

IN THE  
SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO ex rel. ROBERT MERRILL, :  
TRUSTEE, et al. : Case No. 2009-1806  
: :  
Appellees and Cross-Appellees :  
: On Appeal from the Lake  
: County Court of Appeals,  
v. : Eleventh Appellate District  
: Court of Appeals  
: Case No. 2008-L-007  
STATE OF OHIO, DEPARTMENT OF : Case No. 2008-L-008  
NATURAL RESOURCES, et al. : Consolidated  
: :  
Appellants and Cross Appellees, :  
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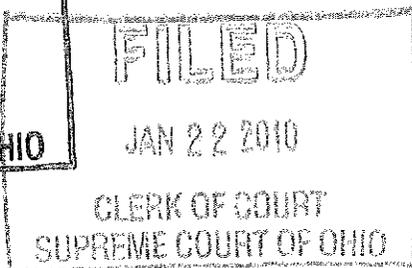
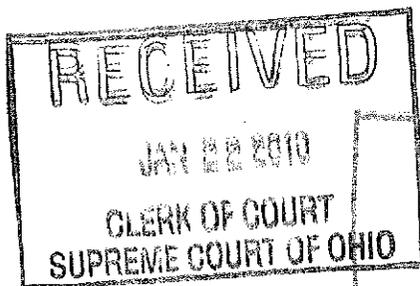
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**SUPPLEMENTAL RESPONSE MEMORANDUM OF CROSS-APPELLANT  
HOMER S. TAFT TO SUPPLEMENTAL JURISDICTIONAL MEMORANDUM  
OF STATE OF OHIO**

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## II. ARGUMENT

### I. THE ATTORNEY GENERAL LACKS STANDING TO APPEAL A JUDGMENT AGAINST THE STATE OF OHIO WHERE THAT APPEAL IS CONTRARY TO THE DIRECTION OF THE GOVERNOR, THE ATTORNEY GENERAL IS NOT REPRESENTING AN ADMINISTRATIVE AGENCY AND THE GENERAL ASSEMBLY DID NOT REQUIRE REPRESENTATION AT ANY STAGE OF THE PROCEEDINGS AND TEXTUALLY COMMITTED RESPONSIBILITY OF THE SUBSTANTIVE ISSUE TO THE AGENCY NO LONGER REPRESENTED BY THE ATTORNEY GENERAL.

If the Governor “required” (requested or approved) the appeal of the Common Pleas Court judgment below, as the current Attorney General<sup>1</sup> suggests, Cross-Appellant would concede the appeal falls within the express requirements of Revised Code §109.02, and the Court of Appeals ruling would be in error. The problem with the Attorney General’s newfound reliance on the Governor’s authority is not only complete lack of support or evidence in the record at the trial court, in the Attorney General’s Briefs before the Court of Appeals, or in oral argument to the Court of Appeals in response to their questions of such an approval. The Attorney General’s Proposition of Law No. 1 and Memorandum supporting jurisdiction before this Court made no such assertion or proposition. The Attorney General chose the grounds of his appeal and asserted that he has the authority to appeal “in all cases” where the State is a defendant without “case-by-case instructions from the Governor of the General Assembly.”

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<sup>1</sup> Attorney General Richard Cordray is the fourth Attorney General to appear in this matter. During administration of Governor Taft, Attorney General Petro represented the Defendant parties. When Governor Strickland, early in his term, instructed the Department and Director to change the policies complained of and “honor the deeds” of plaintiff owners, Attorney General Dann “informed” the Governor that he would continue his opposition, hired special counsel for the Department and Director, and filed a closing Reply Memorandum on his Motion for Summary Judgment on behalf of the “State”. Thereafter, without claim or evidence of any request by the Governor, Attorney General Dann initiated the appeal to the Court of Appeals below, which the Department and Director did not appeal. Shortly thereafter, upon his resignation, Attorney General Rogers was appointed and entered her appearance, which continued through oral argument on appeal. Attorney General Cordray was elected thereafter for the remaining term and entered appearance upon the appeal to this Court.

Memorandum In Support of Jurisdiction of State of Ohio, Proposition of Law 1. In now raising this claim, the Attorney General largely avoids rather than responds to the issue requested by this Court or the issue raised in his appeal.

