



U.S. Supreme Court won't decide until next year whether to hear Lake Michigan beach ownership appeal

Dan Carden

November 18th, 2018

The U.S. Supreme Court will not decide until next year whether it will hear an appeal from a Northwest Indiana couple that seeks to reclassify many of the beaches along Lake Michigan, and the four other Great Lakes, as private property.

The nation's high court has approved a request from Indiana Solicitor General Thomas Fisher to postpone until Jan. 11 the due date for the state's response to the petition for Supreme Court review, also known as a writ of certiorari, filed by Bobbie and Don Gunderson, of Long Beach.

Indiana originally was required to submit its filing by Nov. 13. But Fisher asked the Supreme Court for an extra 59 days due to the crush of work he said is pending in the appellate division of the Indiana attorney general's office.

"Even giving this matter priority, we will be unable to prepare a satisfactory response to the petition by the current date owing to obligations in other cases in this court, the Seventh Circuit Court of Appeals and the Indiana Supreme Court," he said.

The Gunderson attorneys did not object to the state's request for additional time.

Indeed, the Supreme Court gave them two extra months in July to file their appeal of the landmark Feb. 14 ruling by the Indiana Supreme Court that held Lake Michigan's shoreline is owned by the state, in trust for all Hoosiers, and the property of adjacent homeowners ends at the ordinary high water mark, or roughly the spot where beach becomes land.

The Gundersons contend that the Indiana high court ruling, and a similar 2005 decision by the Michigan Supreme Court, upset a longstanding consensus in the Great Lakes states that held private ownership extended to the water's edge, wherever that edge may be at any given time.

They're asking the U.S. Supreme Court to definitively set the water's edge as the boundary of lake-adjacent properties for all five Great Lakes — with no requirement to provide public access to the beach.

Once Fisher submits Indiana's response to the Gunderson petition, the Gunderson attorneys will have a chance to comment on the state's filing, and then the nine Supreme Court justices will decide whether they want to hear additional arguments in the case and ultimately issue a ruling.

It takes agreement by four of the nine justices to grant a petition for certiorari. However, nearly every case appealed to the Supreme Court is rejected, leaving the lower court ruling in force.

Though this one may attract some extra attention from the court since Chief Justice John Roberts grew up in Long Beach.

It already is getting noticed by property rights groups across the country who have begun filing amicus, or "friend of the court," briefs, urging the Supreme Court to rule in favor of the Gundersons.

The Minnesota Association of Realtors argues in its filing that the varying definitions of lake-adjacent property boundaries in the Great Lakes states calls out for the Supreme Court to conclusively determine where "the line between private and public property rights on lakefront property must be drawn."

The Minnesota Realtors also said that if the lakeshore is to be owned by the state, then adjacent homeowners are entitled to compensation for the beachfront property being taken from them.

A second amicus brief, led by the Cato Institute, a Libertarian think tank based in Washington, D.C., and joined by Save Our Shoreline and the Whalesback Preservation Fund, both of Michigan, likewise contends that the Indiana Supreme Court ruling amounts to an unconstitutional taking of private property.

"If Indiana wanted to make the shoreline of Lake Michigan a public beach, it could have done so by explicitly exercising its power of eminent domain and justly compensating the landowners," they said.

"What Indiana cannot do, however, is to convert private property to public property by judicial or administrative fiat."

They suggest the water's edge is an understandable property boundary compared to the Indiana Supreme Court's definition that relies, in part, on vegetation changes to mark where public land ends and private property begins.

"The proposition is quite simple," they said. "Are your feet wet? If so, you are on land subject to the public trust doctrine. Are your feet dry? If so, you are on privately owned land. It need not be more complex than this."