SUBMERGED LANDS IN LAKE ERIE AND SANDUSKYGY BAY

Background Concepts and Terms
History and Legal Issues
Case Studies

Presented October, 2012 for The Professional Land Surveyors of Ohio
ABUTTING OWNER'S RIGHTS TO A BODY OF WATER

Littoral owner is one who abuts a lake, pond or ocean (non-flowing body of water)

Riparian Owner is one who abuts a river, stream (moving body of water)

Littoral Owner's concerns are as follows:
• Title to the bed of the lake (or what once was lake)
• What rights owner has in the lake and his abutting land
• What use can he make of the shore, and what is his actual "boundary"
• What rights does he have when the shoreline changes
In Ohio, title to the bed of the Lake Erie and Sandusky Bay is held with the State of Ohio for the public.

In the US, navigable waterways are generally common "highways" and federally owned for benefit of the public.

State of Ohio was granted those interests upon statehood in 1803.

In Ohio, the Fleming Act, 1917 (further codified in what is today ORC 1506.10 and 1506.111 and OAC 1501-6) established the natural shoreline as boundary of the public trust, and defined the rights of a littoral owner.

Littoral owner has the right to wharf out or build docks to navigable water, and has whatever rights and title in dry land that State does not have.

What use the owner can make of the shore seems to depend on the State's regulation of shoreline structures and granting of leases to lands now or formerly "submerged."

The boundary between the State's lands and the abutting owner has been unclear and is still not completely settled.
Terms for changes in the shoreline:

**Accretion** - the imperceptible or gradual accumulation of material

**Relic tion** - the gradual uncovering of land when the water retreats

**Erosion** - the wearing away of the land based on action by water; the process referred to as "recession".

**Avulsion** - the sudden, perceptible loss of land due to water action

**Filling** - artificial filling, generally by littoral owner to gain land or provide shore protection, docking or wharfing
Generally title accrues to littoral owner when accretion or reliction occurs

Title is lost when erosion occurs

Title is not lost due to avulsion.

When filling occurs, title to the underlying (submerged) land is still held in trust by the State of Ohio for the public, although land recovered post avulsion is not "filled" and,

Land subject to reliction and subsequently filled may not be considered filled.
RELATED LEGAL CASES

Sloan v. Biemiller, 1878, Ohio Supreme Court
State ex. Rel. Squire v. City of Cleveland et al., 1948, Ohio Supreme Court
United States v. 461.42 Acres of Land in Lucas County, Ohio, 1963, US District Court
Thomas et al. v. Sanders, 1979, Court of Appeals, Sixth District, Erie
City of Toledo v. Kilburn et al., 1995, Toledo Municipal Court
Lemley et al. v. Stevenson et al., 1005, Court of Appeals, Sixth District, Erie
Sandusky Marina Limited Partnership et al. v. Ohio Department of Natural Resources et al., Court of Appeals, Sixth District, Erie
Johnson Island Property Owner’s Association v. ODNR, 2000, Court of Common Pleas of Ohio
Schnittker v. Ohio, 2001, Court of Appeals of Ohio
Beach Cliff, Board of Trustees v. John Ferchill et al., 2003, Court of Appeals of Ohio Eight District
Susan Manifold, et al. v. Charles L Gaydos, et al., 2007, Court of Appeals of Ohio, Sixth District, Ottawa
Hack et al., v. Sand Beach Conservancy District et al., 2008, Court of Appeals, Sixth District, Ottawa
State ex rel. Merrill v. Ohio Department of Natural Resources, 2011, Ohio Supreme Court
HISTORY FOR SUBMERGED LANDS IN LAKE ERIE

Sloan vs. Biemiller - 1878, Ohio Supreme Court decision
Considered the rights of riparian owner to wharf out subject to navigation defined the natural shoreline as the line at which the water stands when free from disturbing causes

State of Ohio v. Cleveland and Pittsburg Railroad Co. - 1916
Affirmed Federal control over navigable waters, Ohio authority over subaqueous lands and title in trust for the Public, right of littoral owner to access to navigable water, including right to wharf out, all subject to federal navigation

Fleming Act - 1917
Established the Public Trust Doctrine, now further codified in ORC 1506.10 Lake Erie boundary Lines and 1506.11 Development and Improvement of Lakefront Land
Local municipalities begin issuing Submerged Land Leases

1945, State Department of Public Works placed as agency protecting the State’s rights under 3699 of the General Code for submerged lands
1948 - After an Ohio Supreme Court ruling in Squire v. City of Cleveland, the state of Ohio assumes responsibility for issuing Submerged Land Leases for littoral owners wishing to build structures in Lake Erie. 1955, shore structure permits required.

