

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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**MERIT BRIEF OF
DEFENDANT-APPELLANT-CROSS-APPELLEE STATE OF OHIO**

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INTRODUCTION

Lake Erie is one of Ohio's greatest natural assets, and no one doubts the importance of protecting the Lake for future generations. Further, no one doubts that all parties here have important rights and responsibilities regarding the Lake, even if the parties dispute key aspects of those rights. Plaintiffs, landowners who own private property along the lakefront, do not dispute that the State owns the Lake as a public trust for the good of all Ohioans. The State does not dispute—and indeed vigorously supports—the landowners' rights to their own land, along with their special littoral rights to access and use the public Lake in ways that the general public may not. The dispute arises because the courts below radically relocated the physical line used to define the Lake itself, and thus the point where the State's special public trust authority over the Lake begins and ends. The State does not seek to take anyone's land; it simply asks the Court to re-affirm the centuries-old definition of the Lake and the public trust, to restore a balance of everyone's overlapping rights.

Before reaching that issue, the Court should reverse the appeals court's mistaken ejection of the State from the case. The State is a proper party, separate from the Ohio Department of Natural Resources and its Director (together, "ODNR"), because Plaintiffs sued "the State of Ohio" separately, seeking and obtaining relief that runs against the State and its public trust and ownership interests. The Attorney General rightly represents the State because he has the constitutional power and duty to defend the State when it is sued, and nothing about this case transfers that duty to the ODNR, the Governor, or anyone else.

With that threshold issue resolved, the Court should re-affirm that the State's public trust authority over Lake Erie extends to a line called the "ordinary high-water mark," and that the rights below that point are overlapping and balanced. Both courts below erred in redefining the boundary of the "territory" of Lake Erie in a way that abolished long-held public-trust rights that

exist up to the ordinary high-water mark, and that redefinition upset the careful balance among the legitimate rights of the landowners, the State, and the public. Ohio law has always recognized that the State holds, as a public trust, Lake Erie and the land underneath the Lake. The dispute here is simply over the boundary of that public trust.

The Court should maintain Ohio's traditional rule, which defines the Lake to include all areas that are submerged when the Lake is at its ordinary high-water mark. This rule is not only well-established by case law, statute, and tradition, but it has proved workable over time because it is sensible. The appeals court's contrary view says that the boundary moves with every minimal, momentary change—that is, even if the water drops a few feet for a few days, the State loses *all* title and *all* public trust authority for those few feet over those days. That view defies both settled law and common sense.

The State's view is not only the better legal and practical position, but it is also the balanced one, as it fully recognizes and protects the lakefront owners' special rights, on their land and even into the Lake. The appeals court's extreme view, by contrast, draws a sharp (but moving) line: It fully eliminates the State's public trust at the water's edge. The State's balanced view places the boundary at the ordinary high-water mark as a physical matter, but that is merely the starting point for proper treatment of the overlapping rights and responsibilities that apply within the public trust area. Lakefront owners have littoral rights, not shared with the public, that extend past that boundary and even down into the water, such as the rights to wharf out or build piers, to consume reasonable amounts of water, and so on. These littoral rights are entitled to respect and certain protections—even against the State. And while the public trust allows all citizens to enjoy the Lake, those rights are limited, and they cannot be used to interfere with the littoral owners' rights.

Thus, this case is not about taking away anyone's land, and it is not about forcing landowners to accept campers in their backyard. It is simply about accepting the traditional definition of Lake Erie to include the lakebed, as that boundary was defined at the common law, and protecting all private and public rights along the Lake Erie shore.

The Court should reverse the court below in both respects. It should re-affirm the Attorney General's traditional power and duty to represent the State of Ohio, and it should re-affirm the State's traditional power and duty to protect Lake Erie in a balanced manner that recognizes and respects both the public's rights and the special legal rights of adjacent property owners.

STATEMENT OF THE CASE AND FACTS

A. Landowners sued the State over the scope of the State's public-trust ownership of Lake Erie.

This case began when two sets of plaintiffs, owners of property bordering Lake Erie, filed parallel suits in Lake County in May 2004. *State ex rel. Merrill v. State*, Lake County Court of Common Pleas No. 04CV001080; *State ex rel. Taft v. State*, Lake County Court of Common Pleas No. 04CV001081. Both complaints named three defendants: (1) ODNR, (2) ODNR's Director, and (3) the State of Ohio. Complaint, *Merrill* Trial Docket Entry ("Tr. Dkt.") 12, May 28, 2004, and First Amended Complaint ("OLG FAC"), *Merrill* Tr. Dkt. 22, July 2, 2004, Supplement ("Supp.") S-7; Complaint ("Taft Compl."), *Taft* Tr. Dkt., May 28, 2004, Supp. S-18. The cases were consolidated, and the National Wildlife Federation and the Ohio Environmental Council (together, "NWF") intervened as defendants. Order Consolidating Cases, *Merrill* Tr. Dkt. 32, Aug. 12, 2004; Order Granting Motion to Intervene, *Merrill* Tr. Dkt. 148, Jan. 10, 2007. (All Tr. Dkt. references below are to the *Merrill* docket except where noted.)¹

In both cases, plaintiffs sought declaratory relief regarding the boundary of the State's public trust authority over Lake Erie, the boundaries of the State's and the lakefront owners' titles, and the consequent rights of the owners, the State, and the public along the Lake Erie shoreline. In particular, the *Merrill* plaintiffs sought declarations that "the interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands," and that "ODNR lacks authority" to lease to lakefront owners any

¹ Before suing, several plaintiffs asked the General Assembly to enact the outcome that they now seek from the judicial branch. Several bills were introduced, but the General Assembly did not pass them, nor has it passed the bills introduced while this case has proceeded. See H.B. 583, 124th General Assembly (2001-2002); H.B. 218, 125th General Assembly (2003-2004); S.B. 127 and H.B. 206, 126th General Assembly (2005-2006); and S.B. 189, 127th General Assembly (2007-2008).

property that Plaintiffs claimed they “already owned.” OLG FAC at 9, Prayer for Relief, ¶ 2, Supp. S-15. Plaintiffs claimed that the State’s use of the “ordinary high-water mark” as a boundary amounted to a taking of their property. Consequently, they sought mandamus to force ODNR to file appropriation proceedings in probate courts in the lakefront counties, in which Plaintiffs could recover compensation for the taking. *Id.* at 10, ¶ 3. The *Taft* plaintiffs made similar claims and sought similar relief. See *Taft Compl.* at 2-10, Supp. S-19-S-26.

The trial court, following the parties’ stipulation, certified the case as a class action on limited issues. Joint Stipulation to Class Cert., Tr. Dkt. 122, June 8, 2006; Class Certification Order, Tr. Dkt. 123, June 9, 2006, Apx. Ex. 5, A-117. It defined the class as “all persons . . . excepting the State of Ohio and any state agency . . . who are owners of littoral property bordering Lake Erie . . . within the territorial boundaries of the State.” Class Cert. Order at 2, A-118.² The trial court noted the parties’ stipulation that “‘upland property’ is defined as real property bordering a body of water and that, in Ohio, ‘littoral property’ is defined as upland property that borders an ocean, sea, lake, or a bay of any of these water bodies, as opposed to ‘riparian property’ which is defined as upland property that borders a river, stream, or other such watercourse.” *Id.* at n.1. The court then certified three questions of law:

- (1) What constitutes the furthest landward boundary of the “territory” as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms “southerly shore” in R.C. 1506.10, “waters of Lake Erie” in R.C. 1506.10, “lands presently underlying the waters of Lake Erie” in R.C. 1506.11, “lands

² The court’s class certification named the *Merrill* plaintiffs as class representatives. The named plaintiffs in *Merrill* include Robert Merrill, eleven other named property owners, and the Ohio Lakefront Group, an association of lakefront property owners. The State refers to this group collectively as “Ohio Lakefront Group” or “OLG,” as the class plaintiffs have done in their briefs. Plaintiffs *Taft* and the *Duncans* have continued to litigate separately from OLG at all stages; the *Duncans* filed jointly with *Taft* in the trial court but separated from him on appeal. The State uses the term “Plaintiffs” where applicable to all, including OLG, *Taft*, and the *Duncans*.

formerly underlying the waters of Lake Erie and now artificially filled” in R.C. 1506.11, and “natural shoreline” in R.C. 1506.10 and 1506.11.

(2) If the furthest landward boundary of the “territory” is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such “territory” as proprietor in trust for the people of the State.

(3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the “territory.”

Id. at 2-3, A-118-19.

B. Before the trial court ruled, ODNR changed its regulatory approach, and the State and ODNR chose to litigate separately.

When the case began, the Attorney General represented all three State Defendants through assigned assistant attorneys general, pursuant to his duty to represent the State and its entities in legal proceedings, under both the Constitution and R.C. 109.02. The representation continued in that form from May 2004 to July 2007. In July 2007, after all sides filed various summary judgment motions, the State Defendants decided to pursue different paths. At that time, the Attorney General exercised his power under R.C. 109.07 to appoint special counsel to represent ODNR.

When representation diverged, the State and ODNR filed two documents, both of which explained their understanding of ODNR’s new posture and the State’s continued, separate litigation track. First, the State and ODNR filed a joint notice about the change in representation. See Notice of Substitution of Counsel for Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources (“ODNR Counsel Notice”), Tr. Dkt. 169, July 16, 2007, Supp. S-1. That Notice explained in full:

Please take notice that Kathleen M. Trafford of Porter, Wright, Morris & Arthur LLP is hereby entering her Notice of Appearance on behalf of Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources, pursuant to an appointment by Ohio Attorney Marc Dann as Outside

Counsel for these Defendants-Respondents. Defendant-Respondent State of Ohio will continue to be represented by Ohio Attorney General Marc Dann and Assistant Attorneys General Cynthia K. Frazzini and John P. Bartley. Please serve all notices, pleadings, motions and other documents filed with the Court upon Ms. Trafford at the address indicated below.

Id. The Notice was separately signed by counsel for ODNR and for the State.

Second, on the same day that the parties filed the ODNR Counsel Notice, ODNR filed a response to the pending summary judgment motions, explaining ODNR's new litigating and regulatory positions. Response of Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources, to the Pending Motions for Summary Judgment at 1-2 ("ODNR MSJ Resp."), Tr. Dkt. 170, July 16, 2007, Supp. S-4. ODNR's new litigating position was that it would no longer participate in the ongoing boundary dispute. *Id.* at 2, Supp. S-5. ODNR "welcome[d] the Court's resolution" of the dispute, and it noted that the Court could rely on the "able and exhaustive briefs by the Plaintiffs-Relators on behalf of the lakefront owners and the Attorney General on behalf of the State of Ohio." *Id.* ODNR's new regulatory position was to honor the lakefront owners' "apparently valid real property deeds . . . unless a court determines that the deeds are limited by or subject to the public's interests in those lands or are otherwise defective or unenforceable." *Id.*

ODNR's summary judgment response noted that ODNR was "acting with the consent and direction of Governor Ted Strickland," and, consistent with that position, the Governor issued a press release that further detailed his and ODNR's regulatory and litigation approaches. See July 13, 2007 Press Release, "Governor Strickland Announces New Regulatory Policy for Coastal Land Management," available at <http://ohio.gov/news/2007/jul.stm> (last visited July 9, 2010) (attached as Ex. 3 to State's Reply at Supplemental Jur. Stage). The release explained that "[t]he Attorney General, in his role as counsel to the State of Ohio, has informed the Governor that his

office will continue to pursue its current position in support of the public trust lands doctrine.”

Id.

After ODNR and the State diverged, the parties continued to litigate the summary judgment motions and other disputes in the trial court, and no party suggested that the State was not a party or that the controversy had evaporated. OLG filed two separate summary judgment briefs after the divergence, a brief opposing the State’s summary judgment motion and a reply brief supporting OLG’s own summary judgment motion. Tr. Dkt. 178, July 19, 2007; Tr. Dkt. 180, July 31, 2007. Neither brief raised any issues regarding the State’s status as a party or questioning the continued existence of a live controversy. In particular, OLG’s reply brief noted that the State of Ohio continued to litigate separately to resolve the boundary and public trust issue, and that “ODNR awaits the Court’s determination as to whether ODNR’s acceptance of presumptively valid deeds is lawful.” OLG Reply, Tr. Dkt. 180, July 30, 2007, at 1 n.1.

C. The trial court rejected all parties’ definitions of the boundaries and adopted a momentary “water’s edge” boundary for all purposes, and it reserved issues such as the State’s possible liability for future determination within this case.

On the merits, the State separately maintained that its public 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, and not the highest or lowest point to which the water rises or falls. 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 trust rights above that point. See OLG SJ Mot., Tr. Dkt. 165, May 30, 2007, at 11-16; Taft and Duncans SJ Mot., Tr. Dkt. 168, June 15, 2007, at 3. Plaintiffs diverged, however, in describing the low-water mark: The OLG described it as the “low-water mark,” but without advocating any more specific definition. See OLG SJ Mot. at 15 n.11. Taft and the Duncans said 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 and Duncans SJ Mot. at 3. As noted above, ODNR took a neutral posture as to the boundary disputes, stating that it would “carry out [its] statutory duties consistent with the Court’s ultimate declarations.” ODNR SJ Resp. at 2, Supp. S-5.

The trial court rejected all parties’ suggested boundaries, declining to recognize the ordinary high-water mark or any version of a low-water mark. See Summary Judgment Order, Tr. Dkt. 183, Dec. 11, 2007 (“Com. Pl. Op.”), Apx. Ex. 4, A-40, at 69. It ruled that the most landward boundary of Lake Erie held in trust by the State of Ohio is “the water’s edge, which means the most landward place where the lake water actually touches the land at any given time.” *Id.* at 71-72. In other words, it held that the lakefront owners hold title in fee simple—with no subservience to the public trust or any public rights—down to the “water’s edge . . . at any given moment.” *Id.* at 74-75.

The trial court went further and reformed the legal descriptions in all class members’ deeds to reflect ownership “to the water’s edge as it existed when the deed was filed.” *Id.* at 74. The court noted that artificial fill could not be used to move the line, referring to the “landward boundary where the lake water actually touched the land, notwithstanding any subsequent artificial filling of those lands.” *Id.* at 72. It also ordered that the owners can “exclude others from using the shore down to the water’s edge.” *Id.* at 60.

The trial court also entered relief against the State in multiple ways. It barred the State from exercising any “public trust” rights inconsistent with the “water’s edge” regime. *Id.* at 74. It specifically reserved, for future proceedings in this case, Plaintiffs’ claims that the State had committed a “taking” of their land and Plaintiffs’ claims for damages, whether as compensation for the alleged taking or under any other damages theory. *Id.* at 75-76.

Both OLG and Plaintiff Taft appealed, listing the State of Ohio as an appellee. See OLG Notice of Appeal, Tr. Dkt. 200-01, Jan. 18, 2008; Taft Notice of Appeal, Tr. Dkt. 199, Jan. 18, 2008. The State appealed, and NWF separately appealed as well. State Notice of Appeal, Tr. Dkt. 192, Jan. 8, 2008; NWF Notice of Appeal, Tr. Dkt. 189, Jan. 8, 2008.

D. The appeals court ejected the State from the case, holding that the State had no “standing” and that the Attorney General could not represent the State here.

On appeal, the appeals court ejected the State from the case, although no Plaintiff assigned as error the State’s continued litigation after ODNR’s changed approach. *State ex rel. Merrill v. Ohio Dep’t of Natural Res.* (11th Dist.), 2009-Ohio-4256 (“App. Op.”), Apx. Ex. 3, A-7. (Taft’s appellee brief included a footnote questioning the Attorney General’s authority to proceed, describing it as “unclear,” but he did not assign it as an error. See Taft Answer (Appellee’s) Br. (filed in 11th Dist. Case No. 07-L-008) at 1 n.1.) The appeals court initially questioned “whether the state of Ohio has standing to participate in this appeal,” and “conclude[d] it does not.” App. Op. at ¶ 41. The court cited case law governing a *plaintiff’s* “standing to sue,” *id.* at ¶ 43, without noting that the State was sued here as a defendant. The court then stated that the “Attorney General may only act at the behest of the Governor or General Assembly.” *Id.* at ¶ 44. The court concluded that, because “[t]he governor has ordered ODNR to cease those activities that made it a party to the action,” the Attorney General has “no authority . . . to prosecute this matter on his own behalf.” *Id.* Finally, returning to what it called “standing,” the court held that “the state of Ohio no longer has standing in this matter,” and it struck the State’s briefs and assignments of error. *Id.*

Judge Cannon, dissenting on this point, stated that this issue was “not raised by any party,” *id.* at ¶ 135, and that “[t]he state of Ohio is a named defendant,” *id.* at ¶ 136.

E. The appeals court adopted the momentary water's edge as the boundary for both the State's title and its public trust authority, and it granted lakefront owners absolute right over Lake Erie lands that are artificially filled.

The appeals court then addressed the merits of the boundary issues, relying on NWF's status as an intervenor. The court adopted most of the trial court's holdings, including a unitary boundary of the "actual water's edge" at a given moment. App. Op. at ¶ 127. It held that this boundary limited the State's "public trust," so that only the water itself and "lands under the waters of Lake Erie, *when submerged under such waters*, are subject to the public trust." *Id.* (emphasis added). But it departed from the trial court's ruling in significant respects: (1) it did not define "water's edge" as fixed at the time the deeds were filed, *id.*; (2) it did not define "water's edge" as a definitive boundary at all times, but only when it stands between the "high and low water mark," *id.*; (3) it vacated the trial court's order reforming the legal descriptions in the owners' deeds, which it held should be resolved individually, *id.* at ¶ 103; and (4) it disagreed with the trial court about the effects of artificial fill, suggesting that owners who deposited artificial fill, thus moving the water's edge from where it had been, were entitled to own the newly-filled area in fee simple, with such areas no longer subject to the State's public trust authority, *id.* at ¶ 127.³

The State appealed to this Court, as did NWF and ODNR. Taft cross-appealed. The Court ordered supplemental briefing regarding the State's appeal, and the Court granted all parties' appeals and cross-appeals. See Order of Dec. 23, 2009 (ordering briefing on two specific questions); Order of Mar. 3, 2010 (granting review).

³ The lower courts did not reach the second question of law that the trial court had certified for class treatment; that question concerns the method used to locate the ordinary high-water mark. Both courts found that the issue was moot because that mark, under their approach, has no legal meaning. Consequently, that issue is not before the Court here, although it will again become a live issue on remand if the Court restores the ordinary high-water mark as the relevant boundary.

ARGUMENT

The Court should reverse the appeals court on both issues in the State's appeal. First, the Court should hold that the State of Ohio is a proper party here, independent of ODNR, and that the Attorney General represents the State. Second, the Court should hold, as it always has, that the State's public trust authority over Lake Erie includes all lands that are submerged when the Lake is at its ordinary high-water mark. The State does not lose and regain its public trust authority day-to-day when the momentary "water's edge" fluctuates between the low-water mark and the ordinary high-water mark.

Defendant-Appellant State of Ohio's Proposition of Law No. 1:

Any defendant against whom judgment is entered has standing to appeal, including the State of Ohio when it is named independent of a specific agency, and including when the State's broader interests exceed an agency's administrative interests. In all such cases, the Attorney General represents the State, and his authority to proceed does not require case-by-case instructions from the Governor or the General Assembly.

A. The State is a party independent of ODNR.

The State here is, and always has been, a party separate from ODNR. As an initial matter, the issue here is not a plaintiff's "standing to sue," see App. Op. at ¶ 43, nor is it the Attorney General's right to sue "on his own behalf," *id.* at ¶ 44. Rather, Plaintiffs themselves sued "the State of Ohio" *as a defendant*, and the Attorney General has always proceeded in the State's name, not his own. Therefore, the issue is the State's status, beginning in the trial court, both before and after ODNR's changed approach, and the State's consequent right both to appeal the judgment against it and to participate as an appellee. At all stages, the State has been, and continues to be, a separate party, because Plaintiffs have always sought relief from the State.

1. Plaintiffs sued the State, and the trial court granted relief against the State after ODNR changed its approach.

First, Plaintiffs sued “the State of Ohio” and sought relief from the State. All Plaintiffs named three Defendants: ODNR, its Director, and the State of Ohio. Notably, while OLG stated its factual allegations in terms of ODNR, it named “the state” as the target of its request for declaratory relief regarding the limits of the State’s public trust authority. See FAC at 7 ¶ 32, Supp. S-13 (seeking declaration as to the “interest of the state as trustee over the public trust”); *id.* at 9, Prayer for Relief, ¶ 2 (same), Supp. S-15. Plaintiffs Taft and Duncan similarly sued the State and sought relief from it, and they specified that the “state of Ohio” would have to pay for any alleged taking by ODNR. See Taft Complaint at 3 ¶ 5, Supp. S-20 (naming State separately from ODNR and defining all further ODNR references to include the State); *id.* at 8 ¶ 40 (claiming that “if ODNR is entitled” to “take” the disputed territory, “then Plaintiffs have a clear right to receive compensation from the state of Ohio”); *id.* at 9 Prayer for Relief, ¶ 2 (demanding separate declarations that the “ownership interest of the state” is limited and that “ODNR lacks authority” as a result).

Plaintiffs were correct to sue the State as a separate defendant, as the State of Ohio is the trustee as to the public trust over Lake Erie. The State currently has delegated to ODNR the duty to administer the trust, but it is the broader State that holds the trust. R.C. 1506.10-.11. Reflecting that broader trusteeship in the State as a whole, the General Assembly has, over the years, delegated that administrative responsibility to different agencies. It assigned it originally to municipal corporations along the lakefront, then to the Department of Public Works, then to the Department of Administrative Services, and now to ODNR. See G.C. 3699-1-6 eff. 1917 amended and recodified in 1955 as R.C. 721.04-.11 (delegating to municipal corporations); G.C. 3699-a as first amended in 1945 and recodified in 1955 as R.C. 123.03-.031 (delegating to

department of public works); R.C. 123.03-.031 as amended in 1973 (delegating to department of administrative services); R.C. 123.03-.031 as amended and renumbered in 1989 as R.C. 1506.10-.11 (delegating to department of natural resources). When OLG and other owners unsuccessfully sought a legislative grant of the disputed area (before suing instead), they asked the General Assembly to legislate; they did not ask ODNR for an administrative grant.

Second, the State remained a party after ODNR changed its regulatory approach, and the parties and the trial court recognized that common-sense reality by continuing with the case. Plaintiffs did not challenge the State's authority to proceed after ODNR changed its approach, nor did Plaintiffs pursue any of the procedural options that would have been available—such as dismissal for mootness or a default judgment—if the State could not continue alone.

Third, the trial court's order granted relief against "the State of Ohio" in several respects. Its concluding paragraphs were titled "(C) The rights of the State of Ohio," (D) "The responsibilities of the State of Ohio," "(E) The rights of the people of the State of Ohio," and "(F) The responsibilities of the people of the State of Ohio." Com. Pl. Op. at 74-75. The court addressed what it called "the limited authority" of the "State of Ohio" to "enact laws and regulations" regarding "the public trust ownership of the waters of Lake Erie." *Id.* at 74 (ODNR, of course, has no power to "enact laws.") The court held that the "State of Ohio is prohibited from using its public trust ownership" in certain ways, and it purported to define the "rights and responsibilities of the people of the State of Ohio" pursuant to the public trust. *Id.* Such orders could not be binding without the State's presence as a defendant.

The trial court also noted that several issues were reserved for further proceedings, including whether the State must pay compensation for an alleged taking of property. *Id.* at 75. This discussion of possible future relief shows that Plaintiffs needed the State's presence not

only to *reach* the summary judgment decision after ODNR's policy change, but also to pursue all the relief sought in their Complaints.⁴

After the trial court ruled, both OLG and Taft (but not the Duncans) appealed. They argued that the trial court should have designated the low-water mark as the boundary, not the water's edge. Both named "the State of Ohio" as appellee. See OLG Notice of Appeal, Tr. Dkt. 200-01, Jan. 18, 2008; Taft Notice of Appeal, Tr. Dkt. 199, Jan. 18, 2008.

All of this shows that the State was a party separate from ODNR in the trial court.

2. The State was entitled to appeal, and to participate as an Appellee, because it was a party aggrieved by the trial court order.

The State's status as a party on appeal flows naturally from its status as a party in the trial court. As the losing defendant in the trial court, the State was an aggrieved party entitled to appeal.

The party with standing to appeal is the "party aggrieved by the final order appealed from." *State ex rel. Gabriel v. City of Youngstown* (1996), 75 Ohio St. 3d 618, 619. A party lacks appellate standing only when the party "is not prejudiced by the" appealed order. *Denovchek v. Bd. of Trumbull County Comm'rs* (1988), 36 Ohio St. 3d 14, 17. It is this "party aggrieved" test—not the appeals court's discussion of case law regarding "standing to sue," App. Op. at ¶ 43—that applies here, because Plaintiffs sued the State.

The State easily meets the "party aggrieved" test, because the trial court ordered relief that runs against the State, not ODNR. As detailed above, the trial court's own words phrased the relief as against the "State of Ohio," as well as against "the people" of Ohio. Com. Pl. Op. at 73-

⁴ The trial court was mistaken in saying that valuation of the taking could occur in this case, although that mistake does not affect this appeal. Plaintiffs sought mandamus to force ODNR to initiate takings proceedings in another court, where valuation would be determined. See OLG FAC at 10, Prayer for Relief ¶¶ 3-4, Supp. S-16; Taft Compl. at 10, Prayer for Relief ¶¶ 3-4, Supp. S-26.

75. Moreover, the *nature* of the relief was such that it could only apply to the State as a whole, not ODNR, as the trial court purported to bind the State's public trust authority for all purposes, including future legislation.

Also, the State had the additional right to participate as an *appellee* on the Plaintiffs' cross-appeals. The appeals court held broadly that the State could not "participate" in the appeal, App. Op. at ¶ 41, and it struck the State's *briefs* in whole, *id.* at ¶ 43, without addressing any of the State's merits arguments, including those defending against the cross-appeal. The appeals court therefore did not even allow the State to defend those portions of the judgment *on which the State had prevailed below*.

In sum, the State is a party here, so the question is, "who represents the State and decides its litigation strategy?" The answer, as explained below, is the Attorney General.

B. The Attorney General represents the State and decides its litigation strategy, and the State's position is not controlled by the Governor, ODNR, or any other agency.

Because, as shown above, the State of Ohio is a proper party to this litigation, the only remaining question is who controls the State's litigation *when* the State is a party. The appeals court was mistaken to elide this distinction, and it was mistaken in suggesting that anyone other than the Attorney General directs the State's litigation.

1. The Attorney General represents the State whenever it is sued.

Several considerations establish that the Attorney General has the power and duty to represent the State when it is sued, as it was here.

First, the Constitution creates the Attorney General as an officer independent of the Governor and other offices. Section I, Article III, Ohio Constitution. "[T]he attorney general of Ohio is a constitutional officer of the state . . . with such duties as usually pertain to an attorney general, and especially with those delegated to him by the general assembly of Ohio." *State ex*

rel. Doerfler v. Price (1920), 101 Ohio St. 50, 57. These constitutionally-based duties “especially”—not solely—include powers added or clarified by statute. *Id.* The constitutional grant also sweeps in the recognized common-law powers of an attorney general. *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶ 19.

Second, R.C. 109.02 confirms the Attorney General’s constitutional role by broadly empowering the Attorney General to represent the State when it is a party, and by excluding other representation. It says that the “attorney general is the chief law officer for the state and all its departments,” and that “no state officer . . . or institution of the state shall employ, or be represented by, other counsel . . . or attorneys at law.” This language shows that “the state” is separate from “its departments,” and it confirms that the Attorney General represents the State and her entities, for they cannot hire other counsel, and they cannot go unrepresented when sued.

