ORIGINAL

In the

Supreme Court of Ohio

STATE OF OHIO ex rel. ROBERT MERRILL, TRUSTEE, et al., Plaintiffs-Appellees, and HOMER S. TAFT, et al., Intervening Plaintiffs-Appellees-Cross-Appellants v. STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al., Defendants-Appellants-Cross-Appellees, and STATE OF OHIO, Defendant-Appellant-Cross-Appellee, and NATIONAL WILDLIFE FEDERATION, et al., Intervening Defendants-Appellants-Cross-Appellees.	:	Case No. 2009-1806 On Appeal from the Lake County Court of Appeals, Eleventh Appellate District Court of Appeals Case Nos. 2008-L-007, 2008-L-008 Consolidated

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DEFENDANT-APPELLANT STATE OF OHIO'S MEMORANDUM IN RESPONSE TO APPELLEE-CROSS-APPELLANT HOMER TAFT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

THE COURT SHOULD NOT GRANT JURISDICTION OVER THE CROSS-APPEAL 4

A. The Court should address the issue of the boundary of the State's public trust authority over Lake Erie, but it need not, and should not, grant Taft's cross-appeal to do so. 4

B. The Court should not review the issue of NWF's intervention, as it involves the application of settled law to peculiar facts, and the intervention ultimately did not affect Taft procedurally 5

ARGUMENT 8

Defendant-Cross-Appellee State of Ohio's Proposition of Law 1:

Lake Erie, within the State's boundaries, belongs to the State of Ohio as proprietor in trust for the people of Ohio, and the State's public trust duties extend to the usual or ordinary high-water mark, and not the highest or lowest point to which the water rises or recedes or where the water stands at the moment. Further, although gradual, natural changes such as accretion may move that mark or natural shoreline, private landowners may not use fills or other artificial encroachments to move the boundary of public rights. Adjacent landowners do, however, possess special property rights, known as "littoral rights," below the ordinary high-water mark that are not possessed by other members of the public and that are entitled to respect and certain protections even against the State 8

Defendant-Cross-Appellee State of Ohio's Proposition of Law 2:

An association with members interested in enjoying public rights to the Lake Erie shore is a proper intervenor in a case concerning the reach of the public trust along the shore 13

CONCLUSION 14

CERTIFICATE OF SERVICE ..... unnumbered

INTRODUCTION

The State of Ohio agrees with Appellee-Cross-Appellant Homer Taft that the Court should hear the primary *issue* in his cross-appeal—namely, what is the boundary between the State's "public trust" authority over Lake Erie and the lakefront property owners' exclusive rights? The State has already asked the Court to review that same question, and the difference between the State's appeal and Taft's cross-appeal is that each offers a different answer. The State says that the boundary is the "ordinary high-water mark"; Taft says it is the "low-water mark"; and the decision below rejected both in favor of the "water's edge," or wherever the water touches land at any given moment.

No matter what the answer is, the question is the same—"what is the boundary?"—and it affects all lakefront landowners and all Ohioans. The State accordingly urges the Court to address it, for the reasons set forth in the State's jurisdictional memorandum. See State's Jur. Mem. at 10-11. But that is not to say that the Court should grant Taft's cross-appeal. On the contrary, the cross-appeal is unnecessary, because reviewing the initial appeal would already put the issue before the Court. And a cross-appeal would only complicate procedural matters, as it would add extra stages of briefing and argument.

While Taft's first issue warrants review, his second issue—in which he challenges the intervention below of two conservation groups—does not deserve the Court's review. On the merits, this fight does not involve the State: Taft seeks to eject the National Wildlife Federation and the Ohio Environmental Council (together, "NWF") from the case. But the State opposes jurisdiction because adding this issue would distract from the more important Lake Erie issues. The legal standard for intervention is well-settled, and the application of the law to these particular facts—especially when the intervention did not harm Taft in any way—does not warrant review.

STATEMENT OF THE CASE AND FACTS

The facts regarding the Lake Erie boundary dispute have already been outlined in the parties' jurisdictional memoranda, but the State here stresses facts relevant to (1) the relationship between Taft's cross-appeal and the State's initial appeal, both of which address the boundary of Lake Erie, and (2) NWF's intervention.

