

## COA Opinion: DNRE's Littoral Jurisdiction Limited to Ordinary High Water Mark

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In *Burleson v. Department of Environmental Quality*, the Court of Appeals, in a divided decision, held that the Michigan Department and Natural Resources and Environment's ("DNRE") jurisdiction over the land surrounding and below the Great Lakes under the Great Lakes Submerged Lands Act ("GLSLA") is limited to the ordinary high water mark defined by the international Great Lakes datum of 1955. The court concluded that the DNRE's contention that it was entitled to exercise jurisdiction over all lands that were at some time submerged under the Great Lakes "strains credulity and good sense."

Judge Gleicher dissented.

The case arose after the DNRE (then known as the Department of Environmental Quality) refused to issue a permit to allow Bobby Burleson to build a house on Lake Michigan property because he did not apply for an additional permit under the GLSLA. Burleson disputed that the DNRE had jurisdiction over his property because it is above the ordinary high water mark for Lake Michigan. The DNRE issued a declaratory ruling that its jurisdiction under the GLSLA extended to cover Burleson's property because, at least back in 1987, a significantly greater portion of the property was submerged. According to the DNRE, this portion of the property falls within the lakeward side of the "natural ordinary high water mark" which is different from the ordinary high water mark determined by elevation in the GLSLA.

The trial court affirmed the DNRE's position, and Burleson obtained leave to appeal to the Court of Appeals.

The Court of Appeals noted that the GLSLA references both the "natural ordinary high water mark" which is not defined and the "ordinary high water mark" which is defined as a particular elevation for each Great Lake. The GLSLA limits the DNRE's jurisdiction to land to the lakeward side of the natural ordinary high water mark, then immediately defines "ordinary high water mark." The court reasoned that "natural ordinary high water mark" refers to the ordinary high water mark unaltered (i.e. elevation) unaltered by human activity.

*Disclaimer:* Warner Norcross & Judd LLP represented the successful Petitioner/Appellant Bobby Burleson in this matter.