Revised Code 109.02 does not require the Attorney General to seek the Governor’s permission to represent the State, as the appeals court would seem to have it. The statute provides that “[w]hen required by the governor or the general assembly, the attorney general shall appear for the state.” (Emphasis added). This provision, however, merely supplies an *additional* way for the Attorney General to appear, such as when the State has an interest that warrants intervention or an amicus filing in a case in which the State is not a party. That additional mechanism does not require the Governor’s permission to represent the State in all cases. In particular, reading R.C. 109.02 to require such approval would make no sense in cases that do not involve entities under the Governor’s or the General Assembly’s control, such as when someone sues the Auditor of State or this Court. The same is true when someone sues the State as a whole, which encompasses more than the Governor’s or the General Assembly’s sphere of control. Such a reading also defies common sense, as the Attorney General often must

rush to court to defend against temporary restraining order or to file extensive pleadings within hours on urgent matters such as capital cases, election emergencies, and the like. Obtaining case-specific “permission slips” on every such case is not only impossible, it is also unprecedented over centuries of tradition and practice.

But even if the Attorney General’s duty to represent the State required the Governor’s approval (and it does not), such approval existed here. As the State detailed in supplemental briefing requested by this Court, and as summarized in the facts above, the Governor (and ODNR) fully supported the State’s continued litigation here. See State’s Supp. Jur. Mem. at 5-10; see also ODNR Supp. Jur. Br. at 2 (reiterating ONDR’s and Governor’s support of Attorney General’s authority here); compare Taft Supp. Jur. Br. at 1 (“If the Governor ‘required’ (requested or approved) the appeal,” then Taft “would concede the appeal falls within the express requirements” of R.C. 109.02). ODNR’s separate path was not contrary to the State’s continued litigation; indeed, ODNR’s approach expressly *relied on* the State’s continued litigation. It “welcome[d] the Court’s resolution” of the dispute, based on the “able and exhaustive briefs by the Plaintiffs-Relators on behalf of the lakefront owners and the Attorney General on behalf of the State of Ohio.” ODNR SJ Resp. at 2, Supp. S-5.

2. ODNR’s duty to administer issues regarding Lake Erie does not include the right to control the Attorney General’s power to direct the State’s litigation.

Nothing in R.C. 1506.10, which directs ODNR to manage the State’s interests in Lake Erie, grants ODNR control over the State’s litigation when the State of Ohio is validly a separate party. That provision directs ODNR to protect Lake Erie and to enforce the State’s rights through regulatory or administrative management, not through control over litigation. It states:

The department of natural resources is hereby designated as the state agency in all matters *pertaining to the care, protection, and enforcement of the state’s rights* designated in this section.

Any order of the director of Natural Resources in any matter *pertaining to the care, protection, and enforcement of the state's rights* in that territory is a rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code.

R.C. 1506.10 (emphasis added). The parallel use of the same clause shows that the phrase “enforcement of the state’s rights” has the same meaning in both sentences. The second sentence, meanwhile, declares that all of the ODNR Director’s actions under that power are rules or adjudications subject to Ohio’s Administrative Procedure Act, R.C. Chapter 119 (“APA”). That commitment to APA review shows that the contemplated “enforcement” actions are regulatory ones, not litigation ones, as only such decisions can sensibly be subject to further review under Chapter 119. And while ODNR is of course a party in many cases challenging its specific regulatory actions, the Attorney General has, since the enactment of the statute that became R.C. 1506.10, represented the State’s interests in Lake Erie in the State’s name. See *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8 (Attorney General sued as relator for the State); *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303 (Attorney General represented the State’s interests as an amicus in dispute between city and private landowner).

C. Plaintiffs cannot disclaim the State’s party status after relying on it both to secure the rulings below and to seek further relief on remand.

Plaintiffs’ attacks on the existence of this appeal—whether based on denying the State’s party status or on attacking the Attorney General’s representation of the State—fail for all the reasons above. Moreover, Plaintiffs cannot have it both ways: They cannot simultaneously (1) insist now that neither the State nor ODNR has been a valid adversarial party since July 2007, thus eliminating any State appeal, while (2) seeking to maintain the judgments entered against the State *after* the point at which, in Plaintiffs’ view, no State party remained. Plaintiffs’ inconsistency, and its implications, are undeniable.

On one hand, Plaintiffs claim that the State is not, and never was, truly a party, even though *Plaintiffs sued it*. OLG insists that it sued the State only “out of an abundance of caution,” and that its choice to do so is irrelevant because “OLG . . . has no . . . authority to change the identity of the proper parties by naming certain entities as defendants.” OLG Supp. Jur. at 5 n.1. OLG therefore concludes that “ODNR is the only proper party here.” *Id.*

On the other hand, OLG also insists that ODNR “withdrew from the case on July 16, 2007,” and is now merely an amicus. OLG Jur. Resp. at 1 n.1. OLG’s claim that ODNR “withdrew” is wrong, for ODNR remains a party, and a *defendant’s* ability unilaterally to withdraw from a case is a novel concept. But accepting, for argument’s sake, the claim that ODNR “withdrew,” that claim necessarily means that *no* State defendant remains in this case—not the State (because it never belonged), and not ODNR (because it walked away).

No plausible theory, legal or factual, allows Plaintiffs to insist that they have had no State opponent since July 2007, while still retaining the later-issued judgments—both the trial court’s and the appeals court’s—that were entered against the State. Indeed, Plaintiffs’ tack is a textbook example of when courts apply judicial estoppel: “Courts apply judicial estoppel in order to preserve[] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.” *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 2007-Ohio-6442, ¶ 25 (internal quotations and citations omitted). Here, Plaintiffs relied on the State’s *presence* to secure judgments against the State, but now, with those judgments in hand, they urge the State’s *absence* as a reason to render those judgments unreviewable. That does not wash.

In the alternative, if the State is not and never has been a party, the Court should vacate the judgments below (to the extent they run against the State) based on that flaw.

Defendant-Appellant State of Ohio's Proposition of Law No. 2:

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.

Both courts below erred in redefining the boundary of the "territory" of Lake Erie in a way that abolished long-held public-trust rights that exist up to the ordinary high-water mark. That redefinition upset the careful balance among the legitimate rights of the littoral landowners, the State, and the public. The State urges the Court to maintain Ohio's traditional rule, which is well-established by case law and statute and has proved workable over time.

- A. The State has always held Lake Erie and its submerged lands as a public trust for the benefit of all Ohioans, and the main issue in this case is the boundary used to mark the Lake and its bed to protect the public trust consistently, even when the water is below its ordinary high-water level.**

Before addressing the ultimate question of Lake Erie's boundary, it is critical to understand the underlying natural conditions and the settled legal context, and to clarify what is, and is not, at issue in determining the boundary.

No one disputes that the State owns Lake Erie and what are called "submerged lands"; what the parties dispute is whether lands that are often physically submerged lose their traditional legal designation as "submerged lands" in any moment when the water recedes. That is, the parties dispute the status of any strip at the Lake's edge that is submerged when the water is at its ordinary high, but is sometimes dry. While the answer lies in the law of Ohio, the issue

arises because of a basic law of nature: the only thing constant is change. Water moves, whether quickly or slowly, whether it be ocean tides, flowing rivers, or the more gradual (but sometimes sudden) rise and fall of the water level of the non-tidal Great Lakes, such as Lake Erie. That reality means that bodies of water—and property that touches those bodies of water—have given rise to their own body of law. Property lines along ever-changing waterfronts cannot be fixed with the same “metes and bounds” precision that is used on dry land. The resulting set of common law rules allows boundaries to move gradually, to reflect natural changes in the water line.

While the law accommodates change, it also recognizes the need for stability, along with the overlapping rights that arise from the need to protect public resources and to honor the special rights of lakefront owners. The need for stability means that boundary lines may move in the long run, by natural, gradual, changes. But such lines should not move too frequently and abruptly, with a strip changing hands back and forth, month-to-month or even day-to-day, in dry or rainy seasons.

Equally important, the law recognizes that wherever the lines are drawn, there are areas in which the State, the public, and private owners have overlapping rights. For example, although private property owners cannot own a parcel in the Lake itself, they do have well-established rights—unique to them as lakefront owners—to build piers or wharves out into the public water. But such wharfing may not interfere with public rights of fishing, navigation, recreation, and commerce in the Lake; no one can fence in a piece of the Lake itself as a private preserve. Similarly, the State has both the power and duty, under the public trust doctrine, to preserve Lake Erie as a natural resource and to protect public rights.

While the details of those overlapping rights are discussed below, the existence of overlapping rights demonstrates that this case is not about drawing a bright line that separates absolute state control from absolute private control. Instead, this case is about preserving a framework for balancing rights and responsibilities on both sides of whatever lines are drawn. And to the extent this case involves line-drawing, it is about clarifying the definitions of the lines that have always existed, even if some parties had a different view of those lines. That is, this case is not about the State “taking” from landowners any property that was indisputably theirs; it is about clarifying what was, or was not, always theirs.

In this light, the following subparts of Part A explain the history of the public trust doctrine, its basic contours and its adoption in Ohio law as to Lake Erie, and the basic issues involving the public trust and issues of public and private title to land along the Lake. Part B explains why the boundary of Lake Erie is and always has been the point at which the water usually touches the land, known as the “ordinary high-water mark.” Part C addresses the special situation of “artificial fill,” which creates—by human action rather than Mother Nature—surface land where the Lake’s water once stood. Part D explains the unique “littoral rights” that lakefront owners possess, which they do not share with the public and which are entitled to respect and certain protections even against the State.

- 1. Under federal law, Ohio received, upon admission to the Union, sovereign authority and title in trust to Lake Erie within its territorial boundaries, including submerged lands up to the ordinary high-water mark.**

The State’s “chain of title,” so to speak, formally begins with the establishment of the United States of America, but the relevant common law traces back to England and even to Roman law. As the Michigan Supreme Court noted, in a case similar to this one, the Roman Emperor Justinian explained that the sovereign owned the seas and the shores for the common use of all: “Now the things which are, by natural law, common to all are these: the air, running

water, the sea, and therefore the seashores. Thus, no one is barred access to the seashore” Justinian, Institutes, book II, title I, § 1, as translated in Thomas, *The Institutes of Justinian*, Text, Translation and Commentary (Amsterdam: North-Holland Publishing Company, 1975), 65, and quoted in *Glass v. Goeckel* (2005), 473 Mich. 667, 677. The English adopted the principle that the King owns the sea, and the United States likewise vested title to the seas in the sovereign. *Shively v. Bowlby* (1894), 152 U.S. 1, 11, 57; see *Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469, 473 (noting that the “seminal case in American public trust jurisprudence is *Shively v. Bowlby*”).

In *Shively*, the United States Supreme Court explained that, under the English doctrine, (1) the sovereign’s title over the sea extended to lands that were always or usually underwater, and (2) the sovereign’s title included both a “private title” and a unique “public trust” form of title that differed from both private title and regular sovereignty:

[B]oth the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King’s subjects. Therefore the title, *jus privatum*, in such lands . . . belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

Shively, 152 U.S. at 11. As this passage shows, the sovereign’s title in the sea itself logically includes the lands under the sea. Further, because the tide ebbs and flows, the definition of the “lands” under the water includes all lands that are covered “at all times,” *id.*, and lands covered “at least when the tide is in,” *id.* That is, the area between low and high tide was considered underwater land or submerged land, or part of the sea, even in the times when the water did not

actually cover that area. Put another way, under English law, the sovereign owned “all the lands below high water mark.” The American starting point is the same.

Shively also noted that the sovereign’s title was special in its dual nature and in its accompanying obligations to the public. First, the “title” itself was actually two titles, the “private title,” or *jus privatum*, and the “dominion” for “the public benefit,” or *jus publicum*. The latter, vested in him for the public benefit, obliged the sovereign as a trustee to treat lands held in public trust differently from other lands that the sovereign might own, buy, or sell in the ordinary sense of title (that is, when the sovereign acts like any other property owner).

Most important, the *Shively* Court did not just explain these precepts as English history, but it held that the United States adopted the same doctrine, and that the sovereign’s powers and duties under the doctrine were passed on to each State upon its admission to the Union. “The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones.” *Id.* at 36. That principle—that all States received the same sovereignty and title over navigable waters—is called the Equal Footing Doctrine, and it exists as a matter of constitutional law, predating Congress’s statutes. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 372-74 (a “State’s title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself”); *Idaho v. Coeur d’Alene Tribe* (1997), 521 U.S. 261, 283-84 (describing ownership of lands underlying navigable waters as “an essential attribute of sovereignty”). All this specifically applies to Lake Erie, as the United States Supreme Court applied these rules to the “inland seas”—the Great Lakes. *Ill. Cent. R.R. Co. v. Ill.* (1892), 146

U.S. 387, 436-37 (noting that the “same doctrine . . . applies” to “lands under the navigable waters of the great lakes” as applies to “lands under the tide waters on the borders of the sea”).

The U.S. Supreme Court has repeatedly reaffirmed *Shively* and *Illinois Central*, both as to all States’ equal footing and as to the inclusion of lands under navigable waters, and Congress confirmed both principles when it enacted the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315. See, e.g., *Phillips Petroleum*, 484 U.S. at 478-79; *Corvallis Sand & Gravel*, 429 U.S. at 372-74; *Borax Consol., Ltd. v. Los Angeles* (1935), 296 U.S. 10, 26-27.

The federal Submerged Lands Act re-affirmed the common-law definitions of both the geographic and substantive scope of the States’ authority, and it distinguishes between those States bounding tidal waters and those States bounding non-tidal navigable waters, such as the Great Lakes. Congress confirmed that the States received “the title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters” along with “the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law.” 43 U.S.C. §§ 1311(a)(1) and (2).

As to the physical extent of that authority, Congress adopted principles previously articulated by the U.S. Supreme Court in defining “lands beneath navigable waters” for tidal states and non-tidal coastal states. See 43 U.S.C. §§ 1301(a)(1)–(3). The Act defines “lands beneath navigable waters” for non-tidal States, such as Ohio and the other Great Lakes States, as those “lands . . . up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . [and] all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined.” 43 U.S.C. §§ 1301(a)(1) and (3). See *Phillips Petroleum Co.*, 484 U.S. at 478-79 (noting that the original grant to each non-tidal

State extends to the ordinary high-water mark, “and not upon the ebb and flow of the tide”); *Ill. Cent. R.R. v. Chicago* (1900), 176 U.S. 646, 660 (providing the same rule before the Act was codified). For tidal States, such lands include both those “lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide” and those lands that were “filled in, made, or reclaimed” in those areas. 43 U.S.C. §§ 1301(a)(2) and (3). See *Borax Consol., Ltd.*, 296 U.S. at 26-27 (providing the same rule before the Act was codified).

The Supreme Court reaffirmed these core principles just recently, in rejecting a takings claim by beachfront owners in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, Case No. 08-1151 (June 17, 2010), 2010 U.S. Lexis 4971. The Court explained that state law generally defines property interests, “including property rights in navigable waters and the lands underneath them.” *Id.* at *9. It further explained that Florida law, which was at issue, had retained the same approach to littoral or beachfront property that the common law and the federal statute had. Under that approach, the “State owns in trust for the public the land permanently submerged,” *id.*, and the State also owns land that is submerged when the water is at the applicable high-water mark, whether the “mean high-water line” on Florida’s oceanfront, *id.*, or the ordinary high-water mark here.

While the specific type of high-water mark differs between Florida’s oceanfront and Ohio’s lakefront—mean high-water for tidal States tidal and ordinary high-water for non-tidal States—the key point is that both contexts use some form of high-water mark as the boundary. Both types of high-water mark ensure that the State’s public trust includes “submerged land” that is *legally* submerged but is *physically* dry when the water stands below the relevant high-water mark.

In *Stop the Beach*, the Supreme Court reviewed Florida’s case law and statutes to determine if Florida had granted beachfront owners rights beyond the baseline that applied from common law and the federal statute, and the Court found that Florida had not done so. While the particulars of the issue in *Stop the Beach* are different from those at issue here, the common ground is the need to start with the common law and then look for any changes in state law from there.

Consequently, as a matter of historical fact and legal underpinnings, the State of Ohio’s title and authority over Lake Erie starts with the dominion that the State received upon statehood, which extended to the ordinary high-water mark. To be sure, the States are generally free to re-define and recognize private rights in public trust lands as a matter of state law. “The issue . . . is not what rights the State has accorded private [land] owners in lands which the State holds as sovereign; but, rather, how far the State’s sovereign right extends under the equal-footing doctrine and the Submerged Lands Act.” *Corvallis Sand & Gravel*, 429 U.S. at 369 (internal quotations and citations omitted). But the default position, as a matter of common law and federal constitutional, statutory, and case law, begins with the State holding the full extent of title and authority held by the United States over the Great Lakes, and held by English kings and Roman emperors over their seas—namely, a public trust and title up to the ordinary high-water mark, including lands that are submerged when the Lake is at that point.

- 2. Because Ohio received a public trust obligation to preserve Lake Erie for the people of Ohio, Plaintiffs can succeed only by showing the clearest evidence that Ohio surrendered any aspect of title below the ordinary high-water mark.**

As explained above, Ohio received sovereign authority and title over Lake Erie to the ordinary high-water mark, as a matter of federal law, and the form of that title includes an obligation to hold Lake Erie as a public trust. Ohio is free, as a sovereign State, to define the scope of that authority in several respects. The State may, by state law, define what rights extend

to the public through the public trust, such as regulating the extent of fishing, commerce, recreation, and navigation in the Lake. For example, Ohio's obligation to preserve fish, as a natural resource, both empowers and obliges the State to regulate to avoid overfishing, to manage the various species, and to fight invasive species such as zebra mussels and Asian carp. See, e.g., R.C. 1531.06-.08 (authorizing administrative regulation of fishing, along with hunting and other wildlife protection); R.C. 1533.32 et seq. (fishing provisions). As a matter of the physical property line and title, Ohio may, as a sovereign, grant title (subject to the public trust limits in subpart B-3 below) to adjacent landowners, either on an individual or broad basis, if certain conditions are met. "Under the public trust doctrine, any such conveyance must be authorized by the legislature through specific legislation, must advance public trust purposes, and must not substantially impair the public's use of the remaining public trust lands or waters." 2000 Op. Att'y Gen. No. 2000-047 at 11.

Any such grant of title, however, can only be conveyed by the clearest evidence of the State's decision to relinquish title, such as a statutory enactment declaring such a grant. The U.S. Supreme Court has consistently applied a presumption that a grant of submerged lands requires the strongest showing of the State's intent, such as a statute and not just a document purporting to grant such lands. It has explained "that, in the absence of any local statute or usage, a grant of lands by the State does not pass title to submerged lands below high water mark; and that this principle also applies to the Great Lakes." *Ill. Cent. R.R.*, 176 U.S. at 660 (citing *Pollard v. Hagan* (1845), 44 U.S. 212). Thus, as to submerged lands under a lake, courts presume that a sovereign did *not* intend to part with any portion of its public trust domain, or its rights in that domain, unless clear, express words are used in an enactment—not just a grant of title using words such as "to the lake"—to show such an intent.

That presumption guards against the unintended surrender of valuable public resources to private parties. *Martin v. Lessee of Waddell* (1842), 41 U.S. 367, 411; *Appleby v. City of New York* (1926), 271 U.S. 364, 383-84; 2000 Op. Att’y Gen. No. 2000-047 at 22-23. It specifically prevents the inference of a surrender based upon administrative statements from state agents. In addition, any unintended surrender of the State’s public trust authority is not only unavailable as a matter of specific public trust law, but also under the broader principle that promissory estoppel does not apply against the State based upon administrative acts as opposed to express statutory law. *Hortman v. City of Miamisburg*, 110 Ohio St. 3d 194, 2006-Ohio-4251, ¶ 25 (“as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function”).

Consequently, Plaintiffs can succeed in claiming title to lands below the ordinary high-water mark only if they can show the clearest evidence that Ohio chose to do so—and they cannot.

B. Ohio has always defined the landward boundary of Lake Erie, as a matter of law, as the ordinary high-water mark, as to both the public trust and the State’s title.

Plaintiffs cannot meet the high burden of showing that Ohio surrendered part of its federally received title or authority over the Lake and its submerged lands. Case law and statutory enactments demonstrate that Ohio has always maintained its ownership of Lake Erie to the ordinary high-water mark.

1. This Court held in *Sloan v. Biemiller* that the boundary of Lake Erie is the ordinary high-water mark.

This Court first addressed the Lake Erie boundary in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, and it located that boundary as the “ordinary high-water mark.” *Id.* at 513. *Sloan* was a dispute between private parties, not a dispute with the State over its public trust authority or its title. But its definition of the Lake Erie boundary applies, and *Sloan* is notable for its use of the

term “ordinary high-water mark.” *Sloan* is also important for its explanation of how that mark is also described as the line where the water “usually” stands or touches the land.

In *Sloan*, the Court addressed a private dispute over fishing rights along Lake Erie’s shore, near Cedar Point, where the Lake and Sandusky Bay intersect. Plaintiff Sloan had originally held title to most of “Cedar Point . . . bounded . . . on the northeasterly side . . . by the waters of Lake Erie, and . . . by the waters of Sandusky Bay.” *Id.* at 493. Sloan conveyed about sixteen acres of his Cedar Point property to Defendant Biemiller by deed that expressly reserved to Sloan “the right of fishing in either the lake or bay.” *Id.* at 493-94. However, Biemiller continued to fish in the lake and bay, and Sloan sued Biemiller to quiet title in the fishing rights he had reserved, arguing that Lake Erie and Sandusky Bay, and all rights to their fisheries, were owned and controlled by the adjacent lakefront owners to the middle of the Bay and Lake. *Id.* at 492-95, 501-02, 511.

Because Biemiller claimed he was exercising public rights to fish in public waters, and because Sloan claimed that his upland title—defined as extending to “the waters” of Lake Erie and Sandusky Bay—ran to the center of the Lake and bay, the Court’s resolution of this private dispute turned on the location of the boundary of Lake Erie for both the exercise of public rights and the extent of private title. *Id.* at 511-13. In addressing this issue, the Court extensively reviewed English common law and the law of other States. It explained how American States needed to modify English law to address the Great Lakes, because English law covered rivers, small lakes and seas but “[o]ur large freshwater lakes or inland seas are wholly unprovided for by the law of England.” *Id.* at 511-12. The Court rejected application of the English common-law riparian rule, which provided for private ownership of the beds of non-tidal rivers down to the river’s “low-water mark,” or to the middle of the stream, which the Court had previously

applied to Ohio's navigable rivers. *Id.* at syllabus ¶ 1 and at 512 (citing *Gavit v. Chambers* (1828), 3 Ohio 495, 496). The Court instead used the English rule that applied to seas, but it modified that rule to reflect the fact that Lake Erie's water, unlike the oceans, does not move with the tides. *Id.* at syllabus ¶ 4 and at 512-13.

The Court ultimately held that Lake Erie's boundary was the "ordinary high-water mark," and it adopted an extensive definition of that mark from the Illinois Supreme Court's earlier decision in *Seaman v. Smith* (1860), 24 Ill. 521. *Seaman* had defined the boundary line of Lake Michigan—for purposes of private titles that defined parcels as running to Lake Michigan—as extending to "that line where the water usually stands when unaffected by any disturbing cause. . . . And the line at which it usually stands unaffected by storms and other causes, represents the ordinary high water mark on the ocean." *Id.* at 525. *Sloan* cited that definition with approval, and it explained and adopted *Seaman's* further elaboration of what that line meant:

In the [*Seaman*] opinion it is said: "A grant giving the ocean or a bay as the boundary, by the common law, carries it down to **ordinary high-water mark** . . . The principle, however, which requires that the **usual high-water mark is the boundary** on the sea, and **not the highest or lowest point to which it rises or recedes**, applies in this case, although this body of water has no appreciable tides. . . . The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes."

Sloan, 34 Ohio St. at 512-13 (quoting *Seaman*, 24 Ill. at 524) (internal citations omitted) (emphases added). This Illinois definition—the only one that the Court adopted in *Sloan*—plainly refers to the "ordinary high-water mark," also called the "usual high-water mark." And the Court equated that "ordinary" or "usual high-water mark" term with the "the line at which the water usually stands." Moreover, by contrasting the approved "ordinary" high-water mark with the more extreme "highest or lowest point to which [the water] rises or recedes," the Court confirmed that the line does not shift to whatever rare extreme the water may reach at a given time, such as in a time of flooding or drought.

2. The Court held in *State v. Cleveland & Pittsburgh Railroad Co.* that only the General Assembly could address the State's Lake Erie authority, and it held that the State could not abandon its public trust obligations.

After the Court defined the boundary of Lake Erie as the ordinary high-water mark in *Sloan*, it addressed the nature of the State's public trust duties and the littoral rights of lakefront owners in "the subaqueous land below the high-water mark of navigable waters" in *State v. Cleveland & Pittsburgh R.R. Co.* (1916), 94 Ohio St. 61 ("*C&P R.R. Co.*"). In *C&P R.R. Co.*, the Court considered a dispute between the State and several railroad companies over the ownership of "land" in Cleveland that had been created by artificially filling in part of Lake Erie. (The artificial fill holding is discussed below in Part C). The Court held that only the General Assembly could alter state law regarding the public trust doctrine and that the State could not abandon its trust duties.

First, the Court explained that the State held title to Lake Erie, and that any changes, including regulations based on the State's ownership or its public trust, had to come from the General Assembly. "As shown, the state holds the title to the subaqueous land as trustee for the protection of public rights. The power to prescribe such regulations resides in the legislature of the state." *Id.* at 79. In the absence of legislation, the Court acknowledged that the private owners had the right to wharf out into the water, as that was a long-recognized common-law right that lakefront owners possessed. *Id.* at 77. But the Court rejected the landowner-railroads' claim that their wharves or filled-in areas had become their unencumbered property by virtue of the fill, the State's alleged administrative acquiescence, or both. The Court reasoned that a landowner could do nothing "that will destroy or weaken the rights of the beneficiaries of the trust estate. His right must yield to the paramount right of the state as such trustee to enact regulatory legislation." *Id.* at 79. Thus, the "state as trustee for the public cannot by

acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created.” *Id.* at 80.

Second, that last sentence means not only that the General Assembly alone can convey the State’s title to Lake Erie’s lands to private owners, but also that not even the Assembly, in speaking for the State, can abandon its obligations as trustee. Thus, even if the Assembly wished to transfer private title, it could transfer only the private title that the State holds, not the public trust that would still apply to any transferred strip of land. “[I]t is not in the power of the legislature, unless in the exercise of the power of eminent domain, to authorize property, dedicated to the public for a specific purpose, to be used for a purpose inconsistent with the purpose for which it was dedicated.” *Id.* (citing *The L&N Rd. Co. v. City of Cincinnati* (1907), 76 Ohio St. 481). In short, the “state as trustee for the public cannot by acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created,” and even beyond any such acquiescence, the State is limited in what it can surrender by legislation, based on its duties as public trustee.

Finally, the Court expressed confidence that the General Assembly would act to clarify the rights of lakefront owners and the State and the public along Lake Erie:

It is to be presumed that the legislature, in the enactment of legislation on the subject, will appropriately provide for the performance by the state of its duty as trustee for the purposes stated; that it will determine and define what constitutes an interference with public rights and that it will likewise, in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners.

Id. at 84. The General Assembly responded the next year.

3. The General Assembly confirmed the Court’s holdings by enacting the Fleming Act, and the Court then re-affirmed that the boundary had not changed.