As the decision below and the parties' earlier briefs explain in greater detail, different sets of Plaintiffs, all owners of property bordering Lake Erie, sued the State of Ohio, the Ohio Department of Natural Resources ("ODNR"), and its Director in Lake County in May 2004. *State ex rel. Merrill v. State of Ohio* (11th Dist.), 2009-Ohio-4256 ("App. Op.," Ex. 2 to State Jur. Mem.); State Jur. Mem. at 2-3; Taft Jur. Mem. at 4-5. Taft (and the other Intervening Plaintiffs, the Duncans) proceeded independently of the others, but all Plaintiffs sought a declaration regarding the boundary between the State's "public trust" authority and ownership of Lake Erie and the lakefront landowners' private property rights.

The trial court certified a class of all lakefront owners along Lake Erie, identifying the public trust boundary question as a common issue, along with a question asking whether or not ODNR's method for locating that boundary—the ordinary high-water mark of Lake Erie—is reasonable and lawful. State Jur. Mem. at 2-3 (citing Class Cert. Order, Docket (Tr. Dkt.) 123, at 2). The third certified question addressed the "respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the 'territory'" of Lake Erie, including the lakeward boundary of the lakefront landowners' private property rights. *Id.* at 3.

Meanwhile, the trial court granted NWF's (including the OEC's) motion to intervene on January 10, 2007. Tr. Dkt. 148. The NWF had sought intervention much earlier, as Taft notes. Taft Jur. Mem. at 5. NWF, both pre- and post-intervention, filed motions and other papers

regarding the procedure and law in the case. But it never propounded any discovery requests upon any party.

All parties sought summary judgment, with each asking the trial court to adopt its preferred boundary. State Jur. Mem. at 3. The State and NWF urged that the public trust title and the public's rights run to the "ordinary high-water mark"—that is, the usual reach of high water established over time, not the momentary water's edge. Class Plaintiffs, on the other hand, claimed that the boundary was the "low-water mark," even when that mark was below the water, with no public rights above that point. Taft (and the Duncans) asserted that the boundary was the "level of low water, or the low water mark, as it existed at the time of statehood in 1803, or at any lower level to which the water has since receded." Taft Mot. for Summary Judgment, Tr. Dkt. 168, at 3. The trial court rejected all of these views, ruling that the boundary is "the water's edge, which means the most landward place where the lake water actually touches the land at any given time." See Summary Judgment Order, Tr. Dkt. 183 ("Com. Pl. Op.," Ex. 3 to State Jur. Mem.).

All parties appealed except for ODNR, its Director, and the Duncans. In the appeals court, the NWF appeal was initially separate from the State's, with separate briefing, but the court consolidated the cases for argument and issued one joint decision.

The appeals court adopted the trial court's definition of the boundary as the "actual water's edge" at a given moment, App. Op. ¶ 127, although it altered the trial court's ruling in certain respects, State Jur. Mem. at 5. Like the trial court, the appeals court held that this boundary limited not just the State's title in trust, but also the State's sovereign authority as trustee and the public's rights, so that only the water itself and the "lands under the waters of Lake Erie, *when submerged under such waters,* are subject to the public trust." *Id.* (emphasis added).

The State appealed that ruling, seeking to reverse the appeals court's "water's edge" line in favor of the ordinary high-water mark. The NWF has filed a "second notice of appeal" in the same case. Taft opposes the State's jurisdictional request, but asks the Court to review the appeals court's "water's edge" ruling to consider setting the boundary of the public trust at the historic lowest-water mark, that is, the lowest point that water has reached in over 200 years.

THE COURT SHOULD NOT GRANT JURISDICTION OVER THE CROSS-APPEAL

A. The Court should address the issue of the boundary of the State's public trust authority over Lake Erie, but it need not, and should not, grant Taft's cross-appeal to do so.

As the State's own jurisdictional memorandum detailed, the Court should address the issue of the boundary of the State's public trust authority over Lake Erie and its shore. See State Jur. Mem. at 10-11. That issue has immense legal, practical, and financial effects for all Ohioans, including the lakefront property owners, those who wish to exercise the public's rights, and those who are taxpayers. Consequently, the State agrees with Taft on the broader principle that the issue of the boundary warrants review, and it agrees that the appeals court used the wrong line. If the Court addresses the boundary question, no single answer—even one plainly wrong on the merits, such as Taft's extreme suggestion of the historic lowest-water mark—should be precluded from the Court's consideration. Thus, the State does not oppose Taft's ability to urge the Court at the merits stage to adopt his low-water mark as the boundary of the public trust.