Cross-Appellant also recognizes the right of the Attorney General to appear before this Court on questions that may directly or indirectly affect the interests of the State under explicit statutory authority and the Rules of Practice of the Supreme Court, in such manner as this Court may order. However, neither of these matters are the subject matter of the Attorney General's appeal asserting authority in every case involving the State of Ohio as a party with total independence from regulation of the General Assembly and other constitutional officers of Ohio.

As the question propounded by the Court recognizes, the central underlying issue to the appeal filed by the Attorney General on behalf of the "State of Ohio" is what government entity or office has the right to determine whether to accept or contest a court order against the State. The Attorney General's asserted right to determine whether to appeal without regard to the decisions of any other constitutional officer or the General Assembly would imbue the Attorney General with a veto power over every settlement and dispute resolution before the courts and assign supreme authority to the Attorney General over substantive law and policy questions that should be and are textually committed to other branches and officers. Such power appears to be in derogation of the governmental plan in Ohio since the 1802 and 1851 Constitutions respectively, the history of the office of Attorney General, and extensive statutory enactments over 160 years of the Ohio General Assembly. A change in the duties and powers of the Attorney General of such sweeping proportions would seem better suited for determination by Constitutional revision or actions by the political branches than by claimed "common law" powers that would essentially eviscerate the entire body of law enacted by the Ohio General

Assembly respecting the duties and powers of the Attorney General and of other constitutional officers and administrative agencies.

- a. **The Office of Attorney General was purely a statutory creation of the General Assembly long after statehood, subsequently incorporated into the 1851 Constitution while preserving the former statutory enactments.**

The history of the office of Attorney General in Ohio is contrary to creation of “common law” powers. When Ohio was admitted to the Union under its original Constitution, the office of Attorney General did not exist. Because of a great distrust by the Jeffersonian framers of the 1802 Constitution under which Ohio was admitted to the Union in 1803, particularly in light of the perceived authoritarian actions of the Northwest Territories Governor, the 1802 Constitution created a remarkably feeble executive branch, consisting of an elected Governor and a Secretary of State selected by the General Assembly. The Governor had little power beyond raising the state militia, granting pardons and signing commissions, not even possessing a veto power. Steinglass, S. & Scarselli, G., *The Ohio State Constitution: A Reference Guide*, at 14 (Praeger, 2004). There was provision for fiscal officers of Auditor and Treasurer selected and regulated by the General Assembly.

The office of Attorney General never existed in Ohio until 1846, when it was created by legislative enactment, and the General Assembly appointed the official, who was strictly regulated by it. 44 Ohio Laws 45 (1846). As a purely statutory creation of the General Assembly, particularly in a state which has legislatively rejected the wholesale importation of the common law of England, 4 Ohio Laws 38 (1806), the assertion that the office had “common law” powers should not be seriously considered. The authority of Ohio’s Attorney General is therefore unrelated to those states which retained the office from colonial times or those which adopted the offices upon admission as states and fully retained “common law” powers of

government officers. By contrast, the first Ohio Attorney General, well conversant with the authorization and history of his office, considered his duties to be strictly limited and modest. Miller, C. & Miller, T, *The Constitutional Charter of Ohio's Attorney General* (1977), 37 Ohio St. L.Rev. 801, 804-805.<sup>2</sup>

In the 1851 Constitution, the elected state officers were increased to include the Auditor, Treasurer and Attorney General, as well as creating the office of Lt. Governor. However, the Constitution granted no self executing authority to any officer excepting only limited duties to the Governor and Lt. Governor, reserving to the General Assembly the primary power to determine what role and authority these officers might have. Miller, C. et al, *supra*, at 805 and fn 23. The 1851 Constitution textually preserved all laws previously passed by the General Assembly not at variance with the provisions of the Constitution and retained the serving officers as the serving constitutional officers until elections were held and the officers took their respective offices. Ohio Const., Schedule (1), (3).