In 1917, one year after *C&P R.R. Co.*, the General Assembly passed the Fleming Act, defining the boundary of Lake Erie, the duties of the State as trustee, and the rights of the public

and adjacent landowners. The Act, originally found in Sections 3699-a to 3699-9 of the General Code, has changed little in the near-century since, and the relevant portions are now found at R.C. 1506.10-11. As initially enacted, the declaratory section of the Act provided, in relevant part:

It is hereby declared that the waters of Lake Erie within the boundaries of the state together with the soil beneath and their contents *do now and have always, since the organization of the state of Ohio, belonged to the state of Ohio as proprietor in trust for the people of the state of Ohio*, subject to the powers of the United States government, the public rights of navigation and fishery and further subject only to the right of littoral owners *while said waters remain in their natural state* to make reasonable use of the waters in front of or flowing past their lands, and the rights and liabilities of littoral owners *while said waters remain in their natural state* of accretion, erosion and avulsion. *Any artificial encroachments by public or private littoral owners*, whether in the form of wharves, piers, fills or otherwise *beyond the natural shore line of said waters* not expressly authorized by the general assembly, acting within its powers, shall not be considered as having prejudiced the rights of the public in such domain. Nothing herein contained shall be held to limit the right of the state to control, improve or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

G.C. 3699-a (emphases added). As this language shows, the Fleming Act expressly re-affirmed that the lands, waters, and contents of Lake Erie composing the “territory” are those that were granted to the State at statehood. *Id.*

The current statute preserves the principle that the boundary has never changed. See R.C. 1506.10. Specifically, it provides that the waters and lands of Lake Erie that “do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state.” *Id.* The statute’s reference to “always, since the organization of the state,” confirms that Ohio maintained then, as it does today, the full extent of what the State received at statehood under the federal Equal Footing Doctrine.

In addition, the Act’s references to “artificial encroachments,” which cannot destroy the State’s ownership, expressly agreed with *C&P R.R. Co.* This usage is notable for what it says about artificial fill, as explained in Part C below, and further, because it shows why the General

Assembly referred to the “natural shoreline” in the statute. The General Assembly did so not to adopt any specific new definition of the boundary or “line,” as it preserved the traditional ordinary high-water mark when it maintained the approach that had applied “always, since the organization of the state.” Rather, the term “natural shoreline” was meant to contrast with the *artificial* shoreline that is created when artificial fill is used to expand usable land—and in such cases, that man-made area of “land” is still in State’s hands, because it stands on what would *naturally* be Lake Erie. Cf. *Stop the Beach*, 2010 U.S. Lexis 4971, at *49-50 (explaining that artificially filled area was the State’s, regardless of whether the State or the landowner deposited the fill, because the landowner gains only gradual, natural accretions, while the State maintains public trust lands taken by sudden natural avulsion or filled by artificial means).

When this Court returned to the topic after the Fleming Act was passed, it held that “[i]t is obvious that this section does not change the concept of the declaration of the state’s title as found in” *C&P R.R. Co. State ex rel. Squire*, 150 Ohio St. at 337. The Court therefore continued to apply pre-Fleming Act precedent, such as *C&P R.R. Co.*, in addressing the issue in *Squire*. In particular, the Court in *Squire* explained that the term used in the Fleming Act to describe the boundary—namely, the “natural shore line”—did not change the substance of the law. *Squire*, 150 Ohio St. at 336-37; see also *Thomas v. Sanders* (6th Dist. 1979), 65 Ohio App. 2d 5, 9-10 (“The Fleming Act did not purport to change the common law with regard to other navigable waters in this state,” but rather codified and re-affirmed the existing common-law boundary of the “territory.”).

Consequently, this Court has already decided, under its own common-law cases and under cases applying the Fleming Act, that Lake Erie’s legal boundary remains what it always has been: the “natural shoreline,” R.C. 1506.10, which is the same as the “ordinary high-water

mark,” or the “the line at which the water usually stands when free from disturbing causes,” *Sloan*, 34 Ohio St. at 512-513. This is the proper legal boundary of the Lake, rather than the constantly fluctuating line at which the water stands at any given moment, including movement with every lapping of the waves.

4. Every Great Lake State preserves the State’s public trust up to the ordinary high-water mark, including even “low-water” States that grant limited title below that point.

As noted above, all States received, upon admission to the Union, authority and title over navigable lakes, such as Lake Erie, up to the ordinary high-water mark. *Shively*, 152 U.S. at 11; Submerged Lands Act, 43 U.S.C. §§ 1301(a)(1) and (3). The States, then, had the power to define, as a matter of state law, the extent of public trust and State title, both in the substantive sense of defining what rights and responsibilities apply within the area governed by the public trust, and in the title/boundary sense of defining what, if any, private title might be granted below the ordinary high-water mark.

Eight States border the Great Lakes, and every one of them has preserved the State’s public-trust authority up to the ordinary high-water mark, not merely to the momentary water’s edge or to the low-water mark, or to any other point. See Kenneth T. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1 (publication forthcoming), available at SSRN: <http://ssrn.com/abstract=160402> (last visited July 9, 2010) (summarizing all States’ laws); see Amicus Brief of Michigan et al. (same).

Notably, at least one State, Minnesota, has granted lakefront owners a limited form of “title” to the low-water mark. That special, limited form of title is subservient to the State’s public trust, which is described as the dominant title. See *State v. Korrer* (1914), 127 Minn. 60, 75-76; *Shively*, 152 U.S. at 11 (explaining that sovereign’s public trust and title include two components, even when sovereign held both together). In *Korrer*, the Minnesota Supreme Court

explained, “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.” *Korrer*, 127 Minn. at 76. Thus, Minnesota’s “riparian” owners (a term that includes lakefront or littoral owners in Minnesota) may hold “title,” but rather than a fee simple title as with real property, the Minnesota riparian owner’s title is always subject to the public trust. *Korrer* further explained that the public trust not only extends up to the ordinary high-water mark in Minnesota, but that the trust allows the State to “use it for any such public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation.” *Id.* Minnesota’s current statutes codify that approach, defining the upper boundary of “public waters” as the “ordinary high water level.” Minn. Stat. § 103G.005-14.

Pennsylvania’s law is unclear on whether it, like Minnesota, is a “low-water State” as to private title, but it plainly remains an “ordinary high-water mark” State as to the public trust. See *Freeland v. Pa. R.R. Co.* (1901), 197 Pa. 529, 539 (explaining that on navigable rivers, “the absolute title of riparian owners extends to high watermark only, and that between ordinary high and ordinary low watermark, his title to the soil is qualified, it being subject to the public rights” and “the authority of the state”); see *Sprague v. Nelson* (1924), 6 Pa. D. & C. 493 (trial court applying *Freeland* rule to Lake Erie). The Michigan Supreme Court summarized several States’ laws on this point in *Glass*, 473 Mich. 667, which held that Michigan’s public trust authority, like its sister States’, runs to the ordinary high-water mark, regardless of private title issues, *id.* at 691-93.

In sum, the appeals court's approach is not only contrary to long-established Ohio law, but it is also contrary to the law of every sister State along the Great Lakes.

5. The lower courts' alternative boundary of the momentary water's edge has no support in law and is impractical for all parties, including the adjacent property owners.

Against all this precedent, both the trial court and the appeals court rejected the ordinary high-water mark as the boundary of Lake Erie, reasoning that the boundary lies wherever the water touches the land at a given moment, even if the current water level is much lower than "usual" or "ordinary." Specifically, the trial court defined the boundary as "the water's edge, which means the most landward place where the lake water actually touches the land at any given time." Com. Pl. Op. at 71.

The appeals court also defined the boundary as the water's edge at the moment, but instead of using the trial court's "any given time" phrase, it explained the same concept as the "actual water's edge," App. Op. at ¶ 127, so that the State held only the water itself and "lands under the waters of Lake Erie, *when submerged under such waters.*" *Id.* (emphasis added). The appeals court clarified that it was adopting that boundary not just as to the State's private title, but also as a limit on the State's public trust, saying that only lands "when submerged are subject to the public trust." *Id.* And it further confused matters and modified the trial court's ruling by holding that the "water's edge" was not a definitive boundary at all times, but only when it stands between the "high and low water mark." *Id.*

Both lower courts were mistaken as a matter of law, for all of the reasons explained above. Both courts purported to rely on *Sloan*, quoting the language in that case that referred to "the line at which the water usually stands, when free from disturbing causes." *Sloan*, 34 Ohio St. at 512-513. But both courts ignored both the importance of the word "usually" in that phrase and the entire paragraph of *Sloan* that equated that phrase with the ordinary high-water mark. Indeed,

neither court even acknowledged that *Sloan* used the term “ordinary high-water mark.” *Id.* at 513.

Both courts also relied on the Fleming Act’s use of the term “natural shoreline,” and both reasoned that a “line” must refer to the line where the shore touches the water at the moment. Neither court, however, analyzed the Fleming Act’s express statement that the statutory definition of Lake Erie was what it had always been, as established at the common law. The statute says that Lake Erie’s waters and lands underneath “do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state.” R.C. 1506.10. In addition, neither court acknowledged how, as explained above (in subpart B-3), the Fleming Act’s use of the “natural shoreline” reflected the then-recent decision in *C&P R.R. Co.*, which rejected the use of an artificial shoreline created by artificial fill. Consequently, those courts reached the wrong result.

The use of the momentary water’s edge, as opposed to the ordinary high-water mark, is not only against precedent, but it is also impracticable in application because of its instability. To be sure, the ordinary high-water mark moves, but only slowly over decades, or even centuries. Established doctrine has long accounted for such slow, natural change. The “moveable freehold” doctrine encompasses several related concepts well established in the law—accretion, erosion, reliction, submergence, and avulsion—that allow for water-based boundaries to move by virtue of gradual, natural, long-term processes. Accretion, for example, grants a landowner rights—as real property, in fee simple—to all soil that builds up naturally, turning what was once lake to land. *Stop the Beach*, 2010 U.S. Lexis 4971 at *11-12; *Lake Front-East 55 St. Corp. v. Cleveland* (1939), 21 Ohio Op. 1, 8, 7 Ohio Supp. 17. Erosion is the opposite: if land erodes and the area turns to water permanently, it becomes part of the public lake; a landowner cannot own a

parcel of lake just because the area was once land. *United States v. 461.42 Acres of Land* (N.D. Ohio 1963), 222 F. Supp. 55, 56. But those doctrines apply to accommodate gradual changes that result in a permanent change in the line between land and water; they do not react to rapid, temporary, or artificial changes. *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 11 (explaining that both erosion and accretion must occur naturally and “gradually and imperceptibly through the action of waves and currents” in order to effect a change in title).

By contrast, the water’s edge—as determined at any given moment—moves hour by hour, and also over days, months, and seasons, according to rainfall or drought. Under the appeals court’s theory, in an especially dry season, the State’s public trust authority recedes with the water line, so that lands that are submerged for much of the time are, for the brief time that they dry up, under the exclusive fee simple ownership of the adjacent private property owner. An owner should have little confidence in doing anything of any permanence on that land—other than exercising his established littoral rights, as discussed below in Part D—when his “exclusive rights” will wash away with the next rainy month.

Further, if the water’s edge means *any level* that the water reaches at a given moment, as the trial court said, then temporary floods or periods of unusually high water would deprive an adjacent owner of all his rights over what had previously been his property, which would sorely hamper his ability to respond appropriately in emergency conditions. The appeals court implied that this result is constrained by having the ordinary high-water mark apply as an upper bound upon its water’s-edge rule, but that just shows the internal inconsistency of its approach: It denies that the ordinary high-water mark has any role at all, but then drafts it into service as a backup to the obviously impractical implications of a pure momentary-water’s-edge rule.

Moreover, the momentary-edge rule cannot be squared with any common-sense approach regarding the activities to which the public is entitled pursuant to the public trust. This case does not require the Court expressly to define what the public trust allows the public to do, in the sense of reviewing the extent of fishing or beachwalking rights as a substantive matter. The Court need only reverse the appeals court's holding regarding the physical border where the public trust ends, and it is for the courts below on remand, or for future cases, to define what the public may do within the public trust territory. Nonetheless, those rights are relevant because the appeals court's view eliminates many shoreline-related rights by leaving no public rights above the momentary water's edge.

For all these reasons, the Court should hold—as it has for generations—that the boundary of Lake Erie is the ordinary high-water mark, and that the State's public trust extends to that point, even when the water stands lower than that established mark at a given moment.

C. The State retains title over the artificially-filled lands of Lake Erie, and only gradual, natural accretion transfers title to littoral owners.

For the same reasons, the Court should reverse the appeals court's mistaken holding that landowners may claim exclusive title over areas of the Lake that have been artificially filled in. The appeals court did not analyze this issue at all; instead, it merely added a few words in its conclusion that made its already-mistaken ruling an even more radical one. After concluding that the boundary of Lake Erie was the momentary water's edge, the court restated and summarized its holding thusly: "Therefore, the shoreline, that is, the actual water's edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those *natural or filled in lands privately held by littoral owners.*" App. Op. at ¶ 127 (emphasis added). By adding the words "or filled in" to "natural," and referring to those lands as privately held, the appeals court rewrote Ohio law dramatically.

That unexplained legal leap requires reversal—even if the Court were somehow to reject the State’s view of the ordinary high-water mark generally (though it should not).

Ohio law has never granted landowners the right to claim exclusive title over public trust lands that have been artificially filled in to “become dry”; to the contrary, Ohio law has always provided that areas *artificially filled in*, as opposed to those arising from natural accretion, remain the State’s, even if the area “looks like land” to observers and has been such for generations. The Fleming Act expressly rejected any loss of public authority over such areas, and the statute still says today that the State retains “the lands formerly underlying the waters of Lake Erie and now artificially filled.” R.C. 1506.11(A). This Court expressly addressed filled-in land twice, in *C&P R.R. Co.* and *Squire*, and both times it rejected the idea that landowners could expand their holdings by filling in areas that were previously part of the lakebed. 94 Ohio St. at 79, 150 Ohio St. at 325-26. Thus, the appeals court’s novel approach violated the plain terms of the statute and this Court’s precedent.

Allowing private owners such a windfall, based on artificially filling in rather than by natural accretion, violates common sense as well. The appeals court’s approach allows private owners, by trucking in soil, to expand their property and shrink the public’s Lake. The appeals court offered no reason, let alone a sound one, for such a rule. Nor could any such rule be justified on the theory that such a transfer occurred in such cases where the State consented to the fill, as opposed to an owner’s unilateral expansion. The State has only consented to filling in any land against a backdrop of settled law assuring the State that it retained ownership to such land.

While the statute and this Court’s *C&P R.R. Co.* and *Squire* decisions are enough to resolve this issue in the State’s favor, the U.S. Supreme Court’s recent *Stop the Beach* decision further

supports the State's retention of title over artificially filled-in trust land. See 2010 U.S. Lexis 4971. In that case, the Court upheld Florida's right to retain title over filled-in land below mean high-water mark even when the State itself did the filling. *Id.* at *49-54. Some Florida landowners complained that the new fill cut off the contact between their land and the water, depriving them of the rights to remain beachfront owners and to gain future accretions, and interfering with their littoral access rights. *Id.* at *16-17. The Court rejected that claim, noting that under common law, littoral owners benefited only from gradual, natural accretion, not from sudden natural avulsion or from artificial fill, and the Court found no reason to create a different rule when the State created the fill. *Id.* at *50-51. This case is an easier one in this regard than *Stop the Beach*, since the appeals court here purported to grant owners the right to benefit from the owners' own artificial fill, not the State's acts of filling.

Ohio's landowners are entitled to use artificial fill, and to retain full title over the area that is filled in, in only one circumstance: when the fill is used to restore loss of soil caused by a sudden, natural avulsion. That is, if a sudden storm event washes away land, and leaves nothing but standing water in an area that was plainly the owner's beforehand, the owner may use artificial fill to restore the previous line, as long as he does so reasonably promptly. *461.42 Acres of Land*, 222 F. Supp. at 56; *Baumhart v. McClure* (6th Dist. 1926), 21 Ohio App. 491, 493-494. But that is not at issue here, as no one contests the owner's rights in that regard. The issue here is the appeals court's unwarranted grant of title over all areas artificially filled in.

To be sure, this is a matter of state law, and Florida and Ohio are free to walk different paths. But both Florida and Ohio have retained the common-law approach, so the same result should follow. Plaintiffs here have not pointed to anything that would justify the Ohio courts in

breaking with the common law, other than the unexplained *ipse dixit* announced by the court of appeals below.

Consequently, the Court should reverse the appeals court's mistaken holding as to artificial fill, and it should reaffirm that filled-in areas remain part of the State's public trust ownership of Lake Erie.

D. All parties' rights are best protected and balanced by Ohio's longstanding public trust doctrine, with the boundary properly set at the ordinary high-water mark, and while the Court need not resolve here the precise substantive scope of the overlapping rights within the State's public trust area, the lakefront owners' special littoral rights, which extend below the ordinary high-water mark, must always be protected, even against the State and the public.

This appeal requires the Court only to resolve the issue of Lake Erie's boundary as a physical matter, that is, whether to reaffirm that the State's public trust over Lake Erie continues to extend to the ordinary high-water mark, or whether to redefine the boundary to some other point. Once the traditional boundary is reaffirmed, the Court need not proceed on to define with precision the various rights and responsibilities of the public and of adjacent landowners that overlap within the area of the public trust. Nonetheless, it may be in the public interest for the Court to address those matters to some extent, given the rarity of cases that raise such issues and the apparent confusion that gave rise to this dispute in the first place. In particular, it appears that Plaintiffs filed this lawsuit originally out of concern that state officials were trampling on their property rights rather than respecting them, when state officials should honor both the owners' upland property rights and the special littoral rights that they possess by virtue of their status as adjacent landowners. Thus, the existence and basic outlines of those certain rights—both for adjacent landowners and for the public—are relevant here in several respects.

First, as the Court explained in *C&P R.R. Co.*, even though the unfettered fee of an adjacent property owner extends only to the ordinary high-water mark, the "upland" owners of

lakefront property are entitled to certain littoral rights (but not title) extending below the ordinary high-water mark. *C&P R.R. Co.*, 94 Ohio St. at 75-76. These special rights, which are ancient rights at the common law, are rights that extend beyond those enjoyed by other members of the public. The Court has found that Ohio, like most other States, recognized an unfettered “right of access” to the lake waters; the right of wharfage to construct piers and wharfs reaching out to navigable waters so as to effectuate the right of access; and the right of reasonable use of the waters so accessed, all below the ordinary high-water mark and subject only to such general rules as Congress or the state legislature may prescribe. See *id.* at 77-78; *State ex rel. Squire*, 150 Ohio St. at 337. As a matter of Ohio law, these special rights in the lands lying below the Lake’s ordinary high-water mark belong to the adjacent landowner to be exercised reasonably, and they are a species of “property rights” that cannot be curtailed or even unduly burdened by restrictive processes, unreasonable fees, or other limitations not germane to the State’s superior authority to protect the public trust below the ordinary high-water mark. See *State ex rel. Squire*, 150 Ohio St. at 342. If these littoral rights are appropriately understood and respected by state officials, then the sweeping redefinition of the common-law boundaries of the Lake announced by the lower courts here is not necessary to protect their traditional property interests.

Second, the appeals court’s redefinition of the boundary of the Lake improperly eliminated the public’s rights to engage in *any* transient activities along the shore between the ordinary high-water mark and the momentary water’s edge—whether walking along, fishing from, or otherwise accessing the public’s part of the Lake and shore. By correcting the proper parameters of the boundary, the Court can and should restore the existence of those rights, with a full accounting of their extent perhaps left for another day. But, notably, the public’s rights have always been defined in a limited fashion, in terms of traditional rights to use the Lake and shore

“in aid of navigation, water commerce or fishery,” and the State may, “by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use.” *Id.* at syllabus ¶ 2. For example, the State has both the power and duty to regulate the public’s right to fish, to preserve the fish population for the common good. Similarly, the public’s right to walk along the beach, or any other right akin to an easement (such as landing a boat in distress), is limited and does not allow anyone to interfere unreasonably with the rights of lakefront owners or the rest of the public, such as by squatting or otherwise abusing these limits. Thus, the Court’s restoration of the proper public trust boundary does not establish a license for the public to trample on Plaintiffs’ legitimate property rights.

Third, Plaintiffs’ littoral rights, such as their right to wharf out into the water, are in no way diminished by acknowledging the State’s public trust up to the ordinary high-water mark. By definition, the right to wharf out—to build a pier into the water deep enough to launch a boat—has always extended not only beyond the ordinary high-water mark, but beyond the momentary water’s edge. And if the State were to attempt to forbid all wharfing arbitrarily, it could not do so, not because the public trust authority does not *physically* include the water around a wharf, but because the substantive scope of the public trust does not eliminate the substantive nature of littoral rights. But a lakefront owner’s wharfing rights do not need to include, and cannot include, exclusive “ownership” of the water around his pier, which continues to belong to the State of Ohio, as it always has since the advent of statehood. On the contrary, those littoral rights extend from, or are “appurtenant” to, the ownership of the adjacent land, and they exist *within* the public trust area. See *C&P R.R. Co.*, 94 Ohio St. at 77-78.

For that reason, littoral rights, just like the public’s rights, must be exercised “in furtherance of the object of the trust”; for example, wharfing is in aid of navigation and

commerce. *Id.* Thus, the substantive scope of the public trust does not eliminate the substantive nature of littoral rights, but establishes them as consistent with trust purposes. See also R.C. 1506.11(B) (providing that the state may only grant a lease or permit to develop any part of Lake Erie “without impairment of the public right of navigation, water commerce, and fishery” and “without prejudice to the littoral rights of any owner of land fronting on Lake Erie”).

Viewed from the broadest vantage point, therefore, the unique public resource of the Lake requires the legal system to accommodate and safeguard the overlapping interests of the Federal government, the State of Ohio, the public at large, and the adjacent landowners. The State of Ohio not only has sovereign authority over the shore, but also a perpetual and inalienable duty to act as the trustee for public trust rights in the “territory” of Lake Erie. That territory is traditionally defined as the lands, waters, and contents of the Lake up to its ordinary high-water mark. The State’s authority in this territory is subject to the supreme navigational servitude of the United States, reserved over those same lands and waters up to the ordinary high-water mark, to protect the nation’s navigable waterways. Subordinate to the State’s authority are the public’s individual rights in the territory, including use of the lakebed itself for purposes of navigation, commerce, fishery, or recreation, and more limited access to its shores on a temporary basis for reasonable uses incident thereto up to the ordinary high-water mark. Finally, in coordination with the public’s rights, the upland owners of lakefront property enjoy special “littoral” property rights below the ordinary high-water mark, including rights of access, wharfage, and reasonable use, which the State cannot lawfully infringe or unreasonably constrain except pursuant to its valid role as trustee.

In sum, though the Court need not address every aspect of the parties’ respective rights in this case, it can and should recognize that the public trust doctrine, properly applied, is not

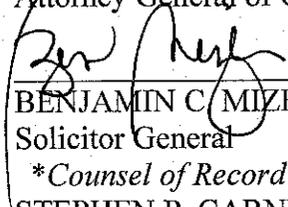
contrary to lakefront owners' rights, but complements them, as the State of Ohio may then act to protect the important resource of Lake Erie for the good of all.

CONCLUSION

For the above reasons, the Court should reverse the appeals court's rejection of the Attorney General's representation of his client, the State of Ohio, as a named defendant in this case. It should then reverse the appeals court's definition of the Lake Erie boundary at the momentary water's edge, and it should hold instead that Lake Erie, and the State's public trust authority over Lake Erie, extends to the traditional common-law boundary, which is the ordinary high-water mark of the Lake, even if the Lake recedes below that line from moment-to-moment on a given day.

Respectfully submitted,

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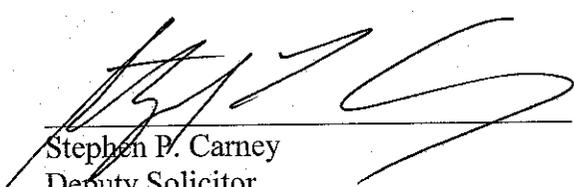
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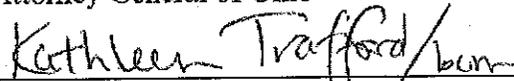
**JOINT NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS STATE OF OHIO,
OHIO DEPARTMENT OF NATURAL RESOURCES, AND SEAN LOGAN, DIRECTOR**

Defendants-Appellants State of Ohio, Ohio Department of Natural Resources, and Sean Logan, Director, give notice of their claimed appeal of right and discretionary appeal to this Court, pursuant to the Court's Rule II, Sections 1(A)(2) and (3), from a decision of the Lake County Court of Appeals, Eleventh Appellate District, journalized in consolidated Case Nos. 2008-L-007 and 2008-L-008 on August 24, 2009. Date-stamped copies of the Eleventh District's Judgment Entry and Opinion are attached as Exhibits 1 and 2, respectively, to the Defendant-Appellant State of Ohio's Memorandum in Support of Jurisdiction.

These parties, represented by separate legal counsel listed below, jointly file this notice of appeal pursuant to Rule II, Section 4. However, the parties are filing separate Memoranda in Support of Jurisdiction, each of which will separately explain why this case raises substantial constitutional questions and is of public and great general interest.

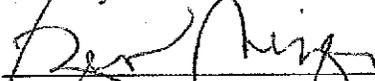
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Counsel for Defendant-Appellant,
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of this Joint Notice of Appeal of Defendants-Appellants State of Ohio, Ohio Department of Natural Resources, and Sean Logan, Director, was served by U.S. mail this 7th day of October, 2009, upon the following counsel:

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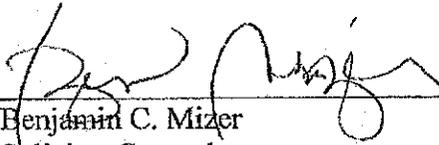
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Intervening Plaintiff-Appellee, Pro Se


Benjamin C. Mizer
Solicitor General

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE ex rel. ROBERT MERRILL,
TRUSTEE, et al.,

JUDGMENT ENTRY

CASE NO. 2008-L-007

Plaintiffs-Appellees/
Cross-Appellants,

HOMER S. TAFT,

Intervening Plaintiff-Appellee/
Cross-Appellant,

L. SCOT DUNCAN, et al.,

Intervening Plaintiffs-Appellees,

-vs-

STATE OF OHIO, DEPARTMENT OF
NATURAL RESOURCES, et al.,

Defendants,

NATIONAL WILDLIFE FEDERATION, et al.,

Intervening Defendants-
Appellants/Cross-Appellees.

FILED
COURT OF APPEALS

AUG 24 2009

MARIPEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

STATE ex rel. ROBERT MERRILL,
TRUSTEE, et al.,

CASE NO. 2008-L-008

Plaintiffs-Appellees/
Cross-Appellants.

HOMER S. TAFT, et al.,

Intervening Plaintiffs-Appellees,

-vs-

STATE OF OHIO, DEPARTMENT OF
NATURAL RESOURCES, et al.,

Defendants,

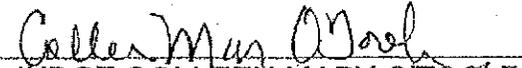
STATE OF OHIO,

Defendant-Appellant/
Cross-Appellee.

For the reasons stated in the opinion of this court, the Ohio Attorney General's assignments of error are stricken. National Wildlife Federation's and Ohio Department of Natural Resource's first and third assignments of error lack merit, while the second assignment is moot. The Ohio Lakefront Group's first cross-assignment of error lacks merit, as Homer S. Taft's first and third cross-assignments of error. Ohio Lakefront Group's second cross-assignment of error, as well as Homer S. Taft's have merit to the extent indicated. The judgment of the Lake County Court of Common Pleas is modified to vacate the portion of the judgment concerning the amendment of the littoral owner's deed, and the judgment of the Lake County Court of Common Pleas is hereby affirmed as modified.

It is the further order of this court that the parties share equally costs herein taxed.

The court finds there were reasonable grounds for this appeal.


JUDGE COLLEEN MARY O'TOOLE

DIANE V. GRENDALL, J., concurs,
TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/
Dissenting Opinion.