1988 - The Ohio General Assembly unanimously approves the Ohio Coastal Management Law which allows the State to apply for federal approval of a coastal management program.

1989 – ODNR is tasked with administering Submerged Land Leases. This program was previously administered by the Ohio Department of Administrative Services.

2002 – ODNR Office of Coastal Management is created to administer Submerged Land Leases. Begins asserting authority of public lands to the USACE OHW.

2006 – The Ohio State Board of Registration provided an opinion to ODNR that ORC 4733 applies to preparation of submerged land lease descriptions and retracement of lease boundaries, requires the Surveyor to conform to the Minimum Standards for Boundary Surveys. Separate metes and bounds descriptions of rental areas are required, and land areas to be reported to the nearest SF and in acres.
October 8, 1974

Mr. Charles E. Frohman,
1313 Cedar Point Road,
Sandusky, Ohio, 44870.

Dear Charlie:

My heartiest commendations on your article, "Do All Lawyers Know", in the fall edition of Inland Seas!

Since you have not been in practice for some years, it may be that you do now know what kind of a hard time Gilligan's Goons in the Department of Natural Resources and Attorney General's Office have been giving us, who have had considerable to do with riparian real estate the last few years.

Notwithstanding the September 26th., 1963, decision in our Federal District Court in Toledo, United States of America vs. 461.42 Acres of Land in Lucas County, et. al., 222 Fed. Supp. 55 (1963), wherein the Department of Natural Resources and the Attorney General's office were taught the difference between avulsion and erosion, Gilligan's Goons started out with the incredible argument that lands washed away by the November 13th-14th storm of 1972 automatically became submerged lands, and, as such belonged to the State by virtue of the Fleming Act (R.C. #123.03), which Act, in my opinion, is the most glaring piece of ex post facto and retroactive legislation ever adopted by our State Legislature.
Just to cite two flagrant examples from my own personal experience (and believe me, there were many more!), let's take the Neuman Boat Line. The Big Storm ripped out a pocket in the north end of its Foot of Columbus Avenue dock (or shall we say, more properly, wharf,) almost the size of a small cove. When we applied to the U. S. Engineer Office at Buffalo for a permit to repair the dock, and to put steel sheet piling all around, they naturally waived in favor of State authorities. The folks at Columbus refused to give us the necessary position until and unless we would apply for and get a lease from the State of Ohio. I told them they had to be out of their skulls. Finally one of the Big Shots called me, and, almost pleading, said he couldn't see why we refused to ask for a lease. I said to him: "Listen! If your house was largely destroyed by fire, and you applied to your City authorities for a rebuilding permit, and were told that the only way you could get one would be to ask for a lease of your own lot from the City, what would you say? He answered "I'd tell 'em to go to hell!" I said "You've answered your own question. We and our predecessors in title have been paying taxes on that dock for over a century and a half, and we will challenge anybody else's claim of ownership". I was then given a grudging "no-prejudice emergency permit".
October 8, 1974

Many riparian owners, however, attorned to the State by asking for and accepting leases. I have never permitted a client of mine to accept a lease from the State. However, some of my accounts did accept leases in the past, before I got into the picture, so I don't know exactly what their position is.

The other example is that of Bob and Doris Bruns. They owned the real estate which Sawmill Creek Lodge now occupies. When we sold out, Bob, who always aspired some day to have a waterfront home, bought an end-of-the-road home in Grand Forest Beach, - one which had a substantial-looking sea wall, and a couple of vacant buffer lots between his house and the Lake.