The constitutionally provided Attorney General was elected in October, 1851 and took office in January, 1852, initially performing his duties under the same prior Act of 1846. After the ratification of the Constitution and election of an Attorney General and General Assembly under its aegis, the General Assembly enacted a statute governing, *inter alia*, the powers and duties of the Attorney General, almost identical in language to the 1846 Act, The General Assembly plainly viewed its prior acts regarding the Attorney General's powers to be effective, as it largely restated those powers and expressly repealed the prior acts. 50 Ohio Laws 267

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<sup>2</sup> Although the article, written by two Assistant Attorneys General, exhibits a strong advocacy position that Ohio Attorneys General have been insufficiently assertive and should attempt a much larger role asserting common law powers that colors their interpretations, it provides an excellent and relatively straightforward history of Ohio law and of "common law" and statutory Attorneys General.

(1852), at sec. 27. As relevant to this appeal, the primary change altered the authorization of the Attorney General to appear before the Supreme Court when sitting en banc to appearing before the Supreme Court without limitation and limitation to appear before all courts when “directly” interested, as opposed to “interested.”. The limitation on appearance in inferior courts remained as enacted in 1846. GC §333; 50 Ohio Laws 267 (1852),

The General Assembly, under its primary power to define and empower the constitutional officers of the State of Ohio, has repeatedly and extensively exercised its right to empower and sometimes circumscribe the Attorney General and all other constitutional officers. Beyond their right to hold the office, the powers of every Article III officer in Ohio are granted and regulated by the General Assembly, excepting only certain powers and duties constitutionally granted to the Governor and Lt. Governor.

The fundamental authorization of the Attorney General today appears in R.C. §109.02, which has existed in virtually identical form since the 1846 enactment and the recodification in 1852. Though there were courts inferior to the Supreme Court of Ohio and actions by and against the State in such courts, the General Assembly chose to make an express distinction between cases or controversies before this Court that might lead to indisputable finality on questions of Ohio law and the participation of the Attorney General in lower courts. The legislature carefully chose words to empower the Attorney General to participate in all proceedings, civil and criminal, before this Court, not only where the State was directly involved, but also where the State might be indirectly affected. However, the same enactment empowers the Attorney General to appear in inferior courts only where “required” by either the Governor or the General Assembly. This provision both removes independent authority to appear where the

State is directly or indirectly affected and adds the condition that the Attorney General must be authorized by the Governor or General Assembly

Since enacting the predecessors of current R.C. §109.02, the General Assembly has enacted literally hundreds of statutory requirements or authorizations to the Attorney General to both initiate action and to defend actions against the State, its political branches, officers and agencies in various courts of this State as well as in federal courts, usually at the request of an administrative department. Over at least the first 130 years of the existence of the office of Attorney General, its officeholders uniformly considered themselves to have limited duties under statutory authority. *Miller, C. et al., supra*, at 803 & fn 9.

No precedent in Ohio found by Cross-Appellant, excepting the Court of Appeals decision below, discusses the Attorney General's authority to appeal except upon request, much less in opposition to the policies of a constitutional officer. In one case where it arose in federal courts, the United States Court of Appeals found it was an undecided question of state law and declined to determine whether the Attorney General might appeal on behalf of the "State" against the request of the Secretary of State. *North East Ohio Coalition for the Homeless v. Blackwell*, (C.A. 6 2006) 467 F.3<sup>d</sup> 999. The Attorney General argues that *State v. United Transp., Inc.*, (S.D. Ohio 1981) 506 F.Supp, 1278, finds common law authority for the Attorney General in Ohio. Though that decision actually turns on finding statutory authority in the Revised Code, not "common law" powers, the Sixth Circuit decision in *North East Coalition* vitiates any continued vitality for "common law" powers in that decision.

Most Ohio cases relied upon by the Attorney General to support "common law" powers actually rely on explicit statutory construction, not common law, as the basis of their decision. E.g., *State ex rel. Doerfler, v. Price* (1950), 101 Ohio St. 50 (Court's syllabus 3 expressly relies

on legislative action, not common law); *State ex rel. S. Monroe & Sons Co. v Baker* (1925), 112 Ohio St. 356 (state officials' authority is regulated by Gen. Assembly); *State v. Finley* (2<sup>nd</sup> Dist. 1998), 1998 Ohio App. Lexis 2693, motion to certify overruled. (1998) 83 Ohio St. 3d 1449 (R.C. §109.02 does not require Governor's request where R.C. §109.14 directly authorizes). Even where "common law" is discussed, the reference is generally to use "common law" as a rule of construction as to the meaning of words appearing in a statute, not as an independent body of law. This is consistent with R.C. §1.49, a rule of construction adopted by the General Assembly, that in determining legislative intent a court "may consider among other matters \*\*\* [t]he common law or former statutory provisions\*\*\*." These cases do not extend the powers of any governmental office beyond the statutory enactments.