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE ex rel. ROBERT MERRILL,
TRUSTEE, et al.,

Plaintiffs-Appellees/
Cross-Appellants,

HOMER S. TAFT,

Intervening Plaintiff-Appellee/
Cross-Appellant,

L. SCOT DUNCAN, et al.,

Intervening Plaintiffs-Appellees,

- vs -

STATE OF OHIO, DEPARTMENT OF
NATURAL RESOURCES, et al.,

Defendants,

NATIONAL WILDLIFE FEDERATION, et al.,

Intervening Defendants-
Appellants/Cross-Appellees.

STATE ex rel. ROBERT MERRILL,
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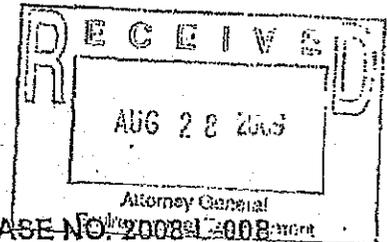
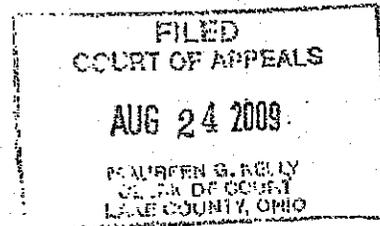
HOMER S. TAFT, et al.,

Intervening Plaintiffs-Appellees,

- vs -

OPINION

CASE NO. 2008-L-007 ✓



CASE NO. 2008-L-008

STATE OF OHIO, DEPARTMENT OF :
NATURAL RESOURCES, et al., :
 :
Defendants, :
 :
STATE OF OHIO, :
 :
Defendant-Appellant/ :
Cross-Appellee. :

Civil Appeal from the Court of Common Pleas, Case No. 04 CV 001080.

Judgment: Modified and affirmed as modified.

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COLLEEN MARY O'TOOLE, J.

{¶1} The issue before us in this case is one of first impression, concerning title to the lands below the ordinary high water mark of Lake Erie. Lake Erie is a non-tidal, navigable body of water, part of which lies within the territorial boundaries of the state of Ohio. The natural shoreline of Lake Erie extends approximately 262 miles, within the

eight counties of Lucas, Ottawa, Sandusky, Erie, Lorain, Cuyahoga, Lake, and Ashtabula.

{¶2} The state of Ohio, through the Ohio Department of Natural Resources (“ODNR”), has asserted trust ownership rights to the area of land along the southern shore of Lake Erie up to the ordinary high water mark, set at 573.4 feet above sea level by the U.S. Army Corps of Engineers in 1985. The Ohio Lakefront Group,¹ (“OLG”), along with several of its members, many of whom own property adjoining Lake Erie, dispute the authority of ODNR to assert these trust ownership rights without first acquiring the property in question through ordinary land appropriation proceedings. The validity of the ordinary high water mark, set at 573.4 feet International Great Lakes Datum (IGLD)(1985) is also disputed, the argument being that the ordinary high water mark is a boundary that must be determined on a case-by-case basis with respect to each parcel bordering the lake. Further, the ODNR’s authority to require landowners to lease land from the state of Ohio when that land is already contained within the legal description in their respective deeds is disputed.

{¶3} Procedural History

{¶4} May 28, 2004, OLG, Robert Merrill, and other individuals owning real property abutting Lake Erie, filed a lawsuit (Case No. 04CV001080) in the Lake County Court of Common Pleas against ODNR, ODNR’s director, and the state of Ohio, for declaratory judgment, mandamus, and other relief. Immediately thereafter, on said date, Homer S. Taft, L. Scot Duncan and Darla J. Duncan filed a complaint (Case No.

1. Ohio Lakefront Group is a duly formed non-profit corporation which represents owners of littoral property on Lake Erie.

04CV001081) in the Lake County Court of Common Pleas against the same defendants, containing nearly identical factual allegations and seeking similar relief.

{¶5} July 2, 2004, an amended complaint seeking certification as a class action and for declaratory judgment, mandamus, and other relief was filed in Case No. 04CV001080. August 12, 2004, the trial court consolidated Case Nos. 04CV001080 and 04CV001081.

{¶6} February 23, 2005, ODNR and the state of Ohio filed an answer, a counterclaim, and a cross-claim against the United States of America and the United States Army Corps of Engineers. The counterclaim sought a declaration that the state of Ohio owns and holds in trust for the people of Ohio the lands and water of Lake Erie up to the natural location of the ordinary high water mark within the territorial boundaries of the state, subject only to the paramount authority retained by the United States for the purposes of commerce, navigation, national defense, and international affairs. Also, a declaration was sought that the state of Ohio has owned and held those lands and waters in trust since statehood.

{¶7} This case was removed to the United States District Court for the Northern District of Ohio on March 28, 2005, on the motion of the United States of America and the United States Army Corps of Engineers. The federal case was dismissed on April 14, 2006, when the federal district court found that neither the federal defendants nor the federal questions were properly before it. Consequently, the case was remanded to the court of common pleas.

{¶8} Class Certification

{¶9} June 8, 2006, the parties filed a notice of joint stipulation to class certification on count one of the first amended complaint, which sought a declaration regarding the extent of the state of Ohio's property rights. Counts two and three of the complaint, which deal with constitutional takings issues, were reserved pending the outcome of the declaratory judgment action. The trial court certified the following group of persons as a class for purposes of pursuing a declaratory judgment action:

{¶10} "**** all persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property¹ bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio' ***. To the extent that governmental entities are included in the class, they are included solely in their proprietary capacity as property owners and not for any purpose or capacity implicating their governmental authority or jurisdiction.

1. "The parties have stipulated that 'upland property' is defined as real property bordering a body of water and that, in Ohio, 'littoral property' is defined as upland property that borders an ocean, sea, lake, or a bay of any of these water bodies, as opposed to 'riparian property' which is defined as upland property that borders a river, stream, or other such watercourse."

{¶11} The class certification order found the following three questions of law common to the class:

{¶12} "(1) What constitutes the furthest landward boundary of the 'territory' as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms 'southerly shore' in R.C. 1506.10, 'waters of Lake Erie' in R.C. 1506.10, 'lands presently underlying the waters of Lake Erie' in R.C. 1506.11,

'lands formerly underlying the waters of Lake Erie and now artificially filled' in R.C. 1506.11, and 'natural shoreline' in R.C. 1506.10 and 1506.11.

{¶13} "(2) If the furthest landward boundary of the 'territory' is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such 'territory' as proprietor in trust for the people of the State.

{¶14} "(3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the 'territory.'"

{¶15} Intervenor

{¶16} Thereafter, the trial court allowed two groups to intervene: (1) Homer Taft and L. Scot Duncan, members of the class, and (2) the National Wildlife Federation ("NWF") and the Ohio Environmental Council ("OEC"), environmental organizations whose purpose is to protect the rights of their members to make recreational use of the shores and waters of Lake Erie. NWF and OEC assert that the state holds the area of the "territory" of the waters of Lake Erie in trust for the public up to the ordinary high water mark.

{¶17} February 13, 2007, the city of Cleveland filed a motion to opt out of the class, which motion was held in abeyance pending further order of the trial court.

{¶18} Overview of Motions for Summary Judgment

{¶19} A motion for summary judgment was filed on behalf of the state of Ohio, Department of Natural Resources, its director, and the state, by the Ohio Attorney General. In this motion, the state advanced three arguments:

{¶20} “(1) As a matter of law, the furthest landward boundary of the ‘territory’ as that term appears in R.C. 1506.10 and 1506.11, is the ordinary high water mark, and the State of Ohio holds title to all such ‘territory’ as proprietor in trust for the people of the state;

{¶21} “(2) The furthest landward boundary of the ‘territory’ is the ordinary high water mark as a matter of law, and that line may be located at the present time using the elevation of 573.4 feet IGLD (1985); and

{¶22} “(3) The rights and responsibilities of littoral owners in their upland property, as well as the respective rights and responsibilities of the federal government, the State of Ohio, the public, and the littoral owners in the ‘territory,’ have long been settled in state and federal law, as has the hierarchy of those rights.”

{¶23} In their motion for summary judgment, NWF and OEC concurred with and affirmatively adopted the state’s position.

{¶24} OLG asserted that under Ohio’s case law, public trust rights in Lake Erie, extend no farther than the actual waters and those public rights do not extend to the shores or uplands. Further, OLG maintained that “shoreline” cannot be defined as the ordinary high water mark, for this boundary would run afoul of case law, opinions authored by the Ohio Attorney General, ODNR’s own rules as set out in the Ohio Administrative Code, and would violate the rights of littoral property owners. OLG alleged that in locating the ordinary high water mark, ODNR unilaterally adopted the Army Corps of Engineers’ estimate of 573.4 feet IGLD (1985), which the Corps adopted for regulatory purposes unrelated to the establishment of boundaries between private property and public trust property.

{¶25} In their motion for summary judgment, Taft and Homer argued that in determining this case, the trial court was required to consider the historical record, which was extensively set forth in their brief and attachments.

{¶26} Trial Court's Ruling on Motions for Summary Judgment

{¶27} In ruling on the motions for summary judgment, the trial court stated:

{¶28} "(1) each owner of Ohio real estate that touches Lake Erie owns title lakeward as far as the water's edge; (2) if the lakeside owner's deed contains a legal description that extends into the lake beyond the water's edge, then that legal description is hereby reformed so that the legal description ends at the water's edge; (3) likewise, the State of Ohio has ownership in trust of the waters of Lake Erie and the lands beneath those waters landward as far as the water's edge, but no farther [sic]. With respect to Lake Erie, this is the boundary of the 'territory' that is subject to the regulatory authority of the State of Ohio's Department of Natural Resources; and (4) the lakeside landowner also has littoral rights, such as the right to wharf out to navigable waters, and those littoral rights extend into the lake as an incident of titled ownership of property adjoining the lake."

{¶29} The trial court further concluded:

{¶30} "Defendants-Respondents and Intervening Defendants have failed, as a matter of law, to show that the *landward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary High Water Mark of 573.4 IGLD (1985), and Plaintiffs-Relators and Intervening Plaintiffs have failed to show that the *lakeward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary Low Water Mark. The court declares that the law of Ohio is that the proper definition of

the boundary line for the public trust territory of Lake Erie is the water's edge, wherever that moveable boundary may be at any given time, and that the location of this moveable boundary is a determination that should be made on a case-by-case basis.

{¶31} “The court’s decision does not attempt to list or comprehensively define all of the littoral rights of landowners of Ohio property adjoining Lake Erie, preferring instead to have those rights determined on a case-by-case basis.” (Emphasis sic.)

{¶32} **Standard of Review**

{¶33} In order for a motion for summary judgment to be granted, the moving party must prove:

{¶34} “*** (1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.” *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶35} Summary judgment will be granted if “the pleadings, depositions, answers to interrogatories, *written admissions*, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***.” Civ.R. 56(C). (Emphasis added.) Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.*, (1986), 477 U.S. 242, 248.

{¶36} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E), provides:

{¶37} “When a motion for summary judgment is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.” (Emphasis added.)

{¶38} Summary judgment is appropriate pursuant to Civ.R. 56(E), if the nonmoving party does not meet this burden.

{¶39} Appellate courts review a trial court’s grant of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. “De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial.” *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116.

{¶40} **Ohio’s Standing**

{¶41} Before considering the issues, we must ascertain whether the state of Ohio has standing to participate in this appeal. We conclude it does not.

{¶42} On July 16, 2007, ODNR, acting with the consent and direction of Governor Strickland, filed a response to the then pending motions for summary judgment stating that ODNR “will discharge its statutory duties and will adopt or enforce

administrative rules and regulatory policies with the assumption that the lakefront owners' deeds are presumptively valid." In addition, ODNR asserted that while it would still require construction permits for structures that may impact coastal lands, it "no longer require[d] property owners to lease land contained within their presumptively valid deeds[.]" and that it "must and should honor the apparently valid real property deeds of the plaintiff-relator lakefront 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 or unenforceable."

{¶43} "'Standing' is defined at its most basic as '(a) party's right to make a legal claim or seek judicial enforcement of a duty or right.' Black's Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, ***. "(T)he question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" (Citations omitted.) *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, ***, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, ***, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, ***, and *Flast v. Cohen* (1968), 392 U.S. 83, ***." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, at ¶27. (Parallel citations omitted.)

{¶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.

{¶45} Appellants'/Cross-Appellees' Assignments of Error

{¶46} NWF and OEC² assert the following assignments of error:

{¶47} "[1.] The trial court erred in holding that the public trust in Lake Erie is demarcated by the line the water of the lake touches at any given time.

{¶48} "[2.] The trial court erred in holding that the Ohio Department of Natural Resources may not use the IGLD elevation to establish the high water mark of Lake Erie.

{¶49} "[3.] The trial court erred in holding that littoral property owners may exclude the people from using the lands below the high water mark of Lake Erie."

{¶50} OLG's and Taft's Cross-Assignments of Error:

{¶51} OLG avers the following cross-assignments of error:

{¶52} "[1.] The Trial Court Erred in Finding that the Boundary of the Territory is Not the Low Water Mark.

{¶53} "[2.] The Trial Court Erred In Reforming All Littoral Property Deeds to the Water's Edge."

{¶54} Taft asserts the following cross-assignments of error:

2. NWF and OEC filed a joint brief in the instant case.

{¶55} “[1.] THE [TRIAL] COURT ERRED IN PERMITTING THE INTERVENTION OF [NWF] AND [OEC] AS DEFENDANTS AND COUNTERCLAIMANTS, AS THEY PRESENTED NO JUSTICIABLE CLAIM AGAINST ANY PARTY, AND THEIR APPEAL SHOULD BE DISMISSED.

{¶56} “[2.] THE [TRIAL] COURT ERRED IN REFORMING THE DEEDS OF PRIVATE PROPERTY OWNERS[.]

{¶57} “[3.] THE [TRIAL] COURT ERRED IN FAILING TO DECLARE THE LITTORAL RIGHTS OF PRIVATE PROPERTY OWNERS ALONG LAKE ERIE.”

{¶58} Applicable Law

{¶59} Prior to analyzing the parties respective assignments and cross-assignments of error, a brief summary of Ohio case law, statutes, rules and regulations regarding the rights of littoral property owners along Lake Erie is in order. For a complete history of the development of littoral property rights in the Great Lakes states, we can only advise the reader to study the immensely scholarly opinion of the trial court, attached hereto as an appendix.

{¶60} We commence with the lead case of *Sloan v. Biemiller* (1878), 34 Ohio St. 492, a quiet title action regarding property on Cedar Point. The Supreme Court of Ohio held, at paragraph four of the syllabus:

{¶61} “Where no question arises in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, *the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to*

the line at which the water usually stands when free from disturbing causes."
(Emphasis added.)

{¶62} The *Sloan* court derived this definition from the opinion of the Illinois Supreme Court in *Seaman v. Smith* (Ill. 1860), 24 Ill. 521, and quoted that case with approbation in the body of its opinion. *Sloan* at 512-513. We further note that none of the parties to this hard fought contest, nor we ourselves, have found any other syllabus law of the Supreme Court of Ohio defining *where* littoral owners' property extends relative to Lake Erie. Consequently, we find this extended quote from *Seaman* illuminating:

{¶63} "This record presents the question as to what answers the call for Lake Michigan, as a boundary line, in the various deeds in a chain of title, held by the plaintiff below. If high water mark is the point at which his land terminates, then this judgment should be reversed; but if, on the contrary, the line where the water usually stands when unaffected by storms and other disturbing causes, is the boundary, then the judgment must be affirmed. *** The great lakes of the north, present questions affecting riparian rights, that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, nor are they affected, like running streams, by rises and falls produced by a wet or dry season. Yet the rules that govern boundaries on the ocean, govern this case.

{¶64} "A grant giving the ocean or a bay as the boundary, by the common law, carries it down to ordinary high water mark. *** The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regular recurring periods, to the same

points, a portion of the shore is regularly and alternately sea and dry land. This being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high water mark indicated by the usual rise of the tide, is his boundary.

{¶65} “The principle, however, which requires that the usual high water mark is the boundary on the sea, and not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water has no appreciable tides. Here, as there, the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it not be extended to the lowest point to which it may recede from like disturbing causes, But (sic) it should be at that line where the water usually stands when unaffected by any disturbing cause.” *Seaman*, supra, at 524-525. (Citation omitted.)

{¶66} In *State v. Cleveland & Pittsburgh RR. Co.* (1916), 94 Ohio St. 61, the Supreme Court of Ohio acknowledged the “public trust” doctrine – i.e., that the state holds the waters and subaqueous lands of Lake Erie in perpetual trust for the people of the state, while littoral owners retain a right to “wharf out” from the shore to the lake's navigable waters. Cf. *id.*, at 79-83. However, the court did not define where the public trust physically commenced, merely using the term “shore.” *Id.* at 68, 79.

{¶67} The *Cleveland & Pittsburgh* court further called upon the legislature to codify the public trust doctrine, which the General Assembly did the following year, with

passage of the Fleming Act, presently codified at R.C. Chapter 1506. However, present R.C. 1506.10, defining the state's rights in Lake Erie, merely states that they commence at the lake's "southerly shore" or "natural shoreline." R.C. 1506.11(A), defining the extent of the public trust "Territory," again merely refers to the "natural shoreline."

{¶68} In *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, the Supreme Court of Ohio determined that the Fleming Act, as supplemented by the Abele Act of 1925, did not alter the common law of accretion as it applied to littoral property owners along Lake Erie. *Id.* at 11-13. The court consistently used the term "shore line," without further description, in referencing where the public trust territory commenced. *Id.* at 9, 11, 12.

{¶69} Finally, in *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, the Supreme Court of Ohio was presented with a dispute regarding whether construction of the east shoreway in Cleveland, Ohio, impinged upon the rights of certain littoral property owners. *Id.* at 316-321. Throughout the body of the opinion, the court generally used the term "natural shore line" to describe where the property of littoral owners cease, and the public trust in Lake Erie commences. *Id.* at 317, 319-322, 334, 337, 339. Notably for the matters at issue herein, the court, in describing the briefs filed on the case, states, at 322:

{¶70} "There is a full discussion of the common-law rule to the effect that the title to subaqueous and marginal lands of tidal and navigable waters in Great Britain is in the crown, that the law with reference to tidal waters in Great Britain applies not only to tidal waters in the United States but likewise is applicable to the waters of Lake Erie, and that

the title to subaqueous and filled-in lands *beyond high water mark* is in the state bordering upon such waters.” (Emphasis added.)

{¶71} Further, at 337, the *Squire* court observed: “The littoral owners of the upland have no title beyond the natural shore line; they have only the right of access and wharfing out to navigable waters.”

{¶72} Moreover, while we recognize that an opinion authored by the Attorney General is persuasive authority and not binding on this court, *Gen. Dynamics Land Sys., Inc. v. Tracy* (1998), 83 Ohio St.3d 500, 504, the Ohio Attorney General has issued an opinion regarding this matter, which concludes, “[t]he land that lies above the natural *shoreline* of Lake Erie belongs to the littoral owner.” 1993 Ohio Atty.Gen.Ops. No. 93-025, at 15. The attorney general further remarked: “The ‘shoreline’ is ‘(t)he line marking the edge of a body of water.’ *The American Heritage Dictionary* 1133 (2d college ed. 1985). Naturally, the shoreline of a body of water is in a constant state of change.” *Id.* at 11.

{¶73} Further, the Ohio Administrative Code, Chapter 1501-6, “Lease of Lake Erie Submerged Lands,” defines the term “shoreline” as “the line of intersection of lake Erie with the beach or shore.” OAC 1501-6-10(U). “Shore” is defined as the “land bordering the lake[.]” OAC 1501-6-10(T) and “beach” means “[a] zone of unconsolidated material that extends landward from the shoreline to the toe of the bluff or dune. Where no bluff or dune exists, the landward limit of the beach is either the line of permanent vegetation or the place where there is a marked change in material or physiographic form.” OAC 1501-6-10(E).

{¶74} Having summarized the leading authorities bearing on the questions at hand, we turn to the assignments and cross-assignments of error.

{¶75} Assignments of Error of NWF and OEC

{¶76} By their first assignment of error, NWF and OEC assert the trial court erred in applying dictionary definitions to determine what the “natural shoreline” is under R.C. 1506.10 and 1506.11(A). The first issue they raise is that federal law requires that the Lake Erie shoreline be defined as the high water mark. In support of this contention, they cite to the decision of the United States Supreme Court in *Shively v. Bowlby* (1894), 152 U.S. 1, recognizing both the equal-footing doctrine and the public trust doctrine, for the proposition that states upon entering the Union, automatically receive land beneath navigable waters below the high water mark.³

{¶77} We respectfully reject this argument. The *Shively* court merely noted that the public trust doctrine, in England, set the border of the crown’s trust for the benefit of the public at the high water mark. The *Shively* court specifically recognized that state law determined the scope of the public trust in land beneath navigable waters in this country.

{¶78} Next, NWF and OEC turn to federal statutory law. Citing to the Submerged Lands Act (“SLA”), 43 U.S.C.S. 1301-1315, they maintain that Congress confirmed a uniform boundary at the ordinary high water mark for all states. Specifically, they refer to 43 U.S.C.S 1311(a), which provides:

{¶79} **** [T]itle to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands

3. The “equal-footing” doctrine holds that those states entering the Union following the establishment of the United States have the same rights as those originally forming the Union.

and waters, and *** the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof[.]”

{¶80} For non-tidal waters, “lands beneath navigable waters” includes “lands and water *** up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction[.]” 43 U.S.C.S. 1301(a)(1), and “all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined[.]” 43 U.S.C.S. 1301(a)(3).

{¶81} We find this reliance upon the SLA to be misplaced. As the United States Supreme Court has observed, the effect of the SLA “was merely to confirm the States’ title to the beds of navigable waters within their boundaries as against any claim of the United States Government.” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 372, fn. 4. Further, state law governs the determination of ownership in the land under the Act, as evidenced by the provision “under the law of the respective States in which the land is located *** [.]” *California ex rel. State Lands Comm. v. United States* (1982), 457 U.S. 273, 288. See, also, *Corvallis Sand & Gravel Co.*, at 372, fn. 4 (discussing *Bonelli Cattle Co. v. Arizona* (1973), 414 U.S. 313).

{¶82} This issue lacks merit.

{¶83} By their second issue under the first assignment of error, NWF and OEC argue that, in defining the public trust territory in Lake Erie as commencing at anything

below the high water mark, land is removed from the public trust, which is strictly forbidden. See, e.g., *Cleveland & Pittsburgh RR. Co.*, supra, at paragraph six of the syllabus. In support of this, they cite to the Fleming Act, and the decisions of the Supreme Court of Ohio in *Cleveland & Pittsburgh RR. Co.*, and *Squire*. They contend that these decisions specifically incorporate the United States Supreme Court's decision in *Shively*, recognizing the English doctrine of the public trust in tidal waters, as well as that court's decision in *Illinois Cent. RR. Co. v. Illinois* (1892), 146 U.S. 387, 452, making the public trust doctrine applicable to the non-tidal waters of the Great Lakes. Consequently, they argue that any interpretation of the Fleming Act requires the courts of Ohio to recognize the high water mark as the boundary of the public trust in Lake Erie.

{¶84} We respectfully reject this argument. Just as the public trust in Lake Erie cannot be abandoned, it cannot be improperly extended in violation of littoral property owners' rights. The *Shively* court specifically recognized that state law defines the boundary of the public trust in navigable waters. We find that any reference by the Supreme Court of Ohio to the "high water mark" acting as the boundary of the public trust in navigable waters in *Cleveland & Pittsburgh RR. Co.*, and *Squire*, is simply a reference to the history of the public trust doctrine, as imported from English law – not a finding as to the boundary of that trust in Lake Erie.

{¶85} The second issue lacks merit, as does the assignment of error.

{¶86} By their second assignment of error, NWF and OEC protest the trial court's determination that ODNR cannot use the IGLD to establish the high water mark for Lake Erie.

{¶87} As ODNR is no longer enforcing this policy, we find this assignment of error moot.

{¶88} By their third assignment of error, NWF and OEC contend the trial court erred in determining that littoral property owners may exclude the public from lands below the high water mark of Lake Erie. By his third cross-assignment of error, Taft asserts the trial court erred in failing to declare the rights of littoral property owners. As the matters are interrelated, for purposes of brevity, we consider them together. We respectfully find each to be without merit.

{¶89} Nearly 130 years ago, the Supreme Court of Ohio observed that littoral owners have the right to exclude the public from their property. *Sloan*, supra. We appreciate and respect the fact that, in Ohio, the public has broad access to navigable waters, including “all legitimate uses, be they commercial, transportational, or recreational.” *State ex rel. Brown v. Newport Concrete Co.* (1975), 44 Ohio App.2d 121, 128. See, also, R.C. 1506.10 and 1506.11(G). However, contrary to NWF’s and OEC’s assertion, the judgment of the trial court does not abolish the rights of the public to walk along Lake Erie. In fact, the public retains the same rights to walk lakeward of the shoreline along Lake Erie, but these rights have always been limited to the area of the public trust (i.e., on the lands under the waters of Lake Erie and lakeward of the shoreline). Therefore, the public does not interfere with littoral property rights when their recognized, individual rights are exercised within the public trust; that is, lakeward of the shoreline as defined herein.

{¶90} The littoral owner has certain well-defined rights incident to the ownership of shore land. Littoral owners may exercise these rights upon the soil and navigable

waters lakeward of the shoreline of Lake Erie within the territorial boundaries of the state, subject to regulation and control by the federal, state and local governments. Those rights include: (1) the right to wharf out to navigable waters to the point of navigability for the purposes of navigation; (2) the right of access to the navigable waters of Lake Erie; and (3) the right to make reasonable use of waters in front of or flowing past their lands.

{¶91} In its judgment entry, the trial court recognized the above enumerated rights of littoral owners. Additionally, the trial court noted that it had not been “asked to define categorically all of the littoral rights that are recognized under Ohio law for land adjoining Lake Erie. Accordingly, notwithstanding the argumentation of the parties, the court declines to make a comprehensive, categorical declaration of what those littoral rights are with respect to all members of the class. Such questions are probably best left to the resolution of specific disputes involving individual parties who are asserting such littoral rights with respect to a specific parcel of land, according to specific deed language, and pertaining to a specific area of the Lake Erie coastline.”

{¶92} The trial court generally recognized the special rights that littoral owners possess, incident to owning shore land. However, it appreciated that the application of such rights to a particular littoral owner or parcel of land would best be resolved on a case-by-case basis. The trial court could not conceivably anticipate every possible scenario with respect to all members of the class. We find that the trial court properly declared the rights of the littoral owners, while acknowledging that individual members of the class may have to adjudicate a specific, individualized question.

{¶93} NWF's and OEC's third assignment of error, as well as Taft's third cross-assignment of error, lack merit.

{¶94} Cross-Assignments of Error of OLG

{¶95} We next turn to OLG's first cross-assignment of error, which states: "[t]he trial court erred in finding that the boundary of the territory is not the low water mark."

{¶96} OLG first argues that common usage dictates when interpreting the term "natural shoreline." The 1916 edition of Webster's New International Dictionary, relied upon by the trial court, defined "shoreline" as the "line of contact of a body of water with the shore." OLG states that based upon the 1916 Webster's New International Dictionary, "shore" is defined as the land between low and high water marks. As such, because the "shoreline" is the line separating the water and the shore, and the "shore" describes the land between high and low water marks, the common meaning of the "shoreline" must be the low water mark. We find OLG's analysis to be flawed.