But the Court need not, and should not, grant Taft's cross-appeal to allow Taft to make his argument. If the State's appeal is granted, the issue of the boundary is already on the table. Taft, as an Appellee to that appeal, can offer his own Proposition of Law as an alternative to the State's. He is not limited, in his capacity as Appellee, to defending the appeals court's legal reasoning about the "water's edge," as opposed to urging his own "low-water" legal theory as an alternate ground. Thus, the Court need not grant his cross-appeal to address his legal position.

And because the cross-appeal is not needed, the Court should not grant it, as doing so would needlessly complicate the case. A cross-appeal would grant Taft, but not the other Plaintiffs, the right to file both a fourth brief and to argue a fourth or sur-rebuttal round at oral argument. See S. Ct. Rule VI, Sec. 5(D) (brief); Rule IX, Sec. 5(C) (argument). However, the *Merrill* Plaintiffs are undoubtedly the primary plaintiffs here, because the court certified a class action with the named *Merrill* plaintiffs—but not Taft (or the Duncans)—as class representatives.

Consequently, the State urges the Court to accept Taft's invitation to address the Lake Erie boundary, and further to consider his low-water mark as one possible answer to the boundary question, but it urges the Court to deny Taft's cross-appeal. If the Court deems it necessary, the Court could, as part of an order denying the cross-appeal, clarify that Taft may still urge his low-water theory. That would give the Court the benefit of all substantive legal options without the procedural concerns noted above.

B. The Court should not review the issue of NWF's intervention, as it involves the application of settled law to peculiar facts, and the intervention ultimately did not affect Taft procedurally.

Regardless of the Court's approach to Taft's cross-appeal on the boundary issue, it should deny review of his second issue, in which he challenges the lower courts' grant and affirmance of NWF's intervention in the case. The issue does not raise any legal issues needing review, and the facts here make it a poor candidate for review in several respects.

First, the legal standards for intervention are well-established, and this case does not address anything new or uncertain. See Civ. R. 24; see *State ex rel. SuperAmerica Group v. Licking County Bd. of Elections* (1997), 80 Ohio St. 3d 182, 184. Taft does not point to any uncertainty in the lower courts or any doctrinal issues needing review. Indeed, he does not cite a single case on intervention, in either his merits discussion or his explanation of why the case

warrants review. See Taft Jur. Mem. at 3-4, 25. That absence of authority shows that no legal principles, let alone unsettled ones, are at stake. His entire discussion of the issue is one paragraph in each part, *id.*, and it boils down to a disagreement with the outcome.

Taft's sole attempt to assert a broader impact is his unsupported claim that allowing intervention here "would wreak havoc in future litigation throughout the State of Ohio whenever any political action group seeks to collaterally attack property rights beyond the scope of private property disputes of the real parties in interest." *Id.* at 4. But a "collateral" attack is, by definition, one levied in a separate case. Here, the NWF joined an existing one. And the dispute here undeniably involves public rights, not merely "private property disputes." As this Court's (or any court's) docket shows, public interest groups such as NWF are already active in litigation, so allowing intervention here does not threaten some new wave of litigation.

Second, even the outcome in this particular case is not worth review, because NWF's presence as a party, although adding a valuable voice substantively, ultimately did not harm Taft or the other Plaintiffs. That is, NWF offered, and still offers, an important perspective on the issues, as its members concretely represent the public rights that the State must protect. But lower courts, like this Court, are typically generous in allowing any entity to have its voice heard as an amicus. Thus, Taft was not harmed NWF's substantive legal arguments, as NWF could have raised those points as an amicus.

A grant of party status has two primary effects: discovery rights and appeal rights. Discovery rights can be critical in many cases, of course, but here, NWF served no discovery on Taft or any party. It merely argued the law. Separately, appeal rights are of course important, and NWF did exercise those rights, at both the appeals court and in this Court. But the State also appealed at both levels, so as things turned out, NWF's ability to appeal did not harm Taft.