The view that the office of Attorney General is one of limited powers is certainly not unique to the Court of Appeals ruling in this case, the decided precedent in Ohio or the laws of many states. As to the right to initiate an appeal, the Arizona Supreme Court, deciding an issue under similar statutory provisions, held that the Attorney General did not have the right to appeal on behalf of the "State" where not authorized by the officers or entities who could "require" such action as set forth in the statute in *Santa Rita Mining Co. v. Dept. Of Prop. Valuation* (1975), 111 Ariz 365. While there are very few cases that deal explicitly with appellate standing, several other cases suggest limitations on the powers of an Attorney General to set policy and act independently of other authority, particularly in states which do not accept the "common law" theory or where the Attorney General acts contrary to the determination of agencies or other officers. E.g., *Blumenthal v. Barnes* (Conn. 2002), 804 A.2d 152; *State v. City of Oak Creek* (2000), 232 Wis. 2d 612, 605 N.W.2d 526; *In re Sharp's Estate* (1974), 63 Wis.2d 254, 217 N.W.2d 258; *Motor Club of Iowa v. Dept. of Transp.* (Iowa 1977), 251 N.W.2d 510;

*State v. Davidson* (1929), 33 N.M. 664, 275 P. 373. See generally, Case Comment, *Blumenthal v. Barnes: Civil Common Law Powers of the State Attorney General in the Charitable Sector* (2004), 17 Quinnipiac Prob. L.J. 383; Matheson, S., *Constitutional Status and Role of the State Attorney General* (1993), 6 U. Fla. J.L.& Pub. Pol'y. 1. While many academic commentators plainly favor robust independent powers for Attorneys General, even they acknowledge considerable limitations in many states. E.g., Comment, *Purdue v. Baker: Who Has Ultimate Power Over Litigation in the State of Georgia -- The Governor or the Attorney General?* (2005), 21 Ga. St. L. Rev. 752; Annotation, *Meredith v. Ieyoub: The Louisiana Supreme Court Limits the Power of the Attorney General by Applying the Separation of Powers Doctrine* (1998), 72 Tul. L. Rev. 2239; Westerberg, C., *From Attorney General to Attorney Specific, How State v. City of Oak Creek Limited the Powers of Wisconsin's Chief Legal Officer* (2001), 2001 Wis. L. Rev. 1207; Van Alstyne, S. & Roberts, L., *The Powers of the Attorney General in Wisconsin* (1974), 1974 Wis. L. Rev. 721.

The Attorney General seemingly invents a Constitutional or statutory "requirement" to always represent the State of Ohio in every case in every court that does not exist and is expressly contradicted by the General Assembly's enactments. Supplemental Jurisdictional Memorandum of State of Ohio, at 6. . See also, Memorandum of Cross-Appellant Homer S. Taft in Response to Appellants' Memorandum and In Support of Jurisdiction for Cross Appeal, at 10. The Court of Appeals below correctly held:

"{¶44} The Ohio Attorney General may only act at the behest of the governor, or the General Assembly. R.C. 109.02. In this case, the attorney general represented the state due to the activities of the ODNR, which department is under the authority of the governor, in whom the constitution vests the "supreme executive power." Section 5, Article III, Ohio Constitution. The governor has ordered ODNR to cease those activities that made it a party to the action. We find no authority for the attorney general to

prosecute this matter on his own behalf. We conclude that the state of Ohio no longer has standing in this matter, and order its assignments of error and briefs stricken.” *State ex rel. Merrill v. Ohio Dept. of Natl Resources* (11<sup>th</sup> Dist. 2009) 2009-Ohio-4256.