{¶97} First, the trial court found that the terms "shore" and "beach" are synonyms in the context of the issues in the instant case and, as a matter of law, they mean "the land between low and high water marks." Since no party objected and we find this definition to be consistent with other dictionary definitions, as well as definitions adopted by Ohio courts and administrative agencies, we hold that "shore" is "the land between low and high water marks."⁴ However, this does not mean that the boundary of the territory for purposes of the public trust doctrine should be set at the low water

4. See, e.g., *Busch v. Wilgus* (Aug. 21, 1922), 1922 Ohio Misc. LEXIS 272, at 14, stating "[t]he term 'shore' includes and designates the land lying between the high and low water mark[.]" OAC 1501-6-10(T) defining "shore" as "the land bordering the lake." Black's Law Dictionary defines "shore" as the "[l]and lying between the lines of high- and low-water mark; lands bordering on the shores of navigable waters below the line of ordinary high water." Black's Law Dictionary (8 Ed.2004) 1412.

mark. Instead, shoreline is the line of actual physical contact by a body of water with the land *between the high and low water mark* undisturbed and under normal conditions. See, e.g., *Sloan*, supra, at paragraph four of the syllabus.

{¶98} In addition, OLG cites to *Wheeler v. Port Clinton* (Sept. 16, 1988), 6th Dist. No. OT-88-2, 1988 Ohio App. LEXIS 3702, and *Mitchell v. Cleveland Elec. Illuminating Co.* (1987), 30 Ohio St.3d 92, to support the proposition that the natural shoreline is the low water mark. However, we find *Wheeler* and *Mitchell* to be inapposite to the instant situation.

{¶99} In *Wheeler*, the appellant, a swimmer who sustained injuries while swimming off of City Beach in Port Clinton, Ohio, sought review of the trial court's decision in granting the city's motion for summary judgment. *Wheeler*, supra, at 1-2. In reviewing the decision of the trial court, the Sixth District Court of Appeals stated, "[t]he north territorial boundary of Port Clinton extends to, but not beyond, the Lake Erie shoreline." *Id.* at 3. Although OLG attempts to utilize this decision as one that supports the low water mark as the boundary of the territory, we disagree. As we have previously concluded, the shoreline is not the low water mark. Furthermore, the main issue before the *Wheeler* court was whether the city was liable for appellant's injuries, not the definition of the public trust boundary.

{¶100} Similar to *Wheeler*, the issue before the court in *Mitchell* was not the definition of the public trust doctrine. In *Mitchell*, "[t]he sole question before [the Supreme Court of Ohio was] whether [the] appellee's opening statement and the allegations of the amended complaint state a cause of action against Avon Lake." *Mitchell*, supra, at 93. In its discussion of whether Avon Lake owed a duty to

decedents, the Supreme Court observed that it was “undisputed that Avon Lake’s territorial limits extend only to the low water line of Lake Erie.” *Id.* at 94. In making this statement, the Supreme Court was merely observing that the parties chose not to dispute the low water mark as the proper boundary; it clearly was not a legal conclusion of the Court.

{¶101} We, therefore, decline to adopt the low water mark to be the boundary of the public trust territory.

{¶102} Since OLG’s second and Taft’s second cross-assignments of error are interrelated, we consider them in a consolidated analysis.

{¶103} We agree with OLG’s and Taft’s assertion that the trial court erred in reforming the deeds. First, in reforming the deeds, the trial court went beyond the scope of the class certification. Further, since this issue was not before the trial court, the parties were not afforded the opportunity to argue their positions for the trial court’s consideration. Reformation of the littoral owner’s deeds could potentially have an impact on title insurance policies and the littoral owners’ rights established by the Fleming Act or other legislation. By reforming all of the littoral owners deeds to the water’s edge, all parties were deprived of the opportunity to be notified of each other’s arguments, and to respond to those arguments, which is contrary to traditional notions of due process. As a result, we vacate this portion of the trial court’s judgment entry.

{¶104} Taft’s First Cross-Assignment of Error

{¶105} As Taft’s first cross-assignment of error, he alleges NWF and OEC presented no justiciable claim against any party and, thus, the trial court erred in permitting their intervention.

{¶106} Ohio courts should liberally construe Civ.R. 24 in favor of intervention. *Indiana Ins. Co. v. Murphy*, 165 Ohio App.3d 812, 2006-Ohio-1264, at ¶5. The granting or denial of a motion to intervene rests with the discretion of the trial court and will not be disturbed on appeal absent the showing of an abuse of discretion. *Peterman v. Pataskala* (1997), 122 Ohio App.3d 758, 761. (Citation omitted.) “The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶107} Pursuant to Civ.R. 24, there are two avenues of intervention: intervention of right and permissive intervention. Civ.R. 24(A)(2) sets forth the relevant requirements for intervention of right:

{¶108} “Upon timely application anyone shall be permitted to intervene in an action: *** (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

{¶109} To be entitled to intervene as of right, pursuant to Civ.R. 24(A), the applicant must demonstrate: (1) the application is timely; (2) an interest in the property or transaction that is the subject of the suit; (3) the disposition of the action may impair or impede his ability to protect that interest; and (4) the existing parties do not adequately protect that interest. *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 352. (Citations omitted.)

{¶110} In his brief, Taft alleges NWF and OEC failed to demonstrate a “legally protectable” interest in the real estate boundary in question. We disagree.

{¶111} “Civ.R. 24(A) requires that the applicant claim an interest relating to the property or transaction which is the subject of the action. While the claim may be shown to be without merit, *** it is not required that the interest be proven or conclusively determined before the motion is granted.” *Blackburn* at 354. (Internal citation omitted.)

{¶112} According to the affidavit of David B. Strauss, attached to NWF and OEC’s brief in support of the motion to intervene, NWF is a non-profit organization whose mission is to conserve natural resources and the wildlife that depends on such resources for the use and aesthetic enjoyments of its members. NWF is comprised of approximately 921,922 members nationwide, approximately 303,997 members in the states bordering the Great Lakes, and approximately 98,114 members in Ohio alone.

{¶113} According to the affidavit of Vicki Deisner, also attached to the brief in support of the motion to intervene, OEC is an Ohio, non-profit corporation, whose purpose is to preserve and protect the environment of the state of Ohio and to represent the interests of its members across the state regarding environmental and conservation issues. OEC is comprised of approximately 2,135 individual members and 113 group members that represent thousands of citizens throughout the state of Ohio.

{¶114} As further stated in their brief in support of the motion to intervene, the NWF and OEC sought to intervene since the relief requested by appellant, if granted, would extinguish the rights of its members to make recreational use of the shore along

Lake Erie below the ordinary high water mark and would have a direct and substantial adverse impact upon the recreational use and aesthetic enjoyments of such shorelands.

{¶115} Therefore, by fulfilling the requirements as set forth under Civ.R. 24(A) and, further, since it has been established that Ohio courts should liberally construe Civ.R. 24, we conclude the trial court was correct in granting NWF's and OEC's motion to intervene.

{¶116} The second type of intervention, permissive, is governed by Civ.R. 24(B), which states:

{¶117} "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

{¶118} We further conclude that NWF and OEC were permitted to intervene under Civ.R. 24(B), permissive intervention, since they demonstrated their defense and counterclaim were both legally and factually related to the claims of OLG. In addition, it is evident that NWF and OEC's intervention did not "unduly delay or prejudice the adjudication of the rights of the original parties." Civ.R. 24(B).

{¶119} Taft also argues that the counterclaim of NWF and OEC failed to state a claim upon which relief could be granted. Civ.R. 12(B) provides, in pertinent part:

{¶120} “Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: *** (6) failure to state a claim upon which relief can be granted ***[.]”

{¶121} Save for the exceptions stated in Civ.R. 12(H), a party generally waives all defenses and objections not properly raised by motion, a responsive pleading, or amendment allowed under Civ.R. 15(A). Although Taft alleges he asserted a Civ.R. 12(B)(6) claim in his responsive pleading to NWF’s and OEC’s counterclaim, a review of the record in this case reveals that this responsive pleading is not part of our record on appeal, for it was only filed in Case No. 04CV001081, which is not pending before this court. Therefore, we cannot consider it on appeal. App.R. 9(A).

{¶122} Based on the foregoing, Taft’s first cross-assignment of error is without merit.

{¶123} Public Trust Boundary is the Water’s Edge

{¶124} In *Sloan*, the Supreme Court of Ohio affirmed private property rights in the “shores” of Lake Erie and held the boundary between public and private rights is, “the line at which the water usually stands when free from disturbing causes.” *Id.* at paragraph four of the syllabus.

{¶125} As we have identified, the Supreme Court of Ohio recognized the public trust doctrine by holding, “[t]he title of the land *under the waters of Lake Erie* within the

limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted." *Cleveland & Pittsburgh RR. Co.*, at paragraph three of the syllabus. (Emphasis added.) As a result of the Supreme Court's decision, the Fleming Act, now codified at R.C. Chapter 1506, was enacted. In *Squire*, the Supreme Court of Ohio further spoke of the title to the lands under the waters of Lake Erie, stating:

{¶126} "The state of Ohio holds the title to the *subaqueous* soil of Lake Erie, which borders the state, as trustee for the public for its use in aid of navigation, water commerce or fishery, and may, by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use." *Id.*, at paragraph two of the syllabus. (Emphasis added.) The *Squire* court also declared that littoral owners of the upland do not have title beyond the *natural shoreline*, for they only have the right of access and wharfing out to navigable waters.

{¶127} Based upon its decisions, the Supreme Court has identified that the waters, and the lands under the waters of Lake Erie, when submerged under such waters, are subject to the public trust, while the littoral owner holds title to the natural shoreline. As we have identified, the shoreline is the line of contact with a body of water with the land *between the high and low water mark*. Therefore, the shoreline, that is, the actual water's edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled in lands privately held by littoral owners.

{¶128} By setting the boundary at the water's edge, we recognize and respect the private property rights of littoral owners, while at the same time, provide for the public's

use of the waters of Lake Erie and the land submerged under those waters, when submerged. The water's edge provides a readily discernible boundary for both the public and littoral landowners.

{¶129} Based on principle, authority, and considerations of public policy, we determine that the waters and submerged bed of Lake Erie when under such waters is controlled by the state and held in public trust, while the littoral owner takes fee only to the water's edge.

{¶130} Conclusion

{¶131} Based on the above analysis, the Ohio Attorney General's assignments of error are stricken. NWF's and OEC's first and third assignments of error lack merit, while the second assignment is moot. OLG's first cross-assignment of error lacks merit, as do Taft's first and third cross-assignments of error. OLG's second cross-assignment of error, as well as Taft's, have merit to the extent indicated. The judgment of the Lake County Court of Common Pleas is modified to vacate the portion of the judgment concerning the amendment of the littoral owner's deed, and the judgment of the Lake County Court of Common Pleas is hereby affirmed as modified.

{¶132} It is the further order of this court that the parties share equally costs herein taxed.

{¶133} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDALL, J., concurs,

TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/Dissenting Opinion.

Appendix attached.

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶134} I respectfully concur in part with the majority opinion as to the overall disposition of the case; however, I dissent in part as it pertains to the disposition of the issue of standing.

{¶135} At the outset, I would note a concern and the need for caution about issuing rulings on matters not raised by any party, particularly when the parties have not been given an opportunity to brief those issues. While App.R. 12(A)(2) allows an appellate court to consider issues not briefed by the parties, I believe the better rule is “*** when a court of appeals chooses to consider an issue not briefed by the parties, the court should notify the parties and give them an opportunity to brief the issue.” *State v. Blackburn*, 11th Dist. No. 2001-T-0052, 2003-Ohio-605, at ¶45, citing *State v. Peagler* (1996), 76 Ohio St.3d 496, 499, fn.2.

{¶136} The state of Ohio is a named defendant. The majority cites R.C. 109.02 for the proposition that the attorney general may “only act at the behest of the governor, or the General Assembly.” I do not agree with that reading of the statute. The statute states: “[w]hen *required* by the governor or the general assembly, the attorney general *shall* appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested.” R.C. 109.02. (Emphasis added.) This is language of inclusion, not of exclusion. There is nothing that *prohibits* the attorney

general from appearing and representing the state when suit has been filed against it. I would not suggest the attorney general needs an order from the governor or legislation from the General Assembly to defend the state in litigation without first giving the attorney general the full opportunity to brief the issue. It is, quite simply, ground that does not need to be plowed in this case. As acknowledged by the majority, it is clear the citizens of the state of Ohio have an interest in the public trust portion of the waters of Lake Erie. Consequently, they are entitled to representation.

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

JUDGE EUGENE A. LUCCI

STATE *ex rel.* ROBERT MERRILL, TRUSTEE, *et al.*)

CASE NO. 04CV001080

Plaintiffs-Relators)

and)

HOMER S. TAFT, *et al.*)

Intervening Plaintiffs)

and Plaintiffs-Relators, Pro Se)

vs.)

STATE OF OHIO, DEPARTMENT OF)
NATURAL RESOURCES, *et al.*)

Defendants-Respondents)

and Counterclaimants)

and)

NATIONAL WILDLIFE FEDERATION, *et al.*)

Intervening Defendants and)

and Counterclaimants)

ORDER GRANTING
PLAINTIFFS' AND INTERVENING PLAINTIFFS' MOTIONS FOR
PARTIAL SUMMARY JUDGMENT,
IN PART

ORDER DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

and

ORDER DENYING
INTERVENING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT



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[¶1] The table of contents, headings, and paragraph numbers in this opinion are for the convenience of the court and the parties. They form no part of the opinion of the court.

Introduction

Foundational Issues

[¶2] Foundationally, this case concerns the American view of the relationship between: (1) the derivative sovereignty of individuals and other legal persons in the State of Ohio, as that sovereignty relates to their private right to own real property bordering the southern shore of Lake Erie; (2) the derivative sovereignty of the State of Ohio, as that sovereignty relates to the state's ownership in trust of the waters of Lake Erie and the soil beneath the lake; and (3) the balance or harmony that the law requires with respect to: (a) protecting the fee title and littoral rights of the lakeside landowner, and (b) properly limiting the power of the state to regulate the

landowner's private property rights, while still allowing the state enough sovereign power to exercise its trust responsibilities properly.

[¶3] Many of the cases cited by the parties review the common law of England in an effort to resolve issues related to the boundaries of the Great Lakes. In doing so, the courts have often surveyed the British view¹ of the relationship between the sovereign legal rights and responsibilities of the royal crown in the waters of Great Britain and those of riparian and littoral landowners. In the present case, the court believes that there is a distinctively American view of sovereignty that undergirds the proper balancing of the rights of the parties in Ohio, and that this American view of sovereignty is distinguishable from the British view.

[¶4] Under Ohio law, the common law of England relating to navigable waters does not apply to Lake Erie because “(o)ur large freshwater lakes or inland seas are wholly unprovided for by the law of England. As to these, there is neither flow of tide nor thread of the stream; and our local law appears to have assigned the shores down to ordinary low-water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public.”² The public's rights, such as navigation and fishing, exist in the navigable waters of Lake Erie.³

Nature of the Dispute between Plaintiffs and ODNR

[¶5] The State of Ohio, through the Ohio Department of Natural Resources, has asserted trust ownership rights to the area of land along the southern shore of Lake Erie up to the ordinary high water mark as determined by the U.S. Army Corps of Engineers in 1985 (573.4 feet above sea level). Plaintiffs dispute the authority of ODNR to assert these trust ownership rights apart from first acquiring the property in question through ordinary land appropriation proceedings in the relevant courts of common pleas.⁴ Plaintiffs also dispute the validity of the arbitrary choice of 573.4 feet IGLD (1985) as a uniform measure of the ordinary high water mark, arguing that the ordinary high water mark is a boundary that must be determined on a case by case basis with

¹ Some authorities have referenced Magna Carta (aka Magna Charta) of 1215 as the first English instance of balancing the rights of the crown to alienate non-navigable (i.e. non-tidal) land to private individuals, and the rights of the public to fish in navigable (i.e. tidal) waters. See, *Lincoln v. Davis* (1884), 53 Mich. 375, 381, 19 N.W. 103, 1884 Mich. LEXIS 691; *Arnold v. Mundy* (1821), 6 N.J.L. 1, 1821 N.J.Sup.Ct. LEXIS 1 (The court described Magna Carta as the resolution of property disputes arising out of the seizure of common law rights by powerful landed barons on the one hand, and excessive royal grants to courtiers and royal favorites on the other.)

² *Sloan v. Biemiller* (1878), 34 Ohio St. 492, 516-17, 1878 Ohio LEXIS 176.

³ *Bodi v. The Winous Point Shooting Club* (1897), 57 Ohio St. 226, 48 N.E. 944, 1897 Ohio LEXIS 114.

⁴ Both the Courts of Common Pleas and the Probate Courts in Ohio have jurisdiction to hear land appropriation cases. *City of Cleveland v. City of Brookpark* (1995), 103 Ohio App.3d 275, 659 N.E.2d 342, 1995 Ohio App. LEXIS 1731.

respect to each parcel bordering the lake. Plaintiffs also dispute the authority of ODNR to require plaintiffs to lease land from the State of Ohio when that land is already contained within the legal description in their respective deeds.

Nature of the Dispute between Plaintiffs and NWF and OEC

[¶6] As set forth in the motion to intervene, filed by the National Wildlife Federation (“NWF”) and the Ohio Environmental Council (“OEC”) on June 5, 2006, these intervening defendants are environmental organizations whose purpose it is to protect the rights of their members to make recreational use⁵ of the shores and waters of Lake Erie. NWF and OEC assert that the State of Ohio holds the area of the “Territory” of the waters of Lake Erie in trust for the public up to the ordinary high water mark.

[¶7] The scope of the court’s decision will affect the rights of approximately 15,500 littoral owners of parcels of real property abutting Lake Erie within the State of Ohio. These parcels of real estate are located along approximately 311 miles of Ohio coastline⁶ within the eight counties of Lucas, Ottawa, Sandusky, Erie, Lorain, Cuyahoga, Lake, and Ashtabula.⁷

Recent Legislative Treatment of the Issues

[¶8] In recent years, the Ohio General Assembly has made three attempts – all, to date, unsuccessful – to address some of the issues that must be decided by the court in this case.

[¶9] In the 125th General Assembly (2003-2004), HB 218 was introduced in the Ohio House on June 10, 2003. On December 11, 2003, the bill passed its third consideration and was introduced in the Ohio Senate, where it was assigned to the Environmental Affairs Committee. No further action was taken on the bill.

[¶10] With respect to the issues to be decided in this case, HB 218 sought to do the following: (1) enact R.C. 1506.01(J) to provide a legislative definition of “ordinary high water mark” by reference to the mark established by the United States Army Corps of Engineers; (2) amend R.C. 1506.10 and enact R.C. 1506.10(A) to list and define “littoral rights” as that term is used in R.C. 1506.11; (3) amend R.C. 1506.10 and enact R.C. 1506.10(B)(1) to declare legislatively that the

⁵ NWF and OEC distinguish their position from that of the State of Ohio by arguing that the state is defending “the broad public interest” whereas NWF and OEC are defending the specific recreational uses held by their members, including the alleged right of their members to walk along the shore of Lake Erie. They also point out that some of their members are not citizens of the State of Ohio, even though they make recreational use of the waters and shores of Lake Erie.

⁶ “Ohio Coastal Atlas” Page 1 of “County Profiles” subsection, Ohio Department of Natural Resources, retrieved December 22, 2005.

⁷ <http://www.dot.state.oh.us/map1/cntymap.asp>.

boundary of the waters of Lake Erie within the State of Ohio is the point “where the waters of Lake Erie make contact with the land,” and that this is the territory that the State of Ohio owns as proprietor in trust for the people of the state; (4) enact R.C. 1506.10(B)(2) to declare legislatively that property owners on Lake Erie have the right to exercise littoral rights, subject to all applicable provisions of the Revised Code; (5) amend R.C. 1506.11(A) and enact R.C. 1506.11(A)(1) to define the term “territory” as being bordered by the “ordinary high water mark” instead of the “natural shoreline; and (6) amend R.C. 1506.11(A) and enact R.C. 1506.11(A)(2) to constrain the construction of the use of the ordinary high water mark as being for administration of this section only, and not for the determination of any kind of property boundary. Similarly, R.C. 1521.22 would have been renumbered as R.C. 1521.40, and it would have constrained the construction of the use of the ordinary high water mark as being for administration of this section only, and not for the determination of any kind of property boundary.

[¶11] In the 126th General Assembly (2005-2006), SB 127 was introduced in the Ohio Senate on April 19, 2005, where it was assigned to the Environmental Affairs Committee. No further action was taken on the bill.

[¶12] With respect to the issues to be decided in this case, SB 127 sought to do the following: (1) enact R.C. 1506.01(N) to list and define “littoral rights” as that term is used in Chapter 1506 of the Revised Code; (2) amend R.C. 1506.01 and enact R.C. 1506.01(O), (P), and (Q) to define the terms “accretion,” “reliction,” and “avulsion;” (3) amend R.C. 1506.10 to declare legislatively that the proprietary trust of the State of Ohio is subject to the littoral rights of littoral owners; (4) amend R.C. 1506.11(B), (C), and (D) to limit the state’s ability, through the director of natural resources, to require littoral owners to enter into a lease to construct waterfront improvements by exempting the exercise of littoral rights; and (5) renumber R.C. 1521.22 as R.C. 1521.40, and enact subsections (A), (B), and (G) to define the term “ordinary high water mark by reference to the regulatory mark set by the Army Corps of Engineers, prohibit the use of that term to determine property boundaries, and prohibit anything in this section from being construed as determining the boundary of the state’s ownership of the waters of Lake Erie as provided in section 1506.10 of the Revised Code.”

[¶13] In the 127th General Assembly (2007-2008), SB 189 was introduced in the Ohio Senate on June 21, 2007, where it was again assigned to the Environmental Affairs Committee. No further action has been taken on the bill.

[¶14] With respect to the issues to be decide in this case, SB 189 sought to do the following: (1) enact R.C. 1506.01(N) to list and define “littoral rights” as that term is used in Chapter 1506 of the Revised Code; (2) amend R.C. 1506.01 and enact R.C. 1506.01(O), (P), and (Q) to define the terms “accretion,” “reliction,” and “avulsion;” (3) amend R.C. 1506.10 to declare legislatively that the proprietary trust of the State of Ohio is presumptively subject to the littoral rights of littoral owners to restore lands lost by avulsion or artificially induced erosion; (4) amend R.C. 1506.11(A), (B), and (C) to limit the state’s ability, through the director of natural resources, to require littoral owners to enter into a lease to construct waterfront improvements by exempting the exercise of littoral rights; and (5) renumber R.C. 1521.22 as R.C. 1521.40, and enact subsections (A), (B), (G), and (H) to define the term “ordinary high water mark by reference to the regulatory mark set by the Army Corps of Engineers, prohibit the use of that term to determine property boundaries, and prohibit anything in this section from being construed as determining the boundary of the state’s ownership of the waters of Lake Erie as provided in section 1506.10 of the Revised Code.”

Recent Executive Branch Treatment of the Issues

[¶15] It must be noted that on July 16, 2007, ODNR filed a short response to the pending motions for summary judgment in which ODNR announced its new regulatory policy under the direction of Governor Ted Strickland,⁸ and stated ODNR “must and should honor the apparently valid real property deeds of the plaintiff-relator lakefront owners unless a court determines that the deeds are limited by or subject to the public’s interests in those lands or are otherwise defective or unenforceable.” ODNR also stated that, although it would continue to require pre-construction permits for structures that could impact coastal lands, it would “no longer require property owners to lease land contained within their presumptively valid deeds.”

[¶16] Accordingly, it would appear that plaintiffs-relators and defendants-respondents are now in agreement⁹ that, in the absence of a court order finding that a littoral owner’s deed is limited by the public’s interests or is defective or unenforceable, the State of Ohio lacks the authority to

⁸ Governor Strickland was newly-elected in November 2006, and his administration began in January 2007.

⁹ The parties also appear to agree that, whatever the proper boundary is between the public trust territory and the title rights of littoral landowners, that boundary is always coterminous and never overlaps.

require such landowners to obtain leases for land contained within the legal description in their presumptively-valid deeds. Nevertheless, the issue still needs to be resolved by this court because: (1) the regulatory policy of the ODNR may change yet again with future changes in the occupancy of the Governor's office; (2) the legislature may enact legislation that contravenes the Ohio Constitution or otherwise constitutes an unlawful taking without just compensation; and (3) intervening defendants NWF and OEC have not stipulated to ODNR's change in its regulatory policy.

American View of Sovereignty

¶17] Since this case involves balancing the sovereign rights of the property owner against the sovereign power and trust ownership of the State of Ohio of lakefront property in the State of Ohio, as well as the rights of the public, it is worthwhile to begin this analysis by reviewing the historical American view of sovereignty.

¶18] As evidenced by the bold and succinct language of the Declaration of Independence in 1776, the American view of sovereignty began its articulation by recognizing that all¹⁰ human beings have certain unalienable rights, derived first and foremost from God as their Creator.¹¹ These unalienable rights¹² are evidence that individual human beings have been given a derived sovereignty that is ultimately subordinate to God's complete sovereignty.¹³ The Declaration also states that it is one of the primary purposes of civil government to use its delegated sovereignty

¹⁰ Some might suggest that this written recognition in 1776 that all human beings have certain unalienable rights was contradicted in 1789 by the enactment of the U.S. Constitution which failed to abolish slavery, and which included language in Article I, Section 2, stating that slaves ("other persons") would be legally considered as 3/5 of non-slaves for purposes of apportioning representation and direct taxation. But this was in no way a denial of the principles of the Declaration. History has proven that – although it would take a bloody Civil War and several constitutional amendments to do it – the trajectory set in motion by the principles of sovereignty announced in the Declaration of Independence would be fulfilled in time.

¹¹ "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of Independence, ¶2 (1776) (emphasis added).

¹² A similar provision appears in the Ohio Constitution in Article VIII, Section 1, which states: "That all men born equally free and independent, and have certain natural, inherent and unalienable rights; amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence; to effect these ends, they have at all times a complete power to alter, reform or abolish their government, whenever they may deem it necessary." (emphasis added).

¹³ Although it may be unpopular today to discuss the legal concept of sovereignty in theological terms, our founding documents demonstrate that the American system of government was and is based on the presupposition that all sovereignty – both that of the individual and that of civil government – ultimately comes from God. See, "The Christian Life and Character of the Civil Institutions of the United States," by B.F. Morris (1864).

to secure the unalienable rights that God has given to all human beings.¹⁴ By implication, therefore, if civil government acts in a way that improperly takes away the unalienable rights that God has given to all human beings, then the civil government has stepped outside of the scope of its derivative sovereignty and has begun to engage in a usurpation of authority. That kind of usurpation is properly called tyranny.

[¶19] In this sense, then, it is no less an act of unconstitutional tyranny for the government of the State of Ohio to take the property of an individual or other person who owns lakeside property – without giving just compensation – than it is for an individual or other person to use his or her ownership of lakeside property to interfere substantially with the public rights in Lake Erie that are held in trust by the State of Ohio.

[¶20] Under the American system of government – which was ultimately founded on the U.S. Constitution some thirteen years after the Declaration of Independence was signed – “we the people” have voluntarily delegated a limited amount of our derived sovereignty to the local, state, territorial, and federal governments for the specific and limited purposes that are defined by local ordinances, state and federal statutes, the various state constitutions, and the U.S. Constitution.¹⁵ Hence, just as the delegated sovereignty of “the people” is ultimately subordinate to the sovereignty of God, so the delegated sovereignty of local, state, and federal governments is ultimately subordinate to the original derived sovereignty of “the people.”¹⁶ This was the principle on which the founding fathers based their declaration that, “[W]henver any Form of Government becomes destructive of these ends [i.e. securing the unalienable rights that men were endowed with by their Creator], it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”¹⁷ It is also

¹⁴ “. . . That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.” Declaration of Independence, ¶2 (1776).

¹⁵ It should be noted that the Northwest Ordinance of 1787 governed the territory that eventually became the State of Ohio in 1803. Prior to the ratification of the U.S. Constitution in 1789, the abortive Articles of Confederation – enacted in 1777 – formed a national government that was not consistent with the foundational principles set forth in the Declaration of Independence. See, John Quincy Adams, *The Jubilee of the Constitution* (1839).

