniform legal framework to protect public trust rights to the OHWM.⁶⁶ The *Gunderson* decision, with its broad articulation of public trust rights, should reignite those calls.

C. The Ordinary High Water Mark's Implications for Climate Change Adaptations

Notably, the Indiana Supreme Court in *Gunderson* did not mention climate change. Climate change science predicts that extreme storm events will generate progressively more adverse impacts to the Great Lakes shores.⁶⁷ Climate models predict that rapid transitions between extreme high and extreme low water levels in the Great Lakes “will be the new normal.”⁶⁸ Already, the monthly, interannual, and decadal Great Lakes coastal water-level variability is either greater than or comparable to water-level variability along other marine coasts.⁶⁹ But with the increase in pressure from extreme storms, changes in water variability could result in serious impacts for 30 million people who live within the Great Lakes basin and who depend on the lakes for drinking water, industrial use, commercial shipping, tourism, and recreation.⁷⁰ Water variability will also increase erosion along the shores, prompting some governments to announce that they will install barriers along the lakes to reduce shoreline erosion.⁷¹ Already, rapid shoreline erosion on the Great Lakes has forced numerous residents to evacuate or move their homes to prevent them from crumbling into the lakes.⁷²

State public trust doctrines can serve as legal mechanisms to promote climate change adaptation.⁷³ In the famous Mono Lake controversy, Los Angeles diverted stream water from entering Mono Lake, resulting in declining

65. *Id.*

66. See Kilbert, *supra* note 47, at 38.

67. Drew Gronewold & Richard Rood, *Climate Change Is Driving Rapid Shifts between High and Low Water Levels on the Great Lakes*, CONVERSATION (June 4, 2019), <https://theconversation.com/climate-change-is-driving-rapid-shifts-between-high-and-low-water-levels-on-the-great-lakes-118095>.

68. *Id.*

69. *Id.* at 701.

70. *Id.*

71. Monica Eng, *Climate Change Is Already Impacting Lake Michigan – Here’s How*, NPR WBEZ CHI. (Sept. 16, 2019), <https://www.npr.org/local/309/2019/09/16/760909053/climate-change-is-already-impacting-lake-michigan-here-s-how>.

72. Greg Krupa, *Crumbling Great Lakes Shorelines Have Residents Moving Homes to Safety*, DETROIT NEWS, (Jan. 22, 2020, 10:30 PM), <https://www.detroitnews.com/story/news/local/michigan/2020/01/23/crumbling-great-lakes-shorelines-have-residents-moving-homes-safety/4466621002/>.

73. See generally Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines* 34 VT. L. REV. 781 (2009); see also Abrams, *supra* note 50, at 898–902 (discussing the need for adaptive and “mobile” water boundaries to balance public and private interests).

lake levels and threatening the habitat of migratory birds.⁷⁴ Like the court in *Gunderson*, the California Supreme Court in the Mono Lake case relied on the public trust doctrine and emphasized it must be “sufficiently flexible to encompass changing public needs.”⁷⁵ This conception of the public trust doctrine is enormously important “in its focus on both the authority and the duty of the state” to protect related resources as such.⁷⁶

Like with the Mono Lake controversy, the evolving shoreline dynamics of the Great Lakes, coupled with the uncertainties caused by climate change, underscore the important role that a flexible public trust doctrine can play in helping state governments adapt and manage their shores.⁷⁷ Given the current uncertainties regarding the type, scope, and severity of climate change impacts, adaptive state management is a “critical component of climate change adaptation strategies.”⁷⁸ A broad public trust doctrine supports such adaptive state management.

Climate change adaptation requires “greater openness to change and greater deference to public, as opposed to private, property rights.”⁷⁹ Citizens and natural resource managers need access to the Great Lakes shores. First, the public’s ability to walk along the shores is key for citizen conservation efforts, such as monitoring wildlife and beach erosion.⁸⁰ Also, by setting the public trust boundary at the OHWM, the Indiana Supreme Court provides a buffer between the water and upland development. If the balance tipped too much in favor of littoral landowners, landowners might build a structure or fence, which would interfere with the ability of people and wildlife to traverse its shores in the event of erosion. States will also need to be able to discourage, and perhaps even prohibit, construction on lands vulnerable to water-level variability.⁸¹ Ultimately, if too much emphasis is placed on property owners’ common law rights, it will impair a government’s ability to deal adequately with increased water-level variability brought on by climate change.