The storm of November 13th-14th., 1972, tumbled his sea wall and part of his buffer property into the Lake, and so we went through the usual routing of applying for permission to reconstruct the sea wall, and to fill in the washed-out space behind it. Again we were met by a demand from Columbus that we ask for and accept a lease to our own property. Again I told them who their ancestors were. And again I finally got a no-prejudice emergency permit.
Some wise man whose name I do not remember once said something to the effect that those who do not profit from history are bound to repeat. I know that Attorney Generals and their assistants, and the personnel of the Department of Natural Resources come and go, but you would think that the Johnny-come-latelies would at least brief themselves on what has gone before.

For example, last summer, our local Coast Guard force at Cedar Point tried to enforce the 10-mile-per-hour speed limit over all of Sandusky Bay. I gently reminded them that, under the Rivers and Harbors Act of 1910, Sandusky Harbor, for which this speed limit was prescribed, was not co-extensive with Sandusky Bay, but was defined to consist of the improved channels and enough of the adjacent banks to maintain the channels. They were painfully surprised to learn this. Apparently they profited from the information I give them, because there has been no attempt to enforce the ten-mile limit this summer.

Now once again, congratulations on your article.

Cordially yours,

WGS:ss

Willett
Legal cases impacting submerged lands:

1948, Squire v. City of Cleveland. An involved case regarding littoral rights of an upland owner to the Shoreway, and the City of Cleveland appropriating submerged (prior filled land).

1963, United States v. 461.62 acres of land - Title issue over 210 submerged acres of the tract (Pintail Marsh) which had been submerged since a storm in 1929. Court found that: avulsive action, not erosion had resulted in the submergence, and title was not lost by defendants Horizon Enterprises. There is a question as to whether or not title holder was able to or permitted to actually reclaim the land.
1979, Thomas v. Sanders - This case concerns a .325 ac parcel owned by Sanders (orig. purchased from railroad) containing a wharf within the Lawrence St. slip. Lawrence St was platted in the town plat 1818 and the slip north of Water St is shown as extending into Sandusky Bay to the channel line. The decision affirmed that Sandusky Bay is part of the waters of Lake Erie and under the Fleming Act., that land reclaimed (filled) by a private owner in aid of navigation is still part of the public trust and the City or State cannot abdicate that trust in favor of private interests.

The court noted that Sandusky's plat was subject to rights of the State as a sovereign after the Revolution, subject only to right surrendered to the Federal government in the Constitution. So common law was the basis for public rights in the slip for waters filled before the Fleming Act. Railroads originally owned the water lots, filled them in, but gained no title interest in the land, although retaining their littoral rights.
The decision also confirmed that land reclaimed for use for navigation within a municipal corporation, and in the area of a “public slip” or right of way, is abandoned for use in navigation, the land is still within the authority of the municipal corporation to control and regulate.

Note: the decision held that there was no littoral interest in land outside the projected boundaries of the upland owner.

Also note: this public ownership of reclaimed land is not the same as East Bay Sporting Club v. Miller 1928, where private interest was upheld on a part of Sandusky Bay not navigable and not a part of Lake Erie or its bays, and in Hogg v. Beerman 1884 which held that submerged land connected with Lake Erie may be held by private interests where there is an express grant from the United States.
1995, City of Toledo v. Kilburn. This case concerns duck hunters cited for hunting within Toledo City limits, which extended out into the territory of the State, and challenged the City's authority to cite. The City and State were held to both extend dominion over the waters, created islands or causeways in Maumee Bay, and have the right to regulate navigation, fishing, including recreational and commercial use, and Toledo has the right to enforce out to the two mile limit.
1995, Lemley v. Stevenson. This case takes place on Kelleys Island at the historical marker. Plaintiff (appellant), Lemley was initially granted an injunction vs. Stevenson, defendant (apellee) who owned a dock (1889) out into the Lake which crossed Lemley's littoral partition line extended lakeward. Stevenson decides to extend dock, gets permits and a submerged lands lease, proceeds to extend breakwall/dock, and Lemley gets injunction claiming interference with his littoral rights. Trial court invalidated SLL, ordered removal of breakwall. On appeal, trial court was reversed based on Stevenson and State having followed procedure, allowed public comment, and State having jurisdiction over the waters. Key was that the final ruling discounted creation of Lemley's littoral zone and said he had by his own admission, navigability in the Lake. Indeed littoral rights intersected because of the curvature of the shore. Lemley still had littoral rights to wharf out in the remaining area.
1998, Sandusky Marina v. ODNR.
Case of a 19.3 acre submerged lands lease in Sandusky Bay. Lease began 1989 and ran for 50 years at annual rental of $2500, subject to adjustment every five years based on current property values. In 1992 ODNR enacted new regs creating rate schedules for different uses.
On five year renewal in 1994, rent increased to $33,000 and matter went to court.
Erie Co. Court of Common Pleas ruled for the plaintiff Sandusky Bay Marina. In final settlement, the court ruled that contract are contracts, and that even though State has authority over submerged lands, it can't do anything it wants.
On appeal, ruling of the trial court upheld.
2000, Johnson's Island Property Owners' Assn. V. ODNR. This is a case which clarified standing of related parties in an administrative action of ODNR regarding modification of an existing lease.