To be sure, NWF's appellate rights would have been critical if either (1) the State had not appealed or (2) if this Court adopted the view that the State's appeal was invalid—but neither possibility is any reason for reviewing NWF's intervention. Putting aside the merits of the State's appellate standing or the need to review that issue, as those are not at issue in this brief, the State acknowledges that *if* neither it nor NWF could appeal, then Taft would perhaps benefit by achieving victory by default, with no opponents left. But if the State were removed from the case, then NWF would have a much *stronger* case for intervention. The appeals court held that NWF met the standards for both intervention of right and permissive intervention. App. Op. at ¶ 104-22. As to intervention of right, it seems indisputable that NWF's interest would not be "adequately represented by existing parties," Civ. R. 24(A), if no other party represented the public interest and opposed Taft (and other Plaintiffs) at all.

Finally, adding the intervention issue to the case would add procedural complications and distract from the main issue. As noted above regarding Taft's cross-appeal of the Lake boundary, a cross-appeal adds a fourth brief and a fourth round at argument. If NWF's intervention is also at stake, and if Taft's cross-appeal on the boundary issue were also allowed, the argument would be needlessly complicated. While multiple issues and parties are sometimes unavoidable, such complications should be avoided if possible.

In light of the above, the State urges the Court to deny review on this issue, because allowing this unworthy issue into the case would distract from the resolution of the already-complicated Lake Erie issues.

ARGUMENT

Defendant-Cross-Appellee State of Ohio's Proposition of Law 1:

> *Lake Erie, within the State's boundaries, belongs to the State of Ohio as proprietor in trust for the people of Ohio, and the State's public trust duties extend to the usual or ordinary high-water mark, and not the highest or lowest point to which the water rises or recedes or where the water stands at the moment. Further, although gradual, natural changes such as accretion may move that mark or natural shoreline, private landowners may not use fills or other artificial encroachments to move the boundary of public rights. Adjacent landowners do, however, possess special property rights, known as "littoral rights," below the ordinary high-water mark that are not possessed by other members of the public and that are entitled to respect and certain protections even against the State.*

The State's Proposition of Law, as originally set forth in the State's appeal, also responds to Taft's cross-appealed Proposition claiming that his low-water mark is the boundary of the State's public trust authority over Lake Erie. After all, Taft merely asks the same question with a different answer. Therefore, the State notes that its argument in favor of the ordinary high-water mark, as the boundary of the State's public-trust rights, is already summarized in its brief. See State Jur. Mem. at 13-15. The State summarizes below, however, why the low-water mark cannot be the right answer.

First, as the State's earlier brief showed, the Court has long identified the "ordinary high-water mark" as the boundary of a lakefront owner's title. *Sloan v. Biemiller* (1878), 34 Ohio St. 492, 513 (using the term "ordinary high-water mark" to denote the boundary at issue). While *Sloan* also used language from an Illinois case that might seem, when taken out of context, to support the appeals court's water's edge view—namely, the phrase "line at which the water usually stands, when free from disturbing causes"—the context of the following paragraph shows that *Sloan* equated that line with the ordinary high-water mark. *Id.* at 512-13 (citing *Seaman v. Smith* (Ill. 1860), 24 Ill. 521, 525).

Second, Taft is not only wrong in ignoring the discussion of the ordinary high-water mark in *Sloan* and other cases, but he is especially wrong in urging that those courts adopted the low-

water mark—a mark that is almost always underwater. See Taft Jur. Mem. at 20-24. *Sloan* never uses the term "low-water" in discussing the Lake boundary. In sharp contrast, it uses the term "low" when it *rejects* the lowest point, or the highest-ever point, in favor of the "usual high-water mark." *Sloan*, 34 Ohio St. at 513. The term "low-water mark" appears once in *Sloan,* and that is in a quote explaining that British law allowed riparian owners to own to the low-water mark, and the passage goes on to explain why that law does *not* apply to Lake Erie. *Id.* at 512.