While the *Gunderson* court did not acknowledge increasing water-level variability due to climate change, it was clearly concerned with the evolving nature of the shoreline. The court explicitly noted that the OHWM is adaptive to

74. See generally *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709 (1983) (discussing the Mono Lake controversy).

75. *Id.* at 719, 724 (holding that the public trust is “an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right only in rare cases when the abandonment of that right is consistent with the purposes of that trust”).

76. Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 *ECOLOGY L.Q.* 541, 552 (1995).

77. Craig, *supra* note 73, at 781; see also Abrams, *supra* note 50, at 898–902 (discussing the need for adaptive and “mobile” water boundaries to balance public and private interests).

78. Craig, *supra* note 73, at 851.

79. Holly Doremus, *Climate Change and the Evolution of Property Rights*, 1 *UC IRVINE L. REV.* 1091, 1115 (2011).

80. Hyman, *supra* note 2, at 10400.

81. Doremus, *supra* note 79, at 1123.

changing shoreline dynamics.⁸² The court also cited an article noting that the OHWM is more reflective of the past incidence of the true ordinary high water mark and ultimately “more stable over time.”⁸³ While the court acknowledged that the OHWM “presents difficulties in determining the precise location of the OHWM,” the common law OHWM is more adaptive to changing shoreline dynamics than the fixed-elevation boundary used by the DNR.⁸⁴ Therefore, without mentioning climate change and anticipated water-level variability, the court’s ruling best reflects the idea that the public trust doctrine, like all common law principles, “should not be considered fixed or static,” but rather should be “extended to meet changing conditions and needs of the public.”⁸⁵ By articulating a broad and flexible public trust doctrine, the court set the foundation to use the public trust doctrine to adapt to changing circumstances caused by climate change, such as changes in water level or erosion.

The court, however, missed an opportunity to emphasize the role the public trust doctrine can play in adapting to climate change when it failed to *explicitly* mention climate change. In the climate change adaptation era, the court’s public statement of the losses and changes that climate change is bringing to the state can inspire “non-judicial adaptation measures” and “increas[e] public acceptance of adaptation measures.”⁸⁶ Moreover, if the court explicitly linked a broad public trust doctrine with climate change, it might inspire more litigation using the public trust doctrine to encourage more aggressive action to combat climate change, such as the recent atmospheric trust cases.⁸⁷ Perhaps then, that is precisely why the *Gunderson* court failed to address climate change. Climate change and increasing water variability were clearly in the background of this case but the court missed an opportunity to bring them to the foreground. And yet, despite this missed opportunity, the *Gunderson* decision is still a positive step in promoting climate adaptation measures to Lake Michigan’s shore.

CONCLUSION

The Indiana Supreme Court delivered a landmark public trust precedent in *Gunderson*. The court protected shoreline access and held the state owns the shore of Lake Michigan up to the common law OHWM in an inalienable public trust. *Gunderson* provides guidance for using a flexible public trust boundary to balance public and private concerns. This is increasingly important as climate

82. *Gunderson v. State*, 90 N.E.3d 1171, 1176 (Ind. 2018) (holding that “while accretion or erosion may change the actual location of the OHWM, the legal boundary remains the OHWM.” Under this holding, the riparian landowner gains property as the OHWM shifts lakeward and loses property as the boundary shifts landward due to the loss of shoreline).

83. *Id.* at 1187 n.15 (citing Norton et al., *supra* note 27, at 534).

84. *Id.*

85. *Id.* at 1188.

86. Craig, *supra* note 73, at 851.

87. John Schwartz, *Court Quashes Youth Climate Change Case Against Government*, N.Y. TIMES, (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/climate/juliana-climate-case.html>.

change increases water-level variability in the Great Lakes region. Although the applications of the equal footing and public trust doctrines remain varied and inconsistent in the region, *Gunderson* solidifies the majority rule to protect public access and the public trust doctrine.

Betsy Marshall