¹⁶ *Idaho v. Coeur d’Alene Tribe of Idaho* (1997), 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (“The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence ‘became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.” (emphasis added).

¹⁷ Declaration of Independence, ¶2 (1776).

one of the foundational rationales for the holding in *Arnold v. Mundy*,¹⁸ where the court observed, “I am of the opinion, that when Charles II took possession of this country, by his right of discovery, he took possession of it in his sovereign capacity, . . . that those royalties, therefore, of which those rivers, ports, bays, and coasts were part, by the grant of King Charles, passed to the Duke of York, as the governor of the province, exercising the royal authority, for the public benefit, and not as proprietor of the soil [U]pon the Revolution, all those royal rights vested in the people of New Jersey, as the sovereign of the country, and are now in their hands[.]” (Emphasis added).¹⁹

[¶21] This American view of sovereignty is distinctive, and it must constrain our understanding of the earliest cases that sought simultaneously to: (1) apply traditional English common law in the early years of the United States, and (2) adapt that common law to the categorically different topographical, political, and governmental conditions that exist in the American republic.

Issues to be resolved in this case

[¶22] In resolving the issues raised by the parties in this case, the court observes first that there is a uniqueness to: (1) the historical development of the American form of government as a democratic republic founded by “the people;”²⁰ (2) the revolutionary manner in which the United States was established as a sovereign nation upon the Earth;²¹ and (3) the physical nature and extent of the Great Lakes, including Lake Erie.²² These unique factors affect how principles of

¹⁸ *Arnold v. Mundy* (1821), 6 N.J. 1, 1821 N.J.Sup.Ct. LEXIS 1.

¹⁹ See *Massachusetts v. New York* (1926), 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838, 1926 U.S. LEXIS 608 (Headnote 2). See, *Shively v. Bowlby* (1894), 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331, 1894, U.S. LEXIS 2090 (“When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.”)

²⁰ The modern form of the nation-state as a vehicle of political sovereignty entitled to be free from outside interference began with the Treaty of Westphalia in 1648, which ended the Thirty Years War in Europe. But prior to the United States, no such nation state had been founded by “the people.”

²¹ “This act [the establishment of the U.S. Constitution] was the complement of the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government. The Declaration was a manifesto to the world of mankind, to justify the one confederated people, for the violent and voluntary severance of the ties of their allegiance, for the renunciation of their country, and for assuming a station for themselves, among the potentates of the world – a self-constituted sovereign – a self-constituted country. In the history of the human race this had never been done before.” John Quincy Adams, *The Jubilee of the Constitution*, (1839) (emphasis added).

²² As originally constituted, none of the thirteen original colonies had large inland seas of fresh water forming a border with Canada; therefore, it is no surprise that their wholesale adoption of the English common law would be somewhat unwieldy when applied by states bordering the Great Lakes. *Hardin v. Jordan* (1891), 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428, 1891 U.S. LEXIS 2472.

common law – particularly principles of the common law in England – should or should not apply to this case.

[¶23] Second, as framed by the “Notice of Joint Stipulation to Class Certification on Count One of the First Amended Complaint,” filed June 8, 2006, the court observes that it is being asked to issue a declaratory judgment that will define the following specific questions of law:

- 1) What constitutes the farthest landward boundary of the “territory” as that term appears in R.C. 1506.10 and 1506.11?
- 2) What is the proper interpretation of the term, “southerly shore” in R.C. 1506.10?
- 3) What is the proper interpretation of the term, “waters of Lake Erie” in R.C. 1506.10?
- 4) What is the proper interpretation of the term, “lands presently underlying the waters of Lake Erie” in R.C. 1506.11?
- 5) What is the proper interpretation of the phrase, “lands formerly underlying the waters of Lake Erie and now artificially filled” in R.C. 1506.11?
- 6) What is the proper interpretation of the term, “natural shoreline” in R.C. 1506.10 and 1506.11?
- 7) If the farthest landward boundary of the “territory” is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985)?
- 8) If the line may be located at the present time using the elevation of 573.4 feet IGLD (1985), does the State of Ohio hold title to all such “territory” as proprietor in trust for the people of the State?
- 9) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the “territory?”

[¶24] In reviewing the issues to be decided, the court also echoes the 19th Century observance of Chief Justice Kirkpatrick in *Arnold v. Mundy*,²³ where he observed that the issues in this kind of case raise new questions that have never before come before the courts of Ohio “in this shape,” involving questions of great importance, immense interests, and that lay at the foundation and extent of private property rights and the state’s ownership in trust of the waters and soil of Lake Erie.

²³ *Arnold v. Mundy* (1821), 6 N.J. 1, 1821 N.J.Sup.Ct. LEXIS 1.

[¶25] The court notes in passing that none of the issues currently before the court specifically calls for a declaration of the rights and responsibilities of the parties to lands governed by the federal Swamp Land Act of September 28, 1850. With respect to swamp lands, therefore, the court observes that property rights in such lands have been treated differently under both state²⁴ and federal law. Swamp lands are generally treated as property that can be transferred by the state in fee absolute to individuals and other persons, free of the public trust.²⁵

Historical development of the State of Ohio

[¶26] Questions of title and questions of history are inevitably tied together, and the present case is no exception. Accordingly, a brief review of the history of the creation of the State of Ohio is appropriate before entering into the legal analysis of the court.

[¶27] In 1800, while serving in the U.S. House of Representatives, John Marshall – the future Chief Justice of the United States Supreme Court – made a written report to the House of Representatives in Washington, D.C. in which he sought to communicate an accurate and official timeline and history of the origin of the “Western Reserve,” out of which the State of Ohio was established. That timeline and history can be summarized as follows:

Timeline and History of the Western Reserve

- 1497 King Henry VII, of England, obtained title to the northern continent of America by discovery first made and possession first taken under a commission given to Sebastian Cabot.
- 1606 April 10th, James I, King of England, granted a charter in response to an application by Sir Thomas Gates and others for a license to settle a colony in that part of America called Virginia, not possessed by any Christian prince or people. He divided the latitudinally-defined country into two colonies.

The first colony (Jamestown) consisted of the citizens of London and was defined as the east coast lands between the latitudes of 34 and 41 degrees north. Jamestown was given the exclusive right to license additional settlements toward the mainland beyond the initial grant of fifty miles of coastland, and other subjects of the King were expressly forbidden from settling in the back country without a written license from the colony.

²⁴ See, *Glass v. Goeckel* (2004), 262 Mich.App. 29, 683 N.W.2d 719, 2004 Mich. App. LEXIS 1229 (Court of Appeals noted that the Michigan statute governing the ordinary high water mark for Lake Huron specifically excepts “property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction”). See, *Sterling v. Jackson* (1888), 69 Mich. 488, 37 N.W. 845, 1888 Mich. LEXIS 754 (The federal Swamp Land Act of 1850 conveyed to the states in fee all lands within the purview of the act, and such title in fee became vested in the state from the date of the act. Accordingly, a state could grant to an individual title in fee to such lands.)

²⁵ *State v. Lake St. Clair Fishing and Shooting Club* (1901), 127 Mich. 580, 87 N.W. 117, 1901 Mich. LEXIS 1040.

The second colony (Plymouth) consisted of Thomas Hanham and others of the Town of Plymouth and was defined as consisting of east coast lands between the latitudes of 38 and 45 degrees north, with the proviso that no plantation be made within one hundred miles of a prior plantation.

By the same charter, the King agreed to give letters patent to the persons nominated or assigned by the council of each colony "as for the manor of East Greenwich, in the county of Kent, in free and common soccage²⁶ only, and not in capite.²⁷" The letters patent were intended to be assurance from the patentees that they would establish their plantations in accordance with the orders of the colony's council.

- 1609 May 23rd, King James gave the first colony (Jamestown) a second charter in which they were incorporated by the name of "The Treasurer and Company of Adventurers and Planters of the city of London, for the first colony of Virginia." This second charter, granted in response to the application of the colony, enlarged and explained the first grant.
- 1611 March 12th, King James granted the first colony (Jamestown) another charter, in response to the colony's request, extending the seaward reach of the grant from 100 miles to 300 leagues.²⁸ The new grant also extended the latitudinal boundary from 34 degrees north to 30 degrees north, provided always that none of the granted territory was actually possessed or inhabited by any other Christian prince or state, nor be within the bounds of the northern colony (Plymouth).
- 1620 November 3rd, King James gave a charter to the second colony (Plymouth) and declared that the land between the 40th and the 48th degrees of north latitude should be called "New England." He also incorporated a council at Plymouth, in the county of Devon, and granted to them and their successors all that part of America between 40 degrees to 48 degrees, "and in length of, and within all the said breadth aforesaid, throughout all the main lands, from sea to sea, together with all the firm lands, &c., upon the main, and within the said islands and seas adjoining." The charter also contained a proviso that excepted any lands "actually possessed or inhabited by any Christian prince or state" and any lands within the boundaries of the southern colony. The charter also commanded the council to distribute and assign lands within the charter to the adventurers as they should think proper. (emphasis added).
- 1624 July 15th, James I granted a commission for the government of Virginia. The commission stated that the previous charters for the first colony had been legally voided upon a quo warranto proceeding brought in England.

²⁶ "Socage." The modern spelling uses only one "c." The term means "A species of tenure, in England, whereby the tenant held certain lands in consideration of certain inferior services of husbandry to be performed by him to the lord of the fee. "Free" socage was viewed as a kind of service that was both honorable and certain. See Black's Law Dictionary, Revised Fourth Edition (1968).

²⁷ "Capite." Tenure in capite was an ancient feudal tenure, whereby a man held lands of the king immediately. See Black's Law Dictionary, Revised Fourth Edition (1968).

²⁸ A league is approximately 3 statute miles. Webster's New World Dictionary of the American Language (1968).

- 1624 August 20th, James I granted another commission for the government of Virginia, reciting again the voiding of the previous charters through a quo warranto proceeding that arose when the Treasurer and Company of the colony failed to submit their charters to be reformed.
- 1625 May 13th, Charles I proclaimed and declared – after alleging that the letters patent to the colony of Virginia had been legally questioned and then judicially repealed and adjudged void – that the government of the colony of Virginia shall immediately depend on the King and not be committed to any company or corporation. “From this time Virginia was considered a royal government, and it appears that the Kings of England, from time to time, granted commissions for the government of the same.” “The right of making grants of lands was vested in and solely exercised by the Crown.” “The colonies of Maryland, North and South Carolina, Georgia, and part of Pennsylvania, were erected by the Crown within the chartered limits of the first colony of Virginia.” (emphasis added).
- 1628 March 4th, The Council of Plymouth granted to Sir Henry Roswell, and others, a tract of land called Massachusetts.
- 1629 March 4th, King Charles I confirmed the sale of Massachusetts to Sir Henry Roswell and others and granted them a charter, but once again limited the grant with a proviso not to extend to lands possessed by a Christian prince, or within the limits of the southern colony.
- 1631 March 19th, the Earl of Warwick granted to Lord Say-and-Seal and others a described part of New England; the land had been previously granted to the Earl of Warwick by the council of Plymouth in 1630.
- 1635 June 7th, the council of Plymouth surrendered their charter to the Crown.
- 1635 Lord Say-and-Seal and other associates appointed John Winthrop their Governor and agent to take possession of their territory, which he did by beginning a settlement near the mouth of the Connecticut River. A number of English colonists began to emigrate from Massachusetts to the Connecticut river settlement because the Massachusetts settlers found themselves to be without the patent of that colony. They formed into a political association by the name of the Colony of Connecticut and purchased from Lord Say-and-Seal, and others, their 1631 grant from the Earl of Warwick.
- 1661 The Colony of Connecticut petitioned King Charles II for a charter of government that would reflect the history of the previous thirty years: (1) colonization; (2) adoption of a voluntary form of government; (3) their grant from Lord Say-and-Seal and others; (4) their acquisition by purchase and conquest. They sought power equal to that of the Massachusetts colony, or of the lords from whom they had purchased the land, and they sought confirmation of the grant or patent they had obtained from the assigns of the Plymouth council.

- 1662 King Charles II granted the requested charter in which he constituted and declared John Winthrop and others his associates, a body corporate and politic, by the name of the Governor and Company of the English Colony of Connecticut in New England, in America.
- 1664 March 12th, King Charles II granted to James, Duke of York a tract on the eastern coast of North America, from the St. Croix River in Nova Scotia to Long Island. This grant overlapped part of the lands included in the previous charter to Connecticut, and part of the grant to James, Duke of York also contained lands that had been settled by Christian nations prior to the charter of Connecticut. A dispute therefore arose between the Duke of York and the Colony of Connecticut respecting the bounds of their respective grants.
- 1664 April 23rd, King Charles sent a letter to the Governor and Company of Connecticut in which he speaks of having renewed their charter.
- 1664 October 13th, Commissioners arrived to resolve the boundary dispute, and the General Assembly of the Colony of Connecticut appointed agents to wait on the Commissioners. On November 30th, the Commissioners determined the proper boundaries of the disputed lands.
- 1673 June. New York was recovered by the Dutch, and their government was ceded by peace treaty in 1674.
- 1681 March 4th, Charles II granted Pennsylvania to William Penn.
- 1730 The Duke of York obtained a renewal of the patent, and claimed a re-settlement of New York, which was finally effected when the Biram River was established as the border.
- 1754 July 9th, "At a meeting of commissioners from sundry of the then colonies at Albany . . . it was, among other things, agreed and resolved . . . [t]hat his majesty's title to the northern continent of America appears to be founded on the discovery thereof first made, and the possession thereof first taken in 1497 under a commission from Henry VII of England to Sebastian Cabot. . . . That all lands or countries westward from the Atlantic ocean to the South Sea between 48° and 34° north latitude, was expressly included in the Grant of Charles I to divers of his subjects, so long since as the year 1606, and afterwards confirmed in 1620, and under this grant the colony of Virginia claims extent as far west as the South Sea; and the ancient colonies of the Massachusetts Bay and Connecticut were by their respective charters made to extend to the said South Sea: so that not only the right of the sea coast, but to all the inland countries from sea to sea, has, at all times, been asserted by the Crown of England."
- 1754 Some settlements were made from Connecticut on lands on the Susquehanna, about Wyoming,²⁹ within the chartered limits of Pennsylvania, and also within the chartered

²⁹ "Wyoming" refers not to the western state or territory, but rather to an area near Wilkes-Barre, Pennsylvania. See, http://en.wikipedia.org/wiki/Wyoming_Pennsylvania.

limits claimed by Connecticut, which produced a letter from the Governor of Connecticut to the Governor of Pennsylvania disclaiming any right to do so.

- 1755 May. The Susquehanna Company presented a petition to the General Assembly for Connecticut praying for the assent of the Legislature to a petition to his majesty for a new colony within the chartered limits of Connecticut and describing lands lying west of New York. The Legislature expressed their willingness to acquiesce if the King were to grant such a new colony.
- 1763 The Treaty of Paris resulted in the King of France ceding to the King of Great Britain all land in the Louisiana province of North America.
- 1774 The British parliament passed an Act declaring and enacting an annex to the Province of Quebec. The annex was bounded by the "eastern and southeastern bank of Lake Erie, following the bank until the same shall be intersected by the northern boundary, granted by the charter of the province of Pennsylvania, in case the same shall be so intersected; and from thence, along the said northern and western boundaries of said province, until the said western boundary strikes the Ohio. But in case the said bank of the said lake shall not be found to be so intersected, then . . . ; and northward to the southern boundary of the territory granted to the merchants, adventurers of England, trading to Hudson's bay. . . ." The Act also provided that this annex to Quebec would not affect the boundary of any other colony, and that the Act would not alter any rights under any grant or conveyance previously made to lands therein.³⁰ (emphasis added).
- 1779 August 31st, an agreement was concluded between commissioners duly appointed by Virginia and Pennsylvania resolving a boundary dispute concerning the Mason-Dixon line. Pennsylvania ratified this agreement on September 3, 1780.
- 1779 November 27th, the Legislature of Pennsylvania vested the estate of the proprietaries in the Commonwealth. The charter of Pennsylvania included part of the land in the charter of Connecticut (between the 41st and 42nd degrees of north latitude), giving rise to a dispute between the two colonies. Pursuant to the weak Articles of Confederation then in effect, the dispute came to a final decision before a court of commissioners on December 30, 1782. The commissioners concluded that the State of Connecticut had no right to the lands included in the charter of Pennsylvania, and that the State of Pennsylvania had the right of jurisdiction and pre-emption.
- 1780 September 6th, Congress passed a resolution calling upon the States having claims to the western country to surrender their claims liberally.
- 1783 October.³¹ Notwithstanding Connecticut's acquiescence in the decision of the commissioners resolving the 1779 boundary dispute with Pennsylvania, Connecticut did

³⁰ Marshall omits any reference in his timeline to the Declaration of Independence, which was signed on July 4, 1776.

³¹ Marshall also omits any reference to the Treaty of Paris, which officially concluded the American Revolutionary War, and which was signed on September 3, 1783.

- not abandon its claim to lands west of Pennsylvania. Connecticut passed an Act asserting that it had “undoubted and exclusive right of jurisdiction and pre-emption to all the lands lying west of the western limits of the State of Pennsylvania and east of the River Mississippi, and extending between latitude 41 degrees north and 42 degrees 2 minutes north. Connecticut claimed this land under the authority of the charter granted by King Charles II to the Colony (now State) of Connecticut, bearing the date of April 23rd, 1662.
- 1783 November 15th, Connecticut Governor Trumbull issued a proclamation stating the State of Connecticut intended to maintain its claim to the territory west of Pennsylvania.
- 1784 April 29th, Congress adopted a resolution urging the states to again consider ceding their claims on western lands.
- 1786 May. The State of Connecticut authorizes delegates to go to Congress and sign a deed of release and cession of lands west of Pennsylvania. On May 26th, 1786, congress resolved to accept the release and cession once the deed was presented for that purpose.
- 1786 September 14th, the delegates from Connecticut executed the deed of cession. Other similar cessions were made by Virginia, New York, and Massachusetts.
- 1786 October. The Connecticut Legislature passed an act directing the survey of “that part of their western territory not ceded to Congress, lying west of Pennsylvania, and east of the River Cayahoga [sic], to which the Indian right had been extinguished; and by the same act opened a land office.” Under this act, a part of the tract was sold.³²
- 1788 June 6th, Congress directed the geographer of the United States to ascertain the boundary between the United States and the States of New York and Massachusetts, agreeably to the deeds of cession of those states, and also directed that the meridian line between Lake Erie and the State of Pennsylvania being run, the land lying west of the said line, and between the State of Pennsylvania and Lake Erie, should be surveyed for sale. (Emphasis added).
- 1788 September 3rd, Congress passed a resolution transferring to Pennsylvania all rights to the land surveyed as being between Lake Erie and Pennsylvania.
- 1792 The Connecticut Legislature granted 500,000 acres (The Firelands) in the western part of the retained territory to certain citizens for property burned in the Connecticut cities of New London, New Haven, Fairfield, and Norwalk. Following these grants, many transfers of parts of this land were made for valuable consideration.
- 1795 May. The Connecticut Legislature passed a resolution appointing a committee to receive proposals for the purchase of the Connecticut lands west of Pennsylvania. The committee was authorized to negotiate, contract, and execute deeds to accomplish its purpose. The resolution limited the committee’s authority to contract by requiring that all

³² The sale of these lands, and other land sales that took place before Ohio became a state, support the position of plaintiffs-relators regarding whether pre-statehood transactions are relevant to determining the proper boundary of the trust territory today.

contracts for the sale of the entire territory be consummated together at one time, and that the purchasers would hold their respective parts as tenants in common of the whole tract or territory, and not in severalty. The committee's contract authority was also limited in that the minimum sale price was set at one million dollars "in specie" with interest at six percent per annum.

- 1795 September 9th, the Committee signed the quit-claim deeds to the Connecticut lands west of Pennsylvania.
- 1796 May 18th, Congress passed an act entitled, "An act providing for the sale of the lands of the United States Northwest of the River Ohio, and above the mouth of the Kentucky River."
- 1800 As of the date of Marshall's historical report to Congress, he also gave the following status report on the ten-current conditions in the Western Reserve:
- (1) The Legislature of Connecticut had appropriated the money arising from the sale of the lands for the support of schools, and had pledged the annual interest as a perpetual fund for that purpose;
 - (2) The purchasers had surveyed the entire tract east of the Cuyahoga River into townships five miles square;
 - (3) Thirty-five of the surveyed townships were already settled by about a thousand inhabitants;
 - (4) Mills had been built, and roads had been cut through the territory to the extent of seven hundred miles; and
 - (5) Numerous sales and transfers of parcels of land had been made.

[¶28] Congressman Marshall also stated, "As the purchasers of the land commonly called the Connecticut Reserve hold their title under the State of Connecticut, they cannot submit to the Government established by the United States in the Northwestern Territory, without endangering their titles, and the jurisdiction of Connecticut could not be extended over them without much inconvenience. Finding themselves in this situation, they have applied to the Legislature of Connecticut to cede the jurisdiction of the said territory to the United States. In pursuance of such application, the Legislature of Connecticut, in the month of October 1797, passed an act authorizing the Senators of the said State in congress to execute a deed of release on behalf of said State to the United States of the jurisdiction of said territory."

Continued Conflicting Title Claims in the Ohio region

[¶29] Subsequent to Congressman Marshall's March 21, 1800 report to Congress, on October 1, 1800, President Adams sent an American mission to Paris where they concluded a commercial treaty with the French. On the very same day, France purchased Louisiana from Spain in secret.

After the inauguration of Thomas Jefferson on March 4, 1801, by treaty signed April 30, 1803, Napoleon sold all the Louisiana territories which Spain had ceded to France. For fifteen million dollars, Louisiana was transferred to the United States.³³ But even this transfer of title to the enormous territory of approximately 530 million acres was not without its uncertainties. Some doubted whether Napoleon had the legal right to sign these lands away. Some were concerned that the title deed received by the United States was faulty. And some looked to the U.S. Constitution in vain for a clause that expressly empowered the federal government to carry out such an act.³⁴

[¶30] Although not noted in John Marshall's report to the House of Representatives in 1800, at the end of the Revolutionary War the British crown had surrendered its western lands as far as the Mississippi River to the United States under the terms of Article 2 of the Treaty of Paris signed September 3, 1783.³⁵ At that time, the British referred to these lands as "crown lands," and they were known to the colonists as "back lands" or "back country."³⁶

[¶31] In 1783, the interests in the land were many.³⁷ The British had previously won these lands from the French by the united arms of the King and the colonies. After the Treaty of Paris at the end of the American Revolution, the lands lying beyond the Ohio River were referred to in the public councils of the colonies and in the proceedings of Congress as "The Western Territory." Later, when the famous Ordinance of 1787 was passed, these lands became known as the "Northwest Territory."

³³ *A History of the English-Speaking Peoples, Vol III, The Age of Revolution*, by Winston S. Churchill (1957), pp. 285-286.

³⁴ President Jefferson claimed that the negotiations were valid under his treaty-making powers in the Constitution.

³⁵ It is interesting to note that, in keeping with the view of sovereignty first articulated by the Declaration of Independence in 1776, the Treaty of Paris – which constitutes the first official act by the United States of America among the nations of the world – begins with the following language: "In the name of the most holy and undivided Trinity. It having pleased the Divine Providence to dispose the hearts of the most serene and most potent Prince George the Third, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, duke of Brunswick and Lunebourg, arch-treasurer and prince elector of the Holy Roman Empire, etc., and of the United States of America, to forget all past misunderstandings and differences that have unhappily interrupted the good correspondence and friendship which they mutually wish to restore, and to establish such a beneficial and satisfactory intercourse, between the two countries upon the ground of reciprocal advantages and mutual convenience as may promote and secure to both perpetual peace and harmony . . . [they] have agreed upon and confirmed the following articles." Hence, the language of the treaty acknowledges that the sovereignty of the King of Great Britain and the sovereignty of the United States of America was subject to the disposition of "the Divine Providence."

³⁶ Dyer, Albion Morris, "First Ownership of Ohio Lands" (1969) as reprinted by the Genealogical Publishing Company, Baltimore, MD.

³⁷ "It would be difficult to find any country so covered with conflicting claims of title as the Territory of the Northwest." *Discovery and Ownership of the Northwestern Territory, and Settlement of the Western Reserve*, by James A. Garfield, (1873).

[¶32] Four colonies had covered the property with overlapping titles based on vague and confusing royal grants and Indian treaties.³⁸ During the period governed under the awkward and weak Articles of Confederation, the United States was expressly bound by the Articles to respect the claims of the various states to these lands. In addition, many tribes of Indians occupied the territory as hereditary owners, and their right of habitation had been confirmed to them by royal proclamation.³⁹ There were also complications from pledges of bounty land to members of the military, indeterminate grants within the territory to independent companies, squatters, and British garrisons still encouraging natives in their hostilities.⁴⁰ In short, when the United States took title to the Northwest Territory, there were many conflicting claims still to be resolved within the context of the “firm league of friendship” established by the Articles of Confederation.⁴¹

[¶33] As Congressman Marshall had made clear in his report to Congress, the presence of such title conflicts was nothing new to the Northwest Territory. As early as the summer of 1776, just prior to the issuance of the Declaration of Independence, and in the midst of threats of British invasion, the colony of Virginia had unilaterally claimed jurisdiction and possession of all lands and waters of the region between the Chesapeake frontage and the Mississippi River. Virginia warned off all intruders and announced intentions of setting up dependent territorial governments westward of the Allegheny Mountains.⁴² During a Maryland legislative convention held in late October 1776, delegates strongly opposed this land-grab by Virginia and voted to contest and deny Virginia’s title claim to these back lands. For some time thereafter, the Congress refused to consider the matter of the territorial lands, choosing instead to focus on the more pressing issues

³⁸ Dyer, Albion Morris, “*First Ownership of Ohio Lands*” (1969) as reprinted by the Genealogical Publishing Company, Baltimore, MD. Massachusetts and Connecticut rested their title claims on royal charters; New York claimed title by the historic deed of the Six Nations [of the Iroquois] as well as its charter of 1614; Virginia’s claim was rooted in the royal grants and European treaties as supported by the subsequent military achievement of Clark and Virginia’s claim by right of conquest. In addition, there were the claims of the Six Nations (settled by treaty in 1784); the claims of the four Western Tribes -- Wyandottes, Delawares, Chippewas, and the Tawas (settled by treaty in 1785); the claims of other tribes in the Maumee area (settled by treaty in 1795 following the military defeat of those tribes and their British allies). And finally, there were the unfulfilled promises of military bounty, including 150,000 acres promised by Virginia to George Rogers Clark and his officers and soldiers who captured the British ports in the West. But none of these claims had been tested by any court. *Discovery and Ownership of the Northwestern Territory, and Settlement of the Western Reserve*, by James A. Garfield, (1873).

³⁹ Dyer, Albion Morris, “*First Ownership of Ohio Lands*” (1969) as reprinted by the Genealogical Publishing Company, Baltimore, MD.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

pertaining to the Revolutionary War. Ultimately, however, Virginia's land grab gave way to its cessation of those western lands to the United States for the formation of additional states.⁴³

[¶34] Some of this title confusion was quieted by a series of legislative Acts and Deeds that began with a Congressional Act passed on December 2, 1799. Previously, on September 14, 1786, Congress had accepted a cession from the State of Connecticut of certain land, but that cession expressly excepted what was called "The Western Reserve." The 1799 Congressional Act then authorized the President to accept for the United States another cession of Connecticut's jurisdiction over the territory west of Pennsylvania, and to execute and deliver letters patent on behalf of the United States back to the Governor of the State of Connecticut "for the use and benefit of persons holding and claiming under the State of Connecticut, their heirs and assigns forever."