Third, Taft's discussion of other Great Lakes States' positions misstates the law of those States. No State has abdicated its public trust below the ordinary high-water mark of any Great Lake, let alone limited its public trust authority to cover only the underwater area up to the low-water mark, surrendering such authority even in underwater areas whenever the water rises above the low-water mark. Taft ignores the distinction between the public trust boundary and the private title boundary. While some States (but not Ohio) may adopt a different line for private title, no State deviates from using the ordinary high-water mark as the limit of public trust authority. See 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, 896 (surveying States' cases and summarizing that States "do vary on title, but do not vary on the fact that the public's trust rights attach up to high water").

For example, Minnesota does say that the littoral owner holds "private title," or "jus privatum," down to the low-water mark, Taft Jur. Mem. at 21-22, but Minnesota law is clear that such private title is subject to the State's public trust authority as to the area between the ordinary high-water and ordinary low-water marks. See, e.g., *State v Korrer*, 148 N.W. 617, 623 (Minn. 1914) ("While the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening

space his title is limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose. The state may use it for any such public purpose . . . without compensation.").

Similarly, the Michigan Supreme Court recently explained the difference between private title and public trust, explaining in a public-access or "beachwalking" case that it need not even address the private-title boundary when it was plain that the public trust ran to the ordinary high-water mark. *Glass v. Goeckel* (2005), 703 N.W.2d 58, 65-67, 69-70. The *Glass* court explained that the "boundary of the public trust (jus publicum)" is "distinct from a boundary on private littoral title," and raised "a separate question." *Id.* at 68. The court further explained that "Michigan's courts have adopted the ordinary high water mark as the landward boundary of the public trust." *Id.* at 69. Notably, the court also clarified that to the extent prior cases had suggested "ambiguity regarding whether the high or low water mark serves as the boundary of the public trust," *id.*, that was so because those cases concerned private title, not public trust:

> [T]he established distinction in public trust jurisprudence between public rights (jus publicum) and private title (jus privatum) resolves this apparent ambiguity. Cases that seem to suggest, at first blush, that the public trust ends at the low water mark actually considered the boundary of the littoral owner's private property (jus privatum) rather than the boundary of the public trust (jus publicum). Because the public trust doctrine preserves public rights separate from a landowner's fee title, the boundary of the public trust need not equate with the boundary of a landowner's littoral title.

Id. After distinguishing the public-trust boundary from the private-title boundary, the court repeatedly clarified that the private line *might* vary, but it did not commit to the view that Michigan's private titles always ran to any mark lower than the ordinary high-water mark. See *id.* It stated that the boundaries "need not equate," that title "*might* extend past the boundary of the public trust," and that "jus privatum and the jus publicum *may* overlap." *Id.* (emphases added). And it rejected the idea that "private title *necessarily* ends where public rights begin."

Id. (emphases added). The court determined that it did not need to resolve any private-title issues in order to reject the Michigan landowners' effort to limit public trust rights; the court re-affirmed the traditional rule that those public rights run to the ordinary high-water mark. *Id.*

Thus, even if Taft were somehow right that his or other landowners' private title ran below the ordinary high-water mark, whether to water's edge or to the historic low-water mark or any other point, he is wrong in pursuing the novel claim that the State's public trust authority stops somewhere underwater. Even if Ohio had joined Minnesota in adopting a low-water approach to *private title*, or had done so in any individual cases (for it has not done so globally, see State Jur. Mem. at 13), the State of Ohio's *public-trust* authority extends to the ordinary high-water mark, regardless of individual questions about private title.

Finally, the historic legal importance of the ordinary high-water mark, and not the low-water mark, is shown by the separate debate over how to *locate* the ordinary high-water mark. That was an issue in the second question certified for class resolution, see State Jur. Mem. at 3, as different methods for locating the ordinary high-water mark have been adopted in other States and in federal law. See, e.g., *State v. Trudeau* (Wisc. 1987), 408 N.W.2d 337, 344 (explaining the International Great Lakes Datum (IGLD), which measures the elevation of ordinary high water around each Great Lake, and re-affirming Wisconsin's use of the "visual inspection" and "vegetation" tests, which look at the reach of terrestrial vegetation and other factors to show where water is persistently present). Neither the trial court nor the appeals court reached the issue (so this Court need not resolve it either), because their adoption of the water's edge as the boundary rendered the placement of the ordinary high-water mark irrelevant. But no one would have ever debated, or even developed, methods to locate a mark that means *nothing*. Yet that is Taft's view: that States, landowners, courts, and the federal government have gone to great

trouble to locate a line that carries no meaning, not for public trust or private title or for any purpose at all.