**b. The determination and protection of the State’s interest in the boundary of Lake Erie is textually committed to the Department of Natural Resources.**

An additional problem to the Attorney General’s independent authority rests in textual commitment of the issue to another department of state government. In the present case, the question before the courts below and the primary substantive issue before this Court is determining the boundary of the “territory” spoken of in R.C. §1506.10 between so-called “public trust” lands of the State and the deeded private lands of upland owners. In §1506.10, appropriately entitled “Lake Erie Boundary”, the General Assembly has textually committed “\*\*\*all matters pertaining to the care, protection and enforcement of the state’s rights designated in this section” to the Ohio Department of Natural Resources. Similarly, §1506.02 designates the department as the “lead agency” on matters of coastal management planning. Thus, express enactments of the General Assembly preclude the Attorney General’s claim to a primary right to “protect” or enforce the state’s rights to the “territory” of Lake Erie independent of the department, operating under appointment of the executive office of the Governor and empowered by the General Assembly. Compare, *State ex rel. Brown v. Rockside Reclamation, Inc.* (1976), 47 Ohio St.2d 76; *State ex rel. Rogers v. New Choices Community School* (2<sup>nd</sup> Dist. 2009), 2009-Ohio-4608.

**c. The record offers no support for the Attorney General's newfound approval by the Governor of the appeal below, which is not the basis of the Attorney General's appeal.**

The sole support which the Attorney General cites is that the Governor's office released a press statement, which Cross-Appellant stipulates is accurate, that Attorney General Mark Dann "informed" the Governor of his intent to continue to litigate the matter in the trial court. Apart from not supporting that the Governor "required" or approved that decision, it is utterly silent as to the Governor requiring or requesting the Attorney General to appeal that decision, which it is uncontroverted the Governor caused his officers not to appeal. The current Attorney General peers inside the Governor's mind two years ago to discern unstated beliefs and align the Governor's positions on the Attorney General's authority and the substantive "public policy" issues with the Attorney General. The current record does not appear to support any affirmative approval of the Governor or the administrative agency charged with responsibility. The Supplemental Memorandum of Special Counsel for the Department of Natural Resources observes:

"The only directive issued by the Governor regarding this case was a directive to ODNR that it should honor the presumptively valid real property deeds of the Lake Erie lakefront property owners unless a court determines that the deeds are limited by or subject to the public's interest in those lands or are otherwise defective and unenforceable." Supplemental Jurisdictional Memorandum of the Ohio Department of Natural Resources and Sean D. Logan, Director, at 1.

Similarly, and more binding, the Attorney General directly asserts "[t]he only 'directive' from the Governor was his directive to ODNR, a department subordinate to him." Supplemental Jurisdictional Memorandum of State of Ohio, at 2. This is a direct admission of the Governor's department and the Attorney General that there was no affirmative directive to Attorney General Dann to proceed, contradictory to the belated discovery of the Governor's approval. The Governor's understanding cited by the Attorney General that the litigation was continuing would

recognize to the continuing claims of Intervening Defendants National Wildlife Federation et al.. Further, the Governor never limited his adherence to “temporarily” or “until” the courts ruled as asserted by the Attorney General (Supplemental Jurisdictional Memo at 1), nor do those words appear in the Court of Appeals decision below as suggested. The Court accurately quotes the Governor’s policy to respect owner’s deeds “unless a court determines that the deeds are limited by or subject to the public’s interest in those lands or are otherwise defective or unenforceable.” *Merrill*, 2009-Ohio-4256, at ¶44.

If the Governor “understood” Attorney General Dann’s assertion that he would continue to represent the “State of Ohio” on the Motion for Summary Judgment, opposing Plaintiffs’ claims and the Governor’s policy change, it does not rise to the level of the Governor’s affirmative requirement to continue in the trial court, much less a requirement to appeal the determination of the trial court to a higher court. In the trial court, the Attorney General entered appearance on behalf of the administrative agency, its Director, and the “State of Ohio” in care of the Governor and at the request of the Governor. That the Attorney General was initially requested to provide representation to the State (with the Governor being its named representative), the Director and the Department by the request of the Governor and his Director and Department, jointly, appears uncontested. No evidence is offered after the Governor made the determination not to proceed further that any party authorized the Attorney General to proceed independent of his former clients, nor did the Attorney General seek to intervene in his own right at that point or assert a right to intervene as a party on appeal. The materials submitted as Exhibits to its Supplemental Memorandum establish only that Attorney General Dann “informed” the Governor that he intended to continue participation despite the Governor’s decision.

