

Lake Boundary: Arkansas Court of Appeals Addresses Appropriate Method of Delineation

Arkansas Environmental, Energy, and Water Law Blog



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10/14/2016

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The Arkansas Court of Appeals in a September 14th opinion addressed whether the boundary of a disputed lakeside property should have been determined by the “top bank” of the lake, as the appellants argued, or by the “ordinary high water mark” (“OHWM”), as the Circuit Court decided. See *Eifling v. Southbend, Inc.*, 2016 Ark. App. 393.

Southbend filed suit in 2013; asking that the Circuit Court find that the OHWM constitutes the boundary of a six-acre parcel of land east of Lake Dian.

The responding party, Lakeside Plantation Farm (hereafter known as “Eifling,” the party in interest that succeeded Lakeside in 2014), argued that the boundary of the lake was the top bank, rather than the OHWM.

The OHWM is a term that is sometimes used to delineate boundaries involving waterbodies for regulatory or common law purposes. For example, it can play a role in certain federal regulatory jurisdictional determination such as the Clean Water Act or Rivers and Harbors Act. A representative definition of the term is found in the United States Corps of Engineers regulations which define the OHWM as:

. . .that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial. . . .

See 33 C.F.R. 328.3(e).

OHWM was described by Southbend’s land surveyor at the trial as a term used for vegetation changes—anything that will grow within the water is below the OHWM, while anything above the OHWM will not grow in extended water. By contrast, a “top bank” is a physical feature on the land, or the dirt itself. Water was stated to reach its top bank maybe once a year as opposed to the OHWM where the water stays long enough for the vegetation to actually change.

The parties agreed that Lake Dian, as it was in 1950, was the boundary of the disputed land. They disagreed, however, as to how the boundary of Lake Dian should be determined. If the lake’s boundary was the OHWM, as Southbend argued, the six acres between the lake and the top bank would belong to Southbend. However, if the boundary ran along the top bank, then anything between the lake and the top

bank would be within the boundary of Lake Dian. If so, the disputed six acres would be the property of Eifling.

In support of Southbend's contention that the OHWM should be the boundary, a tenant farmer, who had worked on both parties' lands, testified that the Eiflings had never had anything to do with the disputed six acres, even when a levee was built, a timber road carved, or timber harvested. In response, the Eiflings argued:

1. the timber harvest had been concealed from them; and
2. a 1954 quitclaim deed, which had conveyed all land "within the top bank of Lake Dian" and "not heretofore conveyed," was sufficient evidence that the proper boundary was the top bank.

The Circuit Court ruled:

- a) the Eiflings had never asked the tenant farmer to conduct any activity on their behalf on the east side of the lake;
- b) the "top bank" never came up in any of the Eifling deeds prior to the lawsuit;
- c) Southbend had "undisputed and adverse possession of the land for a period in excess of twenty years"; and
- d) tax records reflected that Southbend had paid taxes on the land east of Lake Dian.

The Circuit Court also addressed the Eiflings' 1954 quitclaim deed. It discounted the document's importance because:

1. title to all of the land east of the lake had been conveyed to Southbend's predecessor in interest in 1950, four years before the entry of the quitclaim deed; and
2. the quitclaim deed specifically stated that it did not include any land that had already been conveyed.

The Circuit Court found that the quitclaim deed was not persuasive. Therefore, it moved to the issue of "where was the boundary of the lake" in 1950. To address this question, each party produced its own consulting forester.

Robert Wishard, Southbend's forester, referencing the surrounding trees' ages and ability to tolerate regular flooding, testified on the probable location of the OHWM in 1950. Aerial photos taken of Lake Dian in 1951 corresponded to his conclusion.

The Eiflings' forester, Jeff Denman, testified that markers along the top bank, such as fence posts and strainer pipes, indicated that the top bank was the boundary line. Denman depicted the OHWM as it was in 1950 as much closer to the top bank than had been portrayed by Southbend's experts. Southbend's experts responded that it was not possible that the OHWM was at the top bank in 1950, because "it would have been nine feet over the dam and would have flooded the land to the south."

The Circuit Court sided with Southbend's expert. It found that the OHWM was the boundary of the lake, and that the top bank of Lake Dian was not the same as the OHWM in 1950. Southbend was granted an order quieting title to the disputed 6 acres. The Eiflings appealed.

The Eiflings argued on appeal that:

1. the Circuit Court erred when it did not find that the top bank of Lake Dian was the boundary by acquiescence;
2. Southbend's claim was barred by laches and the statute of limitations;
3. the OHWM was not the boundary line;

4. the Circuit Court erroneously found the location of the OHWM; and
5. the Circuit Court erred when it found Southbend had adversely possessed the disputed land.

The Arkansas Court of Appeals summarily rejected the arguments involving boundary by acquiescence and statute of limitations. It held that the Circuit Court did not address these issues. Therefore, they were not preserved for review.

Regarding the Eiflings' latter three points (that the OHWM was not the boundary line, that the Circuit Court erroneously found the location of the OHWM, and that Southbend had not adversely possessed the disputed land), the Arkansas appellate court gave "due deference to the Circuit Court's superior position to determine the credibility of the witnesses and the weight to be accorded [the] testimony." The Circuit Court's findings were affirmed because they were not clearly against the preponderance of the evidence

[A copy of the decision can be downloaded here.](#)