In contrast with the cases and regulations concerning the location of the ordinary high-water mark, Taft can point to no authority—for none exists—detailing how to discern and track the long-gone 18th or 19th century low-water mark that Taft advocates. See Taft Jur. Mem. at 24. Taft says that the low-water mark was always understood as the limit of both private title and public trust. And he further says that the mark was fixed where it stood at first conveyance, pre-statehood, and that it presumptively stays there—even if that point is now far underwater—unless the State can prove that the line moved by gradual erosion rather than by avulsive storm events in the last 200 years. *Id.* But if that were true, someone would have created records to mark the "true" line, but that did not happen. And it seems near-impossible to examine current conditions and discover the 18th- or 19th-century low-water point. One would have to look at old photos or records, estimate the distance, and perhaps float a buoy to mark the point. That contrasts sharply with the ability to examine vegetation along the shore and determine where the ordinary high-water mark lies, and that contrast confirms that the low-water mark is not, and has not been, the relevant line in Ohio law, and it would be impractical and wrong to adopt it.

None of this is to say that lakefront property owners have no rights below the ordinary high-water mark, for, as the State explained before, owners do have certain littoral rights—not title, but rights that the general populace does not have—below the ordinary high-water mark. The State and the public are obliged to respect those rights, and no one denies that; the State merely wishes to restore balance between those rights and its public trust duty to all citizens.

Defendant-Cross-Appellee State of Ohio's Proposition of Law 2:

An association with members interested in enjoying public rights to the Lake Erie shore is a proper intervenor in a case concerning the reach of the public trust along the shore.

The case for NWF's intervention here is solid. The landowners do not seek solely to dispute boundaries with the State in order to limit some State regulation or obtain damages from the State; instead, the owners' stated goal to is to achieve the right to exclude the general public from walking along the Lake Erie shore and otherwise exercising public rights. That question affects all Ohio citizens, and both the NWF and OEC have members who seek to exercise those rights. Here, Taft and the other owners initiated the lawsuit, so the NWF is not creating litigation, but is merely adding its voice to an existing case.

In addition, the State's presence and the posture here mean that the NWF's party status did not harm Taft. If the State's role is proper, then NWF has not prejudiced Taft, for NWF, while adding an important substantive voice, propounded no discovery and did not burden Taft by expanding the proceedings in any way. Conversely, if the State's right to proceed is diminished, then the NWF's presence is essential; otherwise Taft would win by default rather than on the merits. In either event, the resolution of this issue is clear, and this Court's review is unnecessary.

CONCLUSION

For the above reasons, this Court should deny jurisdiction over Taft's cross-appeal. In the alternative, the Court should grant his cross-appeal only as to his first Proposition of Law, if the Court determines that such a grant is needed to preserve his right to argue the issue. In either case, the Court should ultimately reject both the boundary proposed by Taft and the boundary adopted by the decision below.

Respectfully submitted,

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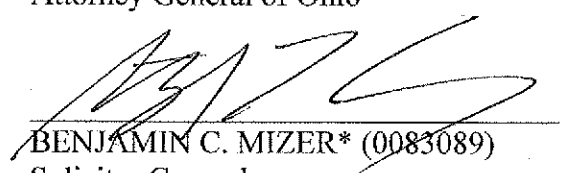

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I certify that a copy of this Defendant-Appellant State of Ohio's Memorandum in Response to Appellee-Cross-Appellant Homer Taft's Memorandum in Support of Jurisdiction was served by U.S. mail this 7th day of October, 2009, upon the following counsel:

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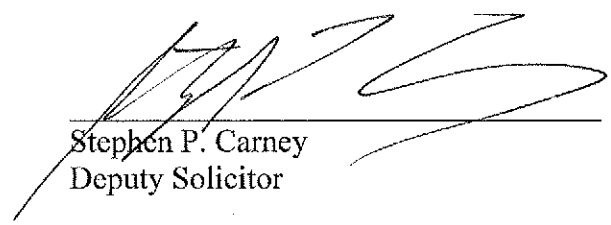
National Wildlife Federation and
Ohio Environmental Council



Stephen P. Carney
Deputy Solicitor