Where the Attorney General representation is provided pursuant to prior authorization of public officials, he has no authority to bring an action on his own motion. *State ex rel Brown v. Rockside Reclamation, Inc.* (1975), 47 Ohio St.2d 76. Cf. *People ex rel. Deukmejian v. Brown* (1981), 172 Cal.Rptr. 478, 29 Cal.3d 150. Initiating an appeal before the Court of Appeals is no different than bringing an action in a trial court.

**d. Public Policy suggests that the sweeping powers asserted and sought by the Attorney General as “common law” powers would be better determined by the political branches of Ohio government than the courts.**

The Constitutions of Ohio and the United States themselves are largely a rejection of English or European governmental structures and proceed instead from the principle that all powers are reserved to the people unless expressly granted to government. To the extent any “common law” powers might be recognized, from the inception of the office of Attorney General, the General Assembly has enacted a provision which is expressly in derogation of such asserted common law powers on this question, even strictly construed. R.C. §109.02. The contortionist argument of the Attorney General that the General Assembly’s choice of differing standards for his authority before this Court and lower courts simply cannot square with the language of the statute.

For the Attorney General then to seek broad independent powers by judicial declaration without the intervening checks and balances of the political institutions of the General Assembly and the other members of the executive, and especially the Governor, seems in derogation of the traditions of American representative government. The “common law” powers argued by the Attorney General are actually a relatively amorphous and undocumented set of rules from 16<sup>th</sup> to 18<sup>th</sup> Century England. Van Alstyne, et al., 1974 Wis. L. Rev. at 724. Some states have in their system of governance relied upon old English decisions, where others have developed their own

“common law”, principally from colonial times. See, e.g., Kanner, A., *The Public Trust Doctrine, Parens Patriae, and the Attorney General as Guardian of the State’s Natural Resources* (2005), 16 *Duke Env’tl. L. & Pol’y. F.* 58; Edminsten, R., *The Common Law Powers of the Attorney General of North Carolina* (1977), 9 *N.C. Cent. L.J.* 1; compare, *McGinley, P., Separation of Powers, State Constitutions & The Attorney General: Who Represents the State* (1997), 99 *W. Va. L. Rev.* 722; Shepperd, J.B., *Common Law Powers and Duties of the Attorney General* (1955), 7 *Baylor L. Rev.* 1. However, Ohio and many other states have rejected applying ancient “common law” principles to the powers of governmental entities, especially offices created and powers determined by royal fiat.

The Attorney General presents many policy arguments, though largely rejected in “code” jurisdictions, that suggest broad, undocumented powers to assert “public” interest on policy questions is in the best interest of the people of Ohio. There are also many considerations that may suggest limitation or denial of those powers. See Signer, M., *Constitutional Crisis in the Commonwealth: Resolving Conflicts Between Governors and Attorneys General* (2006), 41 *Richmond L. Rev.* 43,. The ultimate question is what officers and branch of government should determine the “public interest”. Matheson, S., *Constitutional Status and Role of the State Attorney General*, *supra*, at 13-15.

If the Attorney General believes the office should be more broadly empowered, he may request such authority from the Governor or from the General Assembly, subject only to the veto of such enactments by the Governor. In some or all instances where the Attorney General seeks substantive public policy input independent of the other executive officers or the General Assembly, the General Assembly might consider it appropriate to grant the Attorney General broad discretion and independence on public policy issues, even contrary to the wishes of the

other executive officers. However, such determinations are properly those of the General Assembly, which may also feel that there need to be restrictions on the complete independence of the Attorney General from the determinations of the administrative entities or officers charged with responsibility in the various public policy areas where the Attorney General seeks policy making or litigation authority. *In re Wieland* (2000), 89 Ohio St.3d 535, 2000-Ohio-233.

The Attorney General also argues that it isn't always practical to get signed "permission slips" to act, which Cross-Appellant respectfully submits is utterly irrelevant. No one has argued that the Attorney General must in every case and circumstance have or file a written document before proceeding, but Ohio law does mandate that the "requirement" be initiated in some form by the Governor or under statute adopted by the General Assembly.