2001, Schnittker v. Ohio. Upheld State (ODNR's) requirement under 1506 to require SLL on existing structures. The dock in question was built in the early 1900’s and was there when Schnittker bought the property and when leases came to be required. Note that ODNR does not always take an enforcement position but can where existing structures are on public land or where structures have been built which are not permitted or leased.
2003, Beach Cliff Board of Trustees v. John Ferchill et al 9incl. ODNR. This case was a appeal of a common pleas court summary judgment in favor of Ferchill/ODNR ruling the State's ownership of submerged lands. At issue here was the whether lands were currently submerged or not and testimony was introduced stating the State's position that the USACE OHW mark of 573.4 IGLD '85 was the upland limit of their jurisdiction.

The appeals court bypassed this definition, went back to the "natural shoreline" and said basically that the land was submerged because of testimony and evidence that it had been historically filled. At point is affirmation of the State's right to title in submerged land and historical filling defining submerged lands, and that the decision avoided accepting a definition of the boundary of the public trust.
This case is mainly about property rights within a subdivision, but did in part affirm the rights of majority of upland owners (lot owners) to apply for permits and leases necessary to improve and maintain water related facilities bordering on a development

2008, Hack et al. v. Sand Beach Conservancy District et al.
This case involved the appeal of an injunction enjoining completion of a beach erosion project by Sand Beach Conservancy District, a political subdivision. Sand Beach got permits, USACE and ODNR, including SLL and constructed groins out into the lake to restore beach sand. Plaintiff (appellee) claimed actual erosion and danger to residents and the public from the groins.
Court ruled that there was ample opportunity to protest the groins in the permit/lease process and administrative appeal process, which was not done, and reversed the ruling of the Ottawa County Court of Common Pleas to stop the project.
2011, State ex rel. Merrill v. ODNR, Ohio Supreme Court, also referred to as the Lake County decision

Under federal common law derived from English and Roman Law, the US Supreme Court has recognized the doctrine of the Public Trust in tidal waters and gave the states the land under navigable waters up to the ordinary high water mark.

Coastal states and Michigan have recognized the OHWM as the boundary and given the public rights to walk on the shore.

Ohio in 1803 gained title to underlying lands of Lake Erie and presumably under equal footing doctrine the rights up to the OHWM.


Does not define boundary in terms of OHWM but uses natural shoreline and south shore, shore being the land bordering the lake.

When ODNR began using OHWM (USACE 573.4, IGLG '85) as the limit of the state's trust ownership and for leases, private property owners sued to have deeds enforced to the legal boundary in their deeds, ie low water mark, shore of Lake Erie, water's edge, etc.

Early in the lawsuit, appeal was made to federal court asking for State authority to OHW since federal government gave that to Ohio upon statehood. Court refused to rule stating that this is a boundary matter between the state and littoral owners.
Merrill, an owner via a trust, the OLG, several individuals owners, and some owners in a separate case consolidated with this one were certified as a class in this action

National Wildlife Federation and the Ohio Environmental Council intervened on behalf of the State

While summary judgment was pending, ODNR abandoned authority per instructions of the Governor and no longer required leases on land within the presumably valid deeds. The State of Ohio was still kept in the case via the Attorney General.