[¶35] The President's authority was made conditional on certain corresponding legislation being passed by the State of Connecticut within eight months. On the second Thursday in May 1800, the legislature of Connecticut followed suit by timely passing an Act renouncing its claims to the designated land. Thereafter, on March 2, 1801, President John Adams issued a patent conveying title back to the Governor of Connecticut and his successors in office forever "for the use and benefit of the persons holding and claiming title under the State of Connecticut."⁴⁴ All of this was done to try to quiet title in the designated land.

[¶36] Another interesting wrinkle in the origin of title claims along the southern shore of Lake Erie arises from an exception that was made in the treaty of January 1785, made at Fort McIntosh (now Beaver, Pennsylvania) in which the four signatory Indian tribes (Wyandottes, Delawares, Chippewas, and the Tawas) expressly retained an area of land described in the treaty as follows:

Except that portion bounded by a line from the mouth of the Cuyahoga up that river to the portage between the Cuyahoga and the Tuscarawas; thence down that branch to the mouth of the Sandy; thence westwardly to the portage of the Big Miami, which runs into the Ohio; thence along the portage to the Great Miami or Maumee, and down to southeast side of the river to its mouth; thence along the shore of Lake Erie to the mouth of the Cuyahoga. (Emphasis added).

⁴³ Id. This cessation by Virginia came in response to objections raised originally by the Maryland General Assembly.

⁴⁴ *Discovery and Ownership of the Northwestern Territory, and Settlement of the Western Reserve*, by James A. Garfield, (1873).

The territory thus described was declared to be forever the exclusive possession of these Indians.⁴⁵ The same territory west of the Cuyahoga was also expressly reserved to the Indian tribes in the treaty of August 3, 1795.⁴⁶ However, by treaty held at Fort Industry on July 4, 1805, between the commissioners of the Connecticut Land Company and the Indians, the Indians ceded all lands west of the Cuyahoga to the company.⁴⁷

[¶37] A final note that must be added has to do with what is now called the “Toledo War.” The Toledo War took place between the State of Ohio and the then Territory of Michigan in 1835 and 1836, and it reflects again the unsettled nature of title in the early years of the State of Ohio. The origin of the Toledo War was a boundary dispute between the State of Ohio and the territory of Michigan that arose when Michigan was attempting to become a state.

[¶38] When the Northwest Ordinance was enacted in 1787, the ordinance defined the territory as having a boundary on “an east and west line drawn through the southerly bend or extreme of Lake Michigan.” (emphasis added). However, at the time of the enactment of the Northwest Ordinance, the map on which Congress relied in enacting that ordinance – known as the “Mitchell Map” – erroneously showed the southern tip of Lake Michigan as being entirely north of Lake Erie. Under the boundary description in the proposed 1802 Ohio state constitution, this boundary location would have given Ohio access to most or all of the Lake Erie shoreline west of Pennsylvania, and would have excluded Michigan from having any shoreline access to Lake Erie.

[¶39] In the proposed Ohio Constitution of 1802, the northwestern border of the proposed State of Ohio was similarly described as “an east and west line drawn through the southern extreme of Lake Michigan (emphasis added), running east . . . until it shall intersect Lake Erie on the territorial line [with Canada]; thence with the same, through Lake Erie to the Pennsylvania line aforesaid.” However, by the time of the 1802 Ohio constitutional convention, there had been

⁴⁵ Id.

⁴⁶ Id. It should be pointed out that it was the well-established policy of the British crown and colonies that the title grant of an Indian tribe was not in itself sufficient to convey the right of property to an individual. Chief Justice Marshall agreed with that policy when he wrote, “a title to lands derived solely from a grant made by an Indian tribe northwest of the Ohio in 1773 and 1775 to private individuals cannot be recognized in the courts of the United States.” *Johnson’s Lessee v. M’Intosh* (1823), 21 U.S. 543, 5 L.Ed. 681, 1823 U.S. LEXIS 293, 8 Wheaton 543. In order to be valid, such transfers from Indian tribes had to be approved by the relevant public authority. Dyer, Albion Morris, “*First Ownership of Ohio Lands*” (1969) as reprinted by the Genealogical Publishing Company, Baltimore, MD.

⁴⁷ *Discovery and Ownership of the Northwestern Territory, and Settlement of the Western Reserve*, by James A. Garfield, (1873).

reports from a fur trapper that Lake Michigan's southern tip actually extended significantly farther south than had previously been believed or mapped. Hence, it was possible under the legal description of the boundaries of the state that the State of Ohio could lose all access to the Lake Erie shoreline west of Pennsylvania. As a precaution, the delegates added a proviso to the proposed 1802 Ohio Constitution that provided for an angled adjustment to the state boundary, northeast to the northerly cape of the Maumee Bay," if surveys revealed that the southern tip of Lake Michigan was, in fact, substantially farther south than Congress had believed in 1787. The proposed 1802 state constitution – including the proviso – was accepted by Congress in 1803, and Ohio became a state in February of that year.

Pleadings and procedural history of this case

First Amended Complaint Seeks Declaratory Judgment/Mandamus

[¶40] Plaintiffs filed their complaint for declaratory judgment, mandamus, and other relief on May 28, 2004. On July 2, 2004, plaintiffs filed their first amended complaint for declaratory judgment, mandamus, and other relief.

[¶41] The first amended complaint sought certification as a class action, and identified the following actual controversies between the parties: (1) whether the State of Ohio or the deeded lakeshore property owner has fee title to the lands located above the line of ordinary low water mark and below the "administratively arbitrary"⁴⁸ line of ordinary high water mark along the southern shore of Lake Erie; (2) whether plaintiffs' private property rights and title are defined by Ohio law, their deeds, and original patents, if any; (3) whether ODNR is unlawfully and unconstitutionally asserting and exercising ownership rights over real property that is not part of the public trust lands; (4) whether ODNR's policy is directly contrary to Ohio law, including R.C. §§1506.10 and 1506.11; (5) whether ODNR's contention – that plaintiffs are prohibited from using any land located below OHW, regardless of fee ownership of that land, unless and until plaintiffs agree to pay ODNR to lease that land from ODNR – is erroneous and contrary to Ohio law; and (6) whether ODNR's actions violate plaintiffs' rights under Article I, Section 19 of the Ohio Constitution and the Fifth Amendment of the United States Constitution.

[¶42] Having identified the foregoing actual controversies between the parties, plaintiffs' first amended complaint sought the following declaratory relief:

⁴⁸ Plaintiffs maintain that ODNR's use of High Water Mark as a fixed elevation determined most recently by the Army Corps of Engineers is the use of an arbitrary line, and that ODNR has no administrative authority to adopt such an arbitrary line as the uniform lakeward boundary of all property adjoining the southern shores of Lake Erie.

Declare plaintiffs own fee title between OHWM and actual boundary

[¶43] (1) declaratory judgment declaring that plaintiffs own their fee title to the lands located between OHW and the actual boundary of their properties, as defined by Ohio law (including the rules of accretion, avulsion, erosion, and reliction), their deeds, and their original patent;

Declare public trust does not apply to non-submerged lands

[¶44] (2) declaratory judgment declaring that the interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands;

Declare state lacks authority to compel owners to lease back to state

[¶45] (3) declaratory judgment declaring that ODNR lacks authority to compel plaintiffs, or any one of them, to lease back property already owned by them; and

Declare ODNR land leases to be void as to plaintiff's land below OHWM

[¶46] (4) declaratory judgment declaring that any current submerged land lease between ODNR and any of the plaintiffs is void and invalid as to any land below OHW but owned by the respective plaintiff. In addition, the plaintiffs requested that the court grant further relief, including injunctive relief, as necessary to carry out its declaratory judgment.

ODNR has unconstitutionally taken plaintiffs' land

[¶47] In Count II of the first amended complaint, plaintiffs assert that the actions of ODNR constitute an unconstitutional taking for which compensation is due under Article I, Section 19 of the Ohio Constitution and the Fifth Amendment of the U.S. Constitution. They also state that plaintiffs have no adequate remedy at law, and that ODNR has a legal duty to commence appropriation proceedings in the respective court of common pleas or probate court for each of the plaintiffs.

Plaintiffs are entitled to compensation for the taking of their land

[¶48] In Count III of the first amended complaint, plaintiffs assert in the alternative that, if ODNR is entitled to take and appropriate the lands owned by plaintiffs below the ordinary high water mark, then plaintiffs have a clear right to receive compensation from the State of Ohio for such takings or appropriation pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment of the U.S. Constitution, as a consequence of ODNR's taking of the plaintiffs' real property without rendering any compensation to plaintiffs. Once again, plaintiffs alleged they have no adequate remedy at law, and that ODNR has a legal duty to commence

appropriation proceedings in the respective court of common pleas or probate court for each of the plaintiffs.

[¶49] Plaintiffs' prayer for relief requested certification as a class action. On Count I, the prayer for relief requested a declaratory judgment as outlined above. On Count II, the prayer for relief requested a writ of mandamus compelling ODNR to commence appropriation proceedings. And on Count III, the prayer for relief requested in the alternative a similar writ of mandamus compelling ODNR to commence appropriation proceedings.

Answer, Counterclaim, and Cross Claim of ODNR

ODNR's Answer

Denial of all allegations and assertion of 17 affirmative defenses

[¶50] On February 23, 2005, Defendants-Respondents State of Ohio, Department of Natural Resources filed its Answer, Counterclaim, and Cross Claim. The answer raised 18 numbered defenses: (1) a paragraph-by-paragraph denial of the substance of the allegations of the complaint; (2) failure to state a claim upon which relief can be granted; (3) failure to state a claim upon which relief can be granted by the judiciary; (4) lack of jurisdiction over the subject matter; (5) failure to join all necessary and indispensable parties; (6) failure to meet the statutory requirements for a writ of mandamus; (7) failure to exhaust administrative remedies; (8) "Plaintiffs-Relators have no clear legal right to the relief they seek;" (9) "The State is under no duty to perform the acts requested by Plaintiffs-Relators;" (10) "Plaintiffs-Relators can have no more rights, title or interest than their predecessors in title;" (11) "Plaintiffs-Relators can have no more rights, title or interest than that granted under federal and state law;" (12) "No right, title, or interest by adverse possession can be acquired against the State;" (13) "Plaintiffs-Relators' claims may be time-barred by an applicable statute of limitations;" (14) "Plaintiffs-Relators' claims are barred by the doctrines of waiver, release, estoppel and laches;" (15) "Plaintiffs-Relators' claims are barred by the doctrines of res judicata and collateral estoppel;" (16) "Plaintiffs-Relators lack standing and ripeness;" (17) a catch-all denial of any allegations not specifically denied; and (18) a reservation of the right to add additional defenses as they may appear during discovery.

ODNR's Counterclaim

[¶51] The counterclaim of Defendants-Respondents State of Ohio made the following 47 allegations:

Federal law governs conveyances made by federal land grants

[¶52] (1) “The question of what rights, title and interest are conveyed in a federal grant of land bordering navigable bodies of water prior to the formation of a state is a question of federal law.”

Federal land grants convey no title below OHWM

[¶53] (2) “A federal grant of land bordering on a navigable body of water, known as upland, conveys no title below the ordinary high water mark of that navigable body of water, and does not impair the rights, title or interest of the future state to be created;” (3) “Plaintiffs-Relators’ respective predecessors in title were granted no title below the ordinary high water mark of Lake Erie by virtue of any federal grant;” (4) “Plaintiffs-Relators claim in their First Amended Complaint to ‘own fee title’ to the lands of Lake Erie below its ordinary high water mark by virtue of ‘their original patent,’ and that they are ‘entitled to an order of this Court declaring that . . . they own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by . . . their original patent.”

Federal law governs title to navigable waters received at statehood

[¶54] (5) “The question of what rights, title and interest a state receives at statehood with respect to navigable bodies of water within its territorial boundaries is a question of federal law.”⁴⁹

States’ title to navigable waters is by reservation, not constitutional grant

[¶55] (6) “Navigable waters, lands beneath navigable waters, and their contents were not granted by the Constitution to the United States, but were reserved to the States respectively;” (7) “Under the Equal Footing Doctrine each new state was granted the same rights, title and interest in the navigable bodies of water within that state’s territorial boundaries as that held by the original 13 states;” (8) “The State of Ohio is on equal footing with all of her sister states in this nation with regard to any navigable body of water reserved and granted to the State of Ohio at statehood within Ohio’s territorial boundaries.”

Federal common law says Ohio’s grant extends to OHWM

[¶56] (9) “Under Federal Common Law, in those states that contain non-tidal navigable waters, such as the Great Lakes, within their territorial boundaries, the original grant to the state extends

⁴⁹ After removal to federal district court, the federal court did not expressly decide the issue of whether this is a question of federal law; however, the dismissal of this case by the federal court would seem to indicate that it is not. If the issue had involved a federal question, presumably the district court would have retained jurisdiction over the case. Instead, the federal court found that there were no federal issues to be decided and remanded the case to this court.

to the ordinary high water mark, as that line denotes the common law boundary for navigable waters upon which the state's jurisdiction was made to depend, and not upon the ebb and flow of the tide."

Federal common law says U.S. retains navigational servitude

[¶57] (10) "Under Federal Common Law, the United States retained all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership."

FSLA confirmed States' title to submerged lands

[¶58] (11) "The federal Submerged Lands Act, 43 USCS 1301-1315, expressly confirmed the States' 'title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters' along with 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law.'"

FSLA defined "lands beneath navigable waters" up to OHWM

[¶59] (12) "The federal Submerged Lands Act, 43 USCS 1301-1315, expressly confirmed that the terms 'lands beneath navigable waters' means the following with respect to non-tidal navigable bodies of water: (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and water thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction; (2) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined."

FSLA confirmed that U.S. retained navigational servitude

[¶60] (13) "The federal Submerged Lands Act, 43 USCS 1301-1315, expressly confirmed that the United States retained all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership."

Lake Erie is a non-tidal navigable body of water

[¶61] (14) “Lake Erie is a non-tidal navigable body of water within the territorial boundaries of the State of Ohio.”

Navigable bodies of water include areas covered during high water

[¶62] (15) “A navigable body of water is not limited in its description to only that portion of it covered by water at any given moment, but that portion which is ordinarily covered by water during periods of naturally and routinely occurring high water.”

Ohio was granted title in trust up to OHWM at statehood in 1803

[¶63] (16) “The State of Ohio was granted⁵⁰ title in trust to the navigable waters of Lake Erie, the lands beneath the navigable waters of Lake Erie, and their contents up to the ordinary high water mark of Lake Erie at its statehood in 1803, subject only to the superior authority retained by the United States in its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.”

[¶64] (17) “Plaintiffs-Relators dispute in their First Amended Complaint that the State of Ohio holds title to all lands below the ordinary high water mark of Lake Erie, and that ‘Plaintiffs are entitled to an order of this Court declaring that . . . the interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands.’”

After statehood, title below OHWM is governed by state law

[¶65] (18) “Federal law and Ohio law hold that after statehood, the title and rights of riparian (upland that borders a river, stream, or other such watercourse) or littoral (upland that borders an ocean, lake, or the bay of such body of water) proprietors in the soil below the ordinary high water mark are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.”

Ohio has granted wharfing, access, and reasonable use rights to owners

[¶66] (19) “The State of Ohio has granted the following three littoral rights to owners of uplands bordering Lake Erie which they may exercise upon the soil and navigable waters below

⁵⁰ The court notes the defendants’ use of the passive voice in alleging that the State of Ohio “was granted” title in trust to the navigable waters. This grammatical usage obscures the identity of the alleged grantor. Elsewhere, defendants acknowledge that the original 13 sovereign States obtained title to their land not by federal grant, but rather by reservation of their pre-existing title when they joined the United States, and that subsequent states, such as Ohio, obtained similar title under the Equal Footing Doctrine.

the ordinary high water mark of Lake Erie within the territorial boundaries of the State, subject to regulation and control by the Federal, State and Local governments, and provided that the littoral owner does not interfere with public rights: (1) the right to wharf out to navigable waters to the point of navigability for the purposes of navigation; (2) the right of access to the navigable waters of Lake Erie, and; (3) the right to make reasonable use of the waters in front of or flowing past their lands.”

Littoral rights are not titles to land, but rather licenses or franchises

[¶67] (20) “Pursuant to Ohio’s public trust doctrine, littoral rights appurtenant to upland property in the State of Ohio are not titles to land but are licenses or franchises entirely subject and subservient to the power and authority of the State as proprietor in trust of the lands, waters and contents of Lake Erie and the United States with its supreme authority over navigation, commerce, national defense, and international affairs.”

Ohio law governs movements in the recognized OHWM

[¶68] (21) “Plaintiffs-Relators claim in their First Amended Complaint that the ‘trust ownership by the state of the waters of Lake Erie and the soil beneath . . . is expressly made subject to the property rights of littoral owners.’”

[¶69] (22) “Ohio law recognizes doctrines and legal principles that apply to the following natural and artificial changes to land bordering navigable waters, or the waters themselves, which do or do not result in a loss or gain of title as a matter of law, and a corresponding movement of the location of the ordinary high water mark of Lake Erie: (1) erosion⁵¹; (2) accretion⁵²; (3) submergence⁵³; (4) reliction⁵⁴; (5) avulsion⁵⁵; and (6) artificial fill or other artificial changes.”

[¶70] (23) “Plaintiffs-Relators claim in their First Amended Complaint that ‘the lakeward property line of a littoral owner whose ownership extends to Lake Erie is a ‘moveable freehold’

⁵¹ “Erosion. The gradual eating away of the soil by the operation of currents or tides.” Black’s Law Dictionary, Fourth Edition (1968).

⁵² “Accretion. The act of growing to a thing; usually applied to the gradual and imperceptible accumulation of land by natural causes, as out of the sea or a river.” Black’s Law Dictionary, Fourth Edition (1968).

⁵³ “Submergence. The disappearance of land under water and the formation of a more or less navigable body over it.” Black’s Law Dictionary, Fourth Edition (1968).

⁵⁴ “Reliction. An increase in the land by the permanent withdrawal or retrocession of the sea or a river.” Black’s Law Dictionary, Fourth Edition (1968).

⁵⁵ “Avulsion. The removal of a considerable quantity of soil from the land of one man, and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water.” Black’s Law Dictionary, Fourth Edition (1968).

in that it can move either lakeward or landward [by] virtue of accretion, erosion, or reliction,' and that 'Plaintiffs are entitled to an order of this Court declaring that . . . Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by Ohio law (including rules of accretion, avulsion, erosion, and reliction)."

Public rights in the navigable waters of Lake Erie

[¶71] (24) "Ohio law recognizes the following public rights that exist in the lands and navigable waters of Lake Erie: (1) navigation; (2) commerce; (3) fishery; and (4) recreation."

[¶72] (25) "Plaintiffs-Relators recognize in their First Amended Complaint only 'the public uses of navigation, water commerce, and fishery.'"

Ohio's public trust law prior and subsequent to the Fleming Act of 1917

[¶73] (26) "Ohio law, establishing Ohio's public trust doctrine, held the following prior to and subsequent to the enactment of the Fleming Act of 1917 (current R.C. 1506.10-11, hereinafter "the Act"): (1) The State, as trustee for the people of the State, is the custodian of the legal title in the lands beneath the navigable waters of Lake Erie, charged with the specific duty of protecting the trust estate and regulating its use; (2) an individual may abandon his private property, but a public trustee cannot abandon public property; (3) The State cannot abdicate its trust over property in which the whole people are interested, like navigable waters of Lake Erie and soils under them, so as to leave them entirely under their use and control of private parties; (4) Lands under navigable waters of Lake Erie cannot be placed entirely beyond the direction and control of the State; (5) The ownership of the navigable waters of Lake Erie and the lands under them is a subject of public concern to the whole people of the State, and that the trust with which they are held is governmental and cannot be alienated."

Defining "natural shoreline" and "southerly shore" (RC 1506.10-11)

[¶74] (27) "The Act contains the terms 'natural shoreline' and 'southerly shore' in reference to the extent of the State's rights, title and interest as proprietor in trust for the people of the State in the lands beneath the navigable waters of Lake Erie in the State of Ohio."

[¶75] (28) "The terms 'natural shoreline' and 'southerly shore' are ambiguous terms that must be interpreted under Ohio's canons of statutory construction."

[¶76] (29) "Under Ohio's canons of statutory interpretation and pursuant to Ohio's public trust doctrine, the terms 'natural shoreline' and 'southerly shore' can mean nothing other than the natural location of the ordinary high water mark of Lake Erie, for the State, as trustee for the

people of the State, cannot abandon or alienate the title it has held in trust since statehood to any portion of the lands, waters and contents below the ordinary high water mark of Lake Erie.”

[¶77] (30) “The Act did not purport to change the common law with regard to navigable waters in this State and did not purport to grant title in the lands beneath the navigable waters of Lake Erie to owners of uplands bordering Lake Erie within the territorial boundaries of the State.”

Ohio has never granted or abandoned title below OHWM

[¶78] (31) “The State of Ohio has never granted title in the soil below the ordinary high water mark of Lake Erie to owners of uplands bordering Lake Erie within the territorial boundaries of the State, nor abandoned its title to the same.”

[¶79] (32) “Pursuant to Ohio’s public trust doctrine, the State, as trustee for the people of the State, cannot grant fee simple title in the soil below the ordinary high water mark of Lake Erie to owners of uplands bordering Lake Erie within the territorial boundaries of the State, as such would result in an abdication of the public trust forbidden by Ohio law.”

Ohio has never granted littoral rights of exclusive use along Lake Erie

[¶80] (33) “The State of Ohio has never granted any littoral right of exclusive use of lands beneath the ordinary high water mark of Lake Erie to owners of uplands bordering Lake Erie within the territorial boundaries of the State.”

[¶81] (34) “Only the Ohio General Assembly may grant a littoral right to owners of uplands bordering Lake Erie within the territorial boundaries of the State, provided that said right remains subject to the regulation and control by the Federal, State and Local governments and provided that the littoral owner does not interfere with public rights in the exercise of the right.”

[¶82] (35) “Neither Plaintiffs-Relators, nor their respective predecessors in title, have been granted any title interest, or littoral right to exclusive use, below the ordinary high water mark of Lake Erie by the State of Ohio.

Plaintiffs claim fee title below OHWM under Ohio law and their deeds

[¶83] (36) “Plaintiffs-Relators claim in their First Amended Complaint to ‘own fee title’ to the lands of Lake Erie below its ordinary high water mark by virtue of ‘Ohio law’ and ‘their deeds’ and that they are ‘entitled to an order of this Court declaring that . . . Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by . . . Ohio law and ‘their deeds.’”

[¶84] (37) “Plaintiffs-Relators dispute in their First Amended Complaint that the State of Ohio holds title to all lands below the ordinary high water mark of Lake Erie, and [sic] that ‘Plaintiffs are entitled to an order of this Court declaring that . . . the interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands.’”

Locating the ordinary high water mark

[¶85] (38) “Ohio law is silent as to a preferred process by which to locate the natural location of the ordinary high water mark of Lake Erie for the purposes of the care, protection, and enforcement of the State’s rights and duties under the Act.”

[¶86] (39) “When state law is silent or unclear, it is proper to rely upon federal law.”

[¶87] (40) “Pursuant to 33 CFR 329.11, the United States Army Corps of Engineers (hereinafter “the Corps”) has defined its geographic and jurisdictional limits over navigable waters of the United States with regard to navigable lakes to include all the land and waters below the ordinary high water mark.”

[¶88] (41) “The Corps has defined the current elevation of the ordinary high water mark of Lake Erie as 573.4 International Great Lakes Datum (1985).”

[¶89] (42) “Plaintiffs-Relators claim in their First Amended Complaint that ‘ODNR recently has asserted and continues to assert and maintain that the State of Ohio owns all land lakeward of ‘ordinary high water mark’ or “OHW,’ which for administrative convenience, the ODNR currently defines as wherever the U.S. Army Corps of Engineers defines Ordinary High Water for purposes of federal law (currently a fixed line running at 573.4 feet above International Great Lakes Datum (1985)),’ and that this line of the ordinary high water mark is ‘administratively arbitrary.’”

Under Ohio law, the State authorizes all improvements below OHWM

[¶90] (43) “Pursuant to Ohio law, the Act, and the administrative regulations promulgated thereunder, any improvements or developments occupying the lands beneath the natural location of the ordinary high water mark of Lake Erie must be authorized by the State.”

[¶91] (44) “Plaintiffs-Relators are required to obtain authorization from the State pursuant to Ohio law, the Act, and the administrative regulations promulgated thereunder, for any improvements or developments of Plaintiffs-Relators occupying the lands beneath the natural location of the ordinary high water mark of Lake Erie.”

[¶92] (45) “Plaintiffs-Relators claim in their First Amended Complaint that ‘ODNR has forced some littoral owners wishing to use their private property located below OHW to lease that land – which is owned in fee by the littoral owners – the state’ and that ‘except pursuant to a lease, the issuance and terms of which are wholly within the power of ODNR, ODNR maintains that no littoral owner may make use of its own property, or exclude others from its property, as long as that property lies below OHW.’”

[¶93] (46) “Plaintiffs-Relators claim in their First Amended Complaint that ‘Plaintiffs are entitled to an order of this Court declaring that . . . ODNR lacks authority to compel Plaintiffs, or any of them, to lease back property already owned by them’ and ‘any current submerged land lease between ODNR and any of Plaintiffs is declared void and invalid as to any land below OHW but owned by Plaintiffs.’”

Declaratory judgment must resolve these actual, justiciable controversies

[¶94] (47) “The allegations contained within Plaintiffs-Relators’ First Amended Complaint have demonstrated that an actual and justiciable controversy regarding the State’s rights, title and interest in the land beneath the navigable waters of Lake Erie, and Plaintiffs’ alleged rights therein, may exist and that a declaratory judgment is necessary and appropriate to resolve that controversy.”

ODNR’s Prayer for Declaratory Relief on Counterclaim

[¶95] Defendants-Respondents/Counterclaimants seek six forms of declaratory relief declaring:

State of Ohio holds title as trustee up to OHWM

[¶96] (a) “The State of Ohio holds title and superior rights and interest as Trustee for the people of the State to the lands and waters of Lake Erie, up to the natural location of the ordinary high water mark of Lake Erie within the territorial boundaries of the State of Ohio, subject only to the paramount authority retained by the United States in its navigational servitude over those same lands and waters, along with its rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, and has so held since statehood.”

Ohio never granted or abandoned title to land below OHWM

[¶97] (b) “The State of Ohio has never granted any title in the soil below the ordinary high water mark of Lake Erie to owners of uplands bordering Lake Erie within the territorial boundaries of the State, nor abandoned its title to same.”

Landowners hold 3 littoral rights: wharfage, access, and reasonable use

[¶98] (c) “Plaintiffs-Relators, if adjudged to be upland owners bordering Lake Erie in the State of Ohio, hold the following three littoral rights which they may exercise upon the soil and navigable waters below the ordinary high water mark of Lake Erie within the territorial boundaries of the State, subject to regulation and control by the Federal, State and Local governments, and provided they do not interfere with public rights: (1) the right to wharf out to navigable waters to the point of navigability for the purposes of navigation; (2) the right of access to the navigable waters of Lake Erie; and (3) the right to make reasonable use of the waters in front of or flowing past their lands. These littoral rights appurtenant to upland property in the State of Ohio are not titles to land but are licenses or franchises entirely subject and subservient to the power and authority of the State as proprietor in trust of the lands, waters and contents of Lake Erie and the United States with its supreme authority over navigation, commerce, national defense, and international affairs.”

Plaintiffs have no title and no exclusive right below OHWM

[¶99] (d) “Plaintiffs-Relators have no title and no right of exclusive use in the soil below the ordinary high water mark of Lake Erie within the territorial boundaries of the State.”