In arguing the merits of this matter, Cross-Appellant does not contest an opportunity for the Attorney General, subject to the rules and appropriate orders of this Court, to file any brief before the Supreme Court of Ohio pursuant to R.C. §109.02 or the Rules of Practice of this Court on a question that may directly or indirectly affect the State of Ohio, such as the substantive issues propounded by the other parties. S. Ct. Prac.R. VI, Sec. 6 authorizes such filings. The Court further has the option of inviting the views of the state solicitor on jurisdictional questions and the Attorney General has the further option of filing *amicus curiae* on the jurisdictional question, which the submitted memoranda might be deemed S. Ct. Prac.R. III, sections 5 and 6(E). Both opportunities fall plainly within the General Assembly's authorization for the Attorney General to appear wherever the interests of the State may be either directly or indirectly affected before this Court.

Because of the ability to consider the Attorney General's views in this Court, if not the Attorney General's appeal *per se*, independent of any issue of standing to appeal below, should

this Court decide that the issue was inadequately briefed and considered below and agree with the concurring and dissenting opinion that this issue was unnecessarily reached, Cross-Appellant also would not interpose strenuous objection to vacating the decision as to the Attorney General's standing other than on the merits as unnecessarily determined and avoiding the determination of the issue entirely in this appeal. However, if the State's appeal and the Attorney General's authority to appeal are considered by this Court on the merits, Cross-Appellant respectfully submits that the Court of Appeals determination is the only conclusion supportable from the record in this matter and Ohio's constitutional and legislative requirements.

**II. IF THE ATTORNEY GENERAL HAD STANDING TO APPEAL, THE RECORD IN THIS MATTER IS SUFFICIENT FOR THIS COURT TO RESOLVE THE APPEALS AND CROSS-APPEAL EVEN THOUGH THE STATE OF OHIO'S ASSIGNMENTS OF ERROR AND BRIEFS WERE STRICKEN BY THE COURT OF APPEALS.**

Assuming that the Attorney General did have standing to appeal below, then the record in this matter is complete and the Court could fully consider the Propositions of Law propounded by the State of Ohio before this Court. On this question, Cross-Appellant agrees with the Attorney General and the Department of Natural Resources for three reasons.

- a. The Assignments of Error and the Briefs filed by the Attorney General, purportedly on behalf of the "State of Ohio", will constitute part of the record transmitted by the Court of Appeals, and treat solely on matters of law, permitting this Court to fully consider the issues and arguments of the Attorney General as raised below.**

Presumptively, the Clerk of the Court of Appeals would transmit the entire record on appeal, including the assignments and briefs of all parties, to this Court. Since the Attorney General's appeal and response below were on matters determined on summary judgment in the trial court as to which there were not found to be material questions of fact, the appeals and cross-appeals below were exclusively on questions of law. As such, this Court is free to consider

the assignments and arguments below fully in the matters raised before this Court by all parties. Further, because especially the various memoranda before the trial court below might otherwise be considered bulk or voluminous, this Court can order the Clerk of the Court of Appeals to transmit the entire record of the trial court pursuant to S. Ct. Prac. R. V, including especially all of the Motions for Summary Judgment and memoranda in support or opposition to those motions filed by all parties, which the Court may find particularly illuminating. S.Ct. Prac. R. V, §5(a)(2).

In agreeing that the record is complete for purposes of this appeal, however, Cross-Appellant does not abandon his contention before the trial court and the Court of Appeals that should the “Ordinary High Water Mark” be determined to be the relevant legal boundary between public and private lands, the determination of that mark does present genuine issues of material fact that have not been presented, including materials relied upon in the State’s Motion for Summary Judgment, as well as of Plaintiffs and Intervening Plaintiffs Motions and submissions. There is substantial material that would be offered in evidence in order to appropriately determine the meaning and location of an “ordinary high water mark.”