Trial Court (2007) ruled in favor of property owners and established the “water’s edge” as the boundary, a moveable boundary, and excluded public access upland of that boundary.

Appeals Court in Ohio (2009) ruled that the boundary is the line at which the water stands when free from disturbing causes, not the low water mark, and that property owners can exclude the public.

Final decision of OSC (2011) upheld trial court but refused to reform the deeds, stating this was not within their "class certification" and that the issue was not brought properly before the trial court. Additionally, the boundary did not change moment to moment and artificial fill could not change the boundary.
What is the status of any appeal?

Where will all this go on appeal?
WHAT DO WE DO AS LAND SURVEYORS?

What are the implications to the land surveyor of the recent decisions?

• Where to locate the shoreline boundary?
  location of the water on an average day or still day, ie free of disturbing causes
  location of the lowest water level, low water mark or OLW location consistent with present title (deed) language

• How to describe this boundary?
  to the low water mark, natural shoreline, high water mark as a meander line, series of chords
  What title language, ie qualifiers or "subject to" or “together with” clauses to include in a description
• How to interpret the intention of the original writer of the legal description?
  consistency with the record or,
  adherence with current decisions

  • Can we define procedures which will hold the test of time?
    Deeds may be reformed in the future

  • If not reformed, can we describe the boundary so as to anticipate changes in the interpretation of the Public Trust boundary?
CASE STUDIES
IN SUBMERGED LANDS LEASES

• EXISTING MARINA PROJECT – MODIFICATION

• BATTERY PARK – AMENDMENT AND MODIFICATION

• PAPER DISTRICT MARINA – MODIFICATION AND ENVIRONMENTAL COVENANT

• LURIE LANE – LITTORAL PARTITION STUDY

• YACHT CLUB – EXPANSION AND LEASE MODIFICATION
SONRISE MARINA

- MODIFICATION OF AN EXISTING LEASE TO MATCH EXISTING AREAS
- RECALCULATION OF LEASE RATE BASED ON ACTUAL USE
* Enhanced product schedule is independent of the tiered schedule for standard products.
BATTERY PARK

• MODIFICATION OF AN EXISTING LEASE TO MEET PRESENT RULES
PROPOSED SUB-LEASE TO SANDUSKY BAY DEVELOPMENT
20.1650 ACRES

NOT TO SCALE
PAPER DISTRICT MARINA

- DEVELOPMENT OF A MARINA IN A BROWNFIELD AREA
- LEASE MODIFICATION TO CONFORM TO A CHANGE IN USE
- ADDITIONAL ENVIRONMENTAL REQUIREMENTS OF ODNR
LITTORAL PARTITION LINES ARE BASED ON ADJOINING TITLE LINES AND EXISTING SUBMERGED LANDS LEASES FOR DEEP WATER MARINA AND CHESAPEAKE LOFTS CONDOMINIUMS.

SANDUSKY BAY

UNITED STATES HARBOR LINE

SUB-1731-ER
CITY OF SANDUSKY

SUB-0324-ER
CITY OF SANDUSKY

EXISTING SUBMERGED LANDS AT PAPER DISTRICT MARINA

10/1/12
LURIE LANE

- DETERMINING LITTORAL PARTITION LINES
- DETERMINATION OF HISTORICAL SHORELINE
SANDUSKY YACHT CLUB

- EXPANSION FOR DOCK DEVELOPMENT
- CORRECTION OF INCORRECT LEASE AREAS
- RESOLUTION OF MIS-MATCHED SURVEYS
ACKNOWLEDGEMENTS:

Ann J. Hancock, JD – legal decision and law review article research

Terra Bowling, JD – A Line in the Sand: Court Limits Ohio’s Public Trust Doctrine, 8:4 SandBar 8 (2010)

Patrick Ernst, PS, Ohio Department of Natural Resources Coastal Management

Alex Etchill, PS, PE – exhibits and formatting

Evan Parrott – State Supreme Court Rules on Ohio’s PTD, 8 Sandbar (2012)

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