573.4 IGLD (1985) is not arbitrary for determining OHWM

[¶100] (e) “The Corps’ methodology in its determination of the current elevation of the ordinary high water mark of Lake Erie as 573.4 International Great Lakes Datum (1985) is not arbitrary. It is an acceptable methodology for determining the upper boundary of non-tidal navigable waters of the United States, and may be properly relied upon by the State of Ohio in its determination of that boundary over those same non-tidal navigable waters which were granted⁵⁶ to the state at statehood, until such time as Ohio law provides another methodology for the State’s determination of the natural location of the ordinary high water mark of Lake Erie.”

Plaintiffs must get permission from ODNR to improve below OHWM

[¶101] (f) “Plaintiffs-Relators are required to obtain authorization from the State pursuant to Ohio law, the Act, and the administrative regulations promulgated thereunder, for any

⁵⁶ Again, the court notes that Ohio’s title to its non-tidal navigable waters was not “granted” to it at statehood. Under the Equal Footing Doctrine, it is more accurate to say that the State of Ohio entered the United States by *retaining* its title to the lands and non-tidal navigable waters that it previously held as a Territory governed by the Northwest Ordinance.

improvements or developments of Plaintiffs-Relators occupying the lands beneath the natural location of the ordinary high water mark of Lake Erie.

ODNR's Cross Claim against the United States and Army Corps⁵⁷

[¶102] ODNR's cross claim made the following allegations:

Federal law governs the scope of pre-statehood federal land grants

[¶103] (1) "The question of what rights, title and interest are conveyed in a federal grant of land bordering navigable bodies of water prior to the formation of a state is a question of federal law."

Federal land grants, pre-statehood, convey no title below OHWM

[¶104] (2) "A federal grant of land bordering on a navigable body of water, known as upland, conveys no title below ordinary high water mark of that navigable body of water, and does not impair the rights, title or interest of the future state to be created."

[¶105] (3) "Plaintiffs-Relators' respective predecessors in title were granted no title below ordinary high water mark of Lake Erie by virtue of any federal grant."

Plaintiffs claim to own fee title below OHWM by their original patent

[¶106] (4) "Plaintiffs-Relators claim in their First Amended Complaint to "own fee title" to the lands of Lake Erie below its ordinary high water mark by virtue of "their original patent" and that they are entitled to an order of this Court that . . . Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by . . . their original patent."

⁵⁷ The court notes that neither the complaint nor the first amended complaint named the United States or the Army Corps of Engineers as a defendant. Accordingly, the filing and service of the defendants' cross claim on February 23, 2005, is procedurally defective as a cross claim. It should have been styled as a third party complaint. Additionally, the service of the cross claim by regular U.S. mail, as recited in the certificate of service, failed to join the United States and the Army Corps of Engineers as parties to this case. Nevertheless, it appears from the docket that the cross claim was also served on the cross claim defendants by certified mail on February 25, 2005 and March 3, 2005.

It appears from the docket of the federal district court that the United States and the Army Corps responded to the cross claim by filing a removal to federal court on March 28, 2005 (Case No. 1:05-cv-00818-SO). The notice of removal made no mention of any defect in the cross claim. The federal case was terminated when the District Court remanded the case to this court, and the remanding order of the district court lists the United States and the Army Corps as cross-defendants.

Neither the United States, nor the Army Corps has responded to the cross claim or otherwise defended or entered an appearance in this case. For purposes of summary judgment, the court has an obligation to consider all the pleadings. Therefore, even though the cross claim in this case may have been ineffective in joining the United State and the Army Corps as parties, the court nonetheless has considered the cross claim as one of the pleadings in order to properly frame the issues raised by the parties.

Federal law governs the scope of rights received at statehood

[¶107] (5) “The question of what rights, title and interest a state receives at statehood with respect to navigable bodies of water within its territorial boundaries is a question of federal law.”

Navigable waters were reserved by the States

[¶108] (6) “Navigable waters, lands beneath navigable waters, and their contents were not granted by the Constitution to the United States of America . . . but were reserved the States respectively.”

Equal Footing Doctrine gives Ohio same rights as original 13 States

[¶109] (7) “Under the Equal Footing Doctrine each new state was granted the same rights, title and interest in the navigable bodies of water within that state’s territorial boundaries as that held by the original 13 states.”

[¶110] (8) “The State of Ohio is on equal footing with all of her sister states in this nation with regard to any navigable body of water reserved and granted to the State of Ohio at statehood within Ohio’s territorial boundaries.”

Under federal common law, original grant to State was to OHWM

[¶111] (9) “Under federal common law, in those states that contain non-tidal navigable waters, such as the Great Lakes, within their territorial boundaries, the original grant to the state extends to the ordinary high water mark, as that line denotes the common law boundary for navigable waters upon which the state’s jurisdiction was made to depend, and not upon the ebb and flow of the tide.

Under federal common law, U.S. retained its navigational servitude

[¶112] (10) “Under federal common law, the United States retained all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership.”

FSLA confirmed States’ title to submerged lands

[¶113] (11) “The federal Submerged Lands Act, 43 USCS 1301-1315, expressly confirmed the States’ ‘title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters’ along with the

‘right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law.’”

FSLA defined “lands beneath navigable waters” up to OHWM

[¶114] (12) “The federal Submerged Lands Act, 43 USCS 1301-1315, expressly confirmed that the terms “lands beneath navigable waters” means the following with respect to non-tidal navigable bodies of water: (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and water thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction; (2) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined.”

FSLA confirmed that U.S. retained navigational servitude

[¶115] (13) “The federal Submerged Lands Act, 43 USCS 1301-1315, expressly confirmed that the United States retained all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership.”

Lake Erie is a non-tidal navigable body of water

[¶116] (14) “Lake Erie is a non-tidal navigable body of water within the territorial boundaries of the State of Ohio.”

Navigable bodies of water include areas covered during high water

[¶117] (15) “A navigable body of water is not limited in its description to only that portion of it covered by water at any given moment, but that portion which is ordinarily covered by water during periods of naturally and routinely occurring high water.”

Ohio was granted title in trust up to OHWM at statehood in 1803

[¶118] (16) “The State of Ohio was granted⁵⁸ title in trust to the navigable waters of Lake Erie, the lands beneath the navigable waters of lake Erie, and their contents up to the ordinary high water mark of Lake Erie at its statehood in 1803, subject only to the superior authority retained by the United States in its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.”

[¶119] (17) “Plaintiffs-Relators dispute in their First Amended Complaint that the State of Ohio holds title to all lands below the ordinary high water mark of Lake Erie, and that ‘Plaintiffs are entitled to an order of this Court declaring that . . . the interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands.’”

After statehood, title below OHWM is governed by state law

[¶120] (18) “Federal law and Ohio law hold that after statehood, the title and rights of riparian (upland that borders a river, stream, or other such watercourse) or littoral (upland that borders an ocean, lake, or the bay of such body of water) proprietors in the soil below the ordinary high water mark are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.”

Ohio has granted wharfing, access, and reasonable use rights to owners

[¶121] (19) “The State of Ohio has granted the following three littoral rights to owners of uplands bordering Lake Erie which they may exercise upon the soil and navigable waters below the ordinary high water mark of Lake Erie within the territorial boundaries of the State, subject to regulation and control by the Federal, State and Local governments, and provided that the littoral owner does not interfere with public rights: (1) the right to wharf out to navigable waters to the point of navigability for the purposes of navigation; (2) the right of access to the navigable waters of Lake Erie, and; (3) the right to make reasonable use of the waters in front of or flowing past their lands.”

⁵⁸ The court again notes the defendants’ use of the passive voice in alleging that the State of Ohio “was granted” title in trust to the navigable waters. As noted above, this grammatical usage obscures the identity of the alleged grantor. Elsewhere, defendants acknowledge that the original 13 sovereign States obtained title to their land not by federal grant, but rather by reservation of their pre-existing title when they joined the United States, and that subsequent states, such as Ohio, obtained similar title under the Equal Footing Doctrine.

Littoral rights are not titles to land, but rather licenses or franchises

[¶122] (20) “Pursuant to Ohio’s public trust doctrine, littoral rights appurtenant to upland property in the State of Ohio are not titles to land but are licenses or franchises entirely subject and subservient to the power and authority of the State as proprietor in trust of the lands, waters and contents of Lake Erie and the United States with its supreme authority over navigation, commerce, national defense, and international affairs.”

Ohio law governs movements in the recognized OHWM

[¶123] (21) “Plaintiffs-Relators claim in their First Amended Complaint that the ‘trust ownership by the state of the waters of Lake Erie and the soil beneath . . . is expressly made subject to the property rights of littoral owners.’”

Locating the ordinary high water mark as 573.4 IGLD (1985)

[¶124] (22) “Ohio law is silent as to a preferred process by which to locate the natural location of the ordinary high water mark of Lake Erie for the purposes of the care, protection, and enforcement of the State’s rights and duties under the Act.”

[¶125] (23) “When state law is silent or unclear, it is proper to rely upon federal law.”

[¶126] (24) “Pursuant to 33 CFR 329.11, the United States Army Corps of Engineers (hereinafter “the Corps”) has defined its geographic and jurisdictional limits over navigable waters of the United States with regard to navigable lakes to include all the land and waters below the ordinary high water mark.”

[¶127] (25) “The Corps has defined the current elevation of the ordinary high water mark of Lake Erie as 573.4 International Great Lakes Datum (1985).”

[¶128] (26) “Plaintiffs-Relators claim in their First Amended Complaint that ‘ODNR recently has asserted and continues to assert and maintain that the State of Ohio owns all land lakeward of ‘ordinary high water mark’ or ‘OHW,’ which for administrative convenience, the ODNR currently defines as wherever the U.S. Army Corps of Engineers defines Ordinary High Water for purposes of federal law (currently a fixed line running at 573.4 feet above International Great Lakes Datum (1985)),’ and that this line of the ordinary high water mark is ‘administratively arbitrary.’”

State of Ohio's federally-approved coastal zone management program

[¶129] (27) “The State of Ohio has a federally approved Coastal Management Program under the federal Coastal Zone Management Act, 16 USCS 1451–1465 (hereinafter “the CZMA”) and its corresponding federal regulations, 15 CFR Part 930.”

[¶130] (28) “The State of Ohio’s Department of Natural Resources (hereinafter “ODNR”) is designated as the “State agency” under the Ohio Coastal Management Program (hereinafter “OCMP”), the CZMA, and its regulations.”

[¶131] (29) “Pursuant to the CZMA and its regulations, a designated State agency is required to uniformly and comprehensively apply the enforceable policies of the State’s management program.”

OCMP Enforceable Policy 16 requires state approval of improvements

[¶132] (30) “Enforceable Policy 16 – Public Trust lands, is an enforceable policy of the OCMP that relies upon Ohio’s public trust doctrine and Ohio statutory law found at Ohio Revised Code Sections 1506.10–.11, and the administrative regulations promulgated thereunder at Ohio Administrative Code Sections 1501-6-01–06.

[¶133] (31) “Pursuant to Ohio law referenced in Enforceable Policy 16 of the OCMP, Plaintiffs-Relators are required to obtain authorization from the State for their improvements or developments occupying lands beneath the natural location of the ordinary high water mark of Lake Erie within the territorial boundaries of the State of Ohio.”

If Plaintiffs prevail, Ohio will lose federal approval of its OCMP

[¶134] (32) “Should Plaintiffs-Relators prevail in this action, ODNR will be unable to uniformly and comprehensively apply Enforceable Policy 16 of the OCMP, and the State of Ohio will lose federal approval of the OCMP, as the State of Ohio will no longer hold and will not be able to manage the lands beneath the navigable waters of Lake Erie, but will only be able to manage those lands of Lake Erie covered by water from moment to moment.”

Plaintiffs dispute ODNR's authority to require leases below OHWM

[¶135] (33) “Plaintiffs-Relators claim in their First Amended Complaint that ‘ODNR has forced some littoral owners wishing to use their private property located below OHW to lease that land – which is owned in fee by the littoral owners – from the state’ and that ‘except pursuant to a lease, the issuance and terms of which are wholly within the power of ODNR,

ODNR maintains that no littoral owner may make use of its own property, or exclude others from its property, as long as that property lies below OHW.”

[¶136] (34) “Plaintiffs-Relators claim in their First Amended Complaint that ‘Plaintiffs are entitled to an order of this Court declaring that . . . ODNR lacks authority to compel Plaintiffs, or any one of them, to lease back property already owned by them’ and ‘any current submerged land lease between ODNR and any of the Plaintiffs is declared void and invalid as to any land below OHW but owned by Plaintiffs.’”

There is an actual and justiciable controversy between the parties

[¶137] (35) “The allegations contained within Plaintiffs-Relators’ First Amended Complaint have demonstrated that an actual and justiciable controversy regarding the respective rights, title, interests, duties, and authority of the United States, the Corps, and the State of Ohio in the lands beneath the navigable waters of Lake Erie, and the Plaintiffs’ alleged rights therein, may exist and that a declaratory judgment is necessary and appropriate to resolve that controversy.”

[¶138] (36) “The United States and the Corps claim certain rights, interests, duties, and authority pertaining to the lands beneath and the navigable waters of Lake Erie within the territorial boundaries of the State of Ohio, and in any upland property bordering Lake Erie in the State of Ohio to which the United States may claim title.”

[¶139] (37) “The State of Ohio is unable to represent and defend the rights, interests, duties and authority of the United States and the Corps in the lands beneath and the navigable waters of Lake Erie, or in any upland property bordering Lake Erie in the State of Ohio to which the United States may claim title, which will be impacted in this case.”

[¶140] (38) “The disposition of this action in the absence of the United States and the Corps will prevent complete relief from being accorded to the parties and may as a practical matter impair and impede the ability of the United States and the Corps from protecting their rights, interests, duties and authority in the lands beneath and the navigable waters of Lake Erie, or in any upland property bordering Lake Erie in the State of Ohio to which the United States may claim title.”

Prayer for Relief in Defendants' Cross Claim

[¶141] Defendants' prayer for relief in the cross claim sought a declaratory judgment asserting six things:

[¶142] (a) Under federal law, at statehood, the State of Ohio received title as proprietor in trust to the land and waters of Lake Erie up to the natural location⁵⁹ of the ordinary high water mark subject only to the servitudes retained by the United States.

[¶143] (b) Plaintiffs-Relators have obtained no title and no right of exclusive use in the soil below the ordinary high water mark of Lake Erie within the territorial boundaries of the State from the United States superior to the rights, title and interest of the State of Ohio.

[¶144] (c) If Plaintiffs-Relators are littoral landowners, then they have the following littoral rights: (1) to wharf out to navigable waters to the point of navigability; (2) to access the navigable waters of Lake Erie; and (3) to make reasonable use of the waters in front of or flowing past their lands.

[¶145] "These littoral rights appurtenant to upland property in the State of Ohio are not titles to land but are licenses or franchises entirely subject and subservient to the power and authority of the State as proprietor in trust of the lands, waters and contents of Lake Erie and the United States with its supreme authority over navigation, commerce, national defense and international affairs."

[¶146] (d) "The Corps' methodology in its determination of the current elevation of the ordinary high water mark of Lake Erie as 573.4 International Great Lakes Datum (1985) is not arbitrary. It is an acceptable methodology for determining the upper boundary of non-tidal navigable waters of the United States, and may be properly relied upon by the State of Ohio in its determination of that boundary over those same non-tidal navigable waters which were granted⁶⁰ to the state at statehood, until such time as Ohio law."

⁵⁹ As established by the materials attached to the motions for summary judgment and the respective briefs in support and in opposition, we live in an age in which both the influx of water from the upper Great Lakes into the western basin of Lake Erie, and the outflow of water from the eastern basin of Lake Erie, can be artificially controlled to some extent. This artificial manipulation, in turn, can have an effect on the location of the water's edge. In this modern context, therefore, reference to the "natural" location of the ordinary high water mark is a misnomer.

⁶⁰ Again, the court notes that Ohio's title to its non-tidal navigable waters was not "granted" to it at statehood. Under the Equal Footing Doctrine, it is more accurate to say that the State of Ohio entered the United States by *retaining* its title to the lands and non-tidal navigable waters that it previously held as a Territory governed by the Northwest Ordinance.

[¶147] (e) Plaintiffs-Relators are required to obtain all required federal and state authorizations for any improvements or developments of Plaintiffs-Relators occupying the lands beneath the ordinary high water mark of Lake Erie.

[¶148] (f) ODNR's ability to uniformly and comprehensively apply Enforceable Policy 16 of the OCMP is not impaired, and federal approval of the OCMP is not impaired, as the State of Ohio holds undisputed title and shall manage all lands beneath the navigable waters of Lake Erie within the territorial boundaries of the State.

Removal to Federal District Court

[¶149] As noted elsewhere in this opinion, this case was removed to the United States District Court for the Northern District of Ohio on March 28, 2005, when the United States of America and the United States Army Corps of Engineers filed a notice of removal. Subsequently, on April 14, 2006, the federal case was dismissed because the federal district court found that neither the federal defendants nor the federal questions were properly before that court.⁶¹ In addition, the federal court declined to exercise its pendent or supplemental jurisdiction over the state law claims. Accordingly, the case was remanded to this court to consider and rule upon the issues of state law. Other than filing their notice of removal, the United States and the Army Corps of Engineers have filed nothing in this case and have not participated in any of the proceedings.

Summary Judgment Arguments of the Parties and Court's Analysis

[¶150] The summary judgment arguments of the parties, together with the court's analysis of those arguments, can be summarized as follows:

⁶¹ As noted elsewhere in this opinion, there are good reasons for concluding that these federal parties were never properly joined as parties in this court either.

SJ arguments of plaintiffs' class, including OLG, on Count I

[¶151] The summary judgment arguments of plaintiffs' class, including the Ohio Lakefront Group, Inc. can be summarized as follows:

Public trust rights are limited to the "waters" of Lake Erie

[¶152] Plaintiffs assert that, under Ohio's case law,⁶² public trust rights such as hunting and fishing in Lake Erie extend no farther than the actual waters, and that those public rights do not extend to the shores or the uplands.

The actual intersection of Lake Erie's waters and shoreline fluctuates

[¶153] Plaintiffs attached to their brief the affidavit of Dr. Charles E. Herdendorf⁶³ to provide an overview of the natural physical processes in Lake Erie that produce non-tidal water level fluctuations in the lake.

[¶154] Dr. Herdendorf states that the elevation of Lake Erie typically is reported with reference to low water datum which defines the boundaries of Lake Erie within which navigation and water commerce may safely proceed. The selection of low water datum in 1933 was done to provide a reasonable safety factor for navigation on the lake. Thus, plaintiffs argue, low water datum is directly related to "the public rights of navigation, water commerce, and fishery exercised in the territory defined in R.C. 1506.10 and 1506.11." Initially an elevation of 570.5 feet above mean tide at New York City was selected for this purpose based on considerations of earlier reference places dating back to 1838. Since then, the elevation number has twice been changed: The first revision, known as International Great Lakes Datum 1955, was a change in the point of reference from New York City to Father Point, Quebec. This resulted in a new elevation number of 568.6 feet for Lake Erie LWD. Dr. Herdendorf states that currently, IGLD

⁶² Plaintiffs cite *Sloan v. Biemiller* (1878), 34 Ohio St. 492, 516-17, 1878 Ohio LEXIS 176, and *Bodi v. The Winous Point Shooting Club* (1897), 57 Ohio St. 629, 50 N.E. 1127, affirming in part, *Winous Point Shooting Club v. Bodi* (1895), 10 Ohio Cir.Dec. 544, 20 Ohio C.C. 637, 1895 Ohio Misc. LEXIS 451. However, as discussed in Opinion No. 93-025 by Attorney General Lee Fisher, *Sloan v. Biemiller* "did not hold that a littoral property owner on Lake Erie holds title to the low water mark." Instead, the fact-specific holding in *Biemiller* established that the public retains a right to fish in the waters of Lake Erie regardless of attempts by private littoral landowners to reserve shoreline fishing rights to themselves through deed restrictions. In passing, the court also made reference to various methods by which the boundary of littoral property may be determined in different jurisdictions, but that was not the precise issue before the court.

⁶³ In the State of Ohio's brief in opposition, filed July 16, 2007, defendants-respondents argue in footnote 6 on page 30 that Dr. Herdendorf's affidavit testimony is largely hearsay, and that as a former named plaintiff/class representative, his testimony should not be given much weight or credibility under Evidence Rule 616(A). However, when ruling on a motion for summary judgment, it is not the function of the trial court to weigh the credibility of the witnesses. It is the function of the court to determine whether there is a genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law.

1985 is in use to define the elevation of LWD at 569.2 feet. Similar elevation adjustments to the line are required every 25 to 35 years to reflect continuing movements in the Earth's crust.

[¶155] According to Dr. Herdendorf, the long term (since 1960) mean monthly elevation of Lake Erie is 571.29 feet (IGLD 1985) which equates to 2.09 feet above Low Water Datum (LWD). The maximum monthly mean of 574.28 feet was reached in June 1985 – a level of 5.08 feet above LWD. The minimum monthly mean of 568.18 feet was recorded for February 1936 – a level of 1.02 feet below LWD. Thus the monthly mean water level for Lake Erie has a historic range of 6.10 feet.

[¶156] Dr. Herdendorf states that the measure of “Ordinary High Water Mark (OHWM) for Lake Erie was established by the U.S. Army Corps of Engineers in 1974 for determining the limit of that agency’s jurisdiction over navigable waters of the United States. OHWM for Lake Erie was initially set by the Army Corps at 572.8 (IGLD 1955) (4.2 feet above LWD) as “simply a convenient way of relating things to a common elevation.” In 1992, this elevation was adjusted to 573.4 (IGLD 1985) (4.2 feet above LWD).

Ohio tried to redefine the public trust boundary several times recently

First, Ohio cited the low water datum as the boundary

[¶157] By letter dated October 1, 1970, attached as Exhibit 2 to plaintiffs’ motion for summary judgment, the State of Ohio’s Department of Public Works cited Section 123.03 of the Revised Code for the proposition that the State of Ohio was the proprietor in trust for the people of the lands underlying the waters of Lake Erie. The department stated, “Such land is defined as that which is inundated by water when the lake level is at an elevation of *568.6 feet*, which was the Low Water Datum (1955) at that time.” (emphasis added).

[¶158] Similarly, in *Rheinfrank v. Gienow*,⁶⁴ the State of Ohio unsuccessfully maintained that the boundary of Lake Erie’s public trust territory should be determined by low water datum of 568.6 feet.

⁶⁴*Rheinfrank v. Gienow*, 1973 Ohio App. LEXIS 1671. Although the 10th District Court of Appeals in *Rheinfrank* decided against the State of Ohio on the merits of the case, holding that the plaintiffs’ land adjoined the waters of the Maumee River and not Lake Erie, the court did not challenge the state’s reliance on the low water datum to determine the boundaries of Lake Erie. Instead, the court of appeals acknowledged that the parties had already stipulated in the common pleas court that low water datum was not a standard for determining where the Maumee River ends and Lake Erie begins. This stipulation had the effect of eliminating the probative value of the State’s expert, Charles Edward Herdendorf – who is plaintiffs’ expert in this case – who at that time was employed by the Ohio Department of Natural Resources, Division of Geological Survey, and who testified in *Rheinfrank* that low water datum was the proper standard for determining the boundary of Lake Erie.

Second, Ohio cited the water's edge as the boundary

[¶159] In the Spring 1979 Public Review Draft of the Ohio Coastal Zone Management Program, published by the State of Ohio's Department of Natural Resources, Division of Water (attached as Exhibit 3 to plaintiff's motion for summary judgment), the State of Ohio acknowledged that, "Currently, Ohio's shoreline of Lake Erie, the line where land and water meet, is normally used to determine where the state's rights over the bed of Lake Erie begin." Because this boundary was moveable, and therefore something of an administrative burden, the State of Ohio then made the following recommendation of three alternative, more practical fixed definitions of where the state's rights begin: (1) Low water datum (568.6 feet IGLD); (2) Ordinary high water level (averages 572.6 feet IGLD); and (3) Mean water level over period of record (570.5 feet IGLD).

[¶160] In 1993, Attorney General Lee Fisher was asked by ODNR to opine regarding the extent of the littoral property owners' title, and specifically whether the landowners held title to the ordinary low water mark. In response, the Attorney General issued Opinion No. 93-025, 1993 AG LEXIS 27 (1993) in which he stated that "a littoral owner along Lake Erie holds title to the extent of the natural shoreline" which he defined as "the edge of a body of water." (emphasis added). Although the moveable boundary made it impossible to fix a permanent property line for a littoral owner, the Attorney General did acknowledge that land lying between the shoreline and the ordinary high water mark belongs to the littoral owner and not to the State.

[¶161] In addition, the Ohio Coastal Management Program and Final EIS,⁶⁵ issued in March 1997 by the U.S. Department of Commerce and ODNR, acknowledged that the definition of "beach" was the area extending landward from the water's edge, and stated that "Private littoral property rights extend to the point where land and water meet."⁶⁶

Third, ODNR has now adopted the Army Corps' HWM

[¶162] Plaintiffs next point out that ODNR has now rejected its previous two definitions of the boundary between the property of littoral landowners and the public trust property of the State of Ohio, and ODNR has now unilaterally adopted the Army Corps of Engineers' estimate of OHWM – 574.4 feet IGLD (1985) – which the Corps adopted for regulatory purposes unrelated to the establishment of boundaries between private property and the public trust territory.

⁶⁵ Final Environmental Impact Statement of the State of Ohio, United States Department of Commerce and ODNR (March 1997) Part II at Chapter 9, page 12, attached as Exhibit 4 to Plaintiffs-Relators' motion for summary judgment.

⁶⁶ See Plaintiffs Exhibit 4, attached to their motion for summary judgment.

ODNR did not engage in rule-making to re-set this boundary, nor has it issued any formal orders declaring the same. Similarly, the General Assembly has not taken any action to shift the public trust boundary from the moveable shoreline to the Army Corps' fixed line boundary.

[¶163] Having adopted this new boundary line, ODNR now requires littoral owners to enter into submerged land leases with the State of Ohio to place private improvements on land lakeward of where Ordinary High Water intersects the natural shore.

The General Assembly set the "natural shoreline" as the LWM

[¶164] Plaintiffs reference the express language in Sections 1506.10 and 1506.11 of the Ohio Revised Code to point out that the Ohio General Assembly has already adopted the term "natural shoreline" as the boundary definition of the public trust territory.

[¶165] Recognizing that the use of this moveable boundary line may, at times, result in the private ownership of submerged lands, plaintiffs cite to *Hogg v. Beerman*⁶⁷ for the proposition that there can be private ownership of submerged lands. Specifically, *Hogg* states, "So long as the navigable waters are left free to the public, for unembarrassed passages to and fro, we know of no reason why the United States, or any state, holding ownership and jurisdiction of land and water, may not vest in a private grantee such a body of land, marsh and water as 'East Harbor.'" The court held that East Harbor was part of the 1792 grant by the State of Connecticut to certain individuals because, when the state used the words "shore of Lake Erie" in the original grant, it used that phrase in the popular sense to mean to the water's edge. The court added, "The private grantee of the land cannot do anything that will interfere with the channel, or hamper the passage of water craft [sic] through it. But he may, without the limits of the channel, erect fishing houses or such other structures as his means and the depth of water will permit; he may convert shallow portions into cranberry patches; he may fill up other parts and make solid ground. Although such action by him may lessen the water surface available for the fishing boats, the fishermen cannot complain. Such public right to fish *always yields* to any permanent improvement by the owner of the land on which the water rests." (Emphasis added).

[¶166] Notwithstanding the language in *Hogg* that gives primacy to the littoral rights of the landowner over the general public right to fish, the Ohio Supreme Court said the exact opposite – in *State ex rel. Squire v. City of Cleveland*⁶⁸ – about the littoral rights of the landowner with

⁶⁷ *Hogg v. Beerman* (1884), 41 Ohio St. 81, 1884 Ohio LEXIS 290.

⁶⁸ *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 82 N.E.2d 709, 1948 Ohio LEXIS 375.

respect to the primacy of the