**b. Even absent the assignments of error and briefs on behalf of the Attorney General below, the Attorney General has fully propounded assigned errors on behalf of the State of Ohio in its appeal to this Court and has full ability to argue the merits of those issues completely before this court.**

In the Attorney General’s notice of appeal and accompanying Memorandum in Support of Jurisdiction, the Attorney General has set forth a proposed proposition of law and argument relating to the substantive issue on which review is sought on the boundary of Lake Erie’s “territory”. In the event that this Court determines to grant jurisdiction on that proposition and the related propositions of Appellants National Wildlife Federation and Ohio Environmental

Council and of Cross-Appellant, this Court may permit the Attorney General to fully develop his arguments on his question of law.<sup>3</sup>

- c. **The issues and arguments raised by the briefs of the Attorney General below were substantially identical to the arguments of Intervening Defendants-Appellants National Wildlife Federation and Ohio Environmental Council below, and cited to the same decisional and statutory law, which were fully considered by the court of appeals.**

The Supplemental Memoranda filed by the Attorney General and the Department of Natural Resources pursuant to this Court's order concede that the appeal of the Attorney General below would have fully determined by the Court of Appeals decision in this matter. Cross-Appellant agrees. A substantive reading of both the decision of the merits of the matter and the concurring and dissenting opinion reveals the Court of Appeals considered all of the available authorities and disposed of all of the issues which were raised by the Attorney General, even though his appeal and briefs were stricken. As reflected in the separate opinion of Judge Cannon, who did consider the issues and arguments of the Attorney General, those assignments and briefs would not have altered the ruling of the Court on the substantive issues, as to which determination he concurred.

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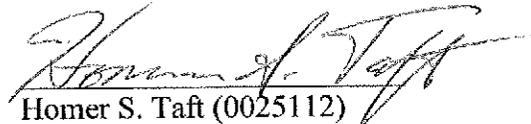
<sup>3</sup> It is curious that while seeking full status to separately argue his appeal, the Attorney General in the same document urges that Cross-Appellant be denied the customary opportunities of briefing and argument on his proposition, while suggesting the issue propounded could nevertheless be argued as an appellee jointly with other appellees who do not propose that issue.

### III. Conclusion

Cross-Appellant intends primarily to state new material in this Supplemental Jurisdictional Memorandum and has not repeated all that appeared in his previous submission, and requests the Court consider this Memorandum in conjunction with the additional authorities and argument previously filed.

Cross-Appellant respectfully submits that the Attorney General fails to establish standing for his appeal to the Court of Appeals below and is permitted to appear here in support of any appeal or proposition of law offered by the other parties as this Court may determine. Further, the record in this matter is complete for the determination of the questions presented to this Court by the Attorney General and the other parties.

Respectfully submitted



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### Certificate of Service

I hereby certify that copies of the foregoing Supplemental Response Memorandum of Cross-Appellant Homer S. Taft to Supplemental Jurisdictional Memorandum of State of Ohio were served by first class U.S. Mail on this 21st day of January, 2010, upon all parties by serving their respective counsel of record addressed as follows:

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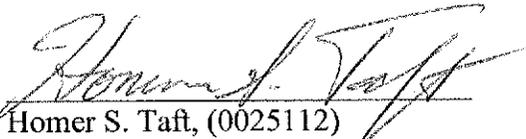
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## APPENDIX

44 Ohio Laws 45 (1846) provided in pertinent part:

“An Act To Create the office of Attorney General, and to prescribe his duties:

Sec. 1. Be it enacted by the General Assembly of the State of Ohio, That there will be elected, by joint ballot of the two houses of the general assembly, an attorney general of the state, who shall be commissioned by the governor, and hold his office for the term of five years from the date of his commission, and who shall reside in, and keep his office at Columbus, in Franklin County.

\*\*\*

Sec. 3. He shall appear for the state in the trial and argument of all causes, criminal or civil, and in chancery, in the supreme court in bank, in which the state is a party for itself or for any county, or wherein the state shall be interested.

Sec. 4. He shall also, when required by the governor, or either branch of the legislature, appear for the state in any court or tribunal, in any causes, criminal, civil, or in chancery, in which the state may be a party, or interested.

\*\*\*”

50 Ohio Laws 267 (1852) provides in pertinent part:

“An Act to prescribe the duties of the Attorney General

Sec. 1. Be it enacted by the General Assembly of the State of Ohio,

\*\*\*

Sec. 3 That the Attorney General shall appear for the state, in the trial and argument of all causes in the supreme court, (whether of a civil, equitable, or criminal description,) wherein the state may be directly interested.

Sec. 4. That he shall, also, when required by the Governor, or General Assembly, appear for the state in any court or tribunal, in any cause to which the state may be a party, or in which the state may be directly interested.

\*\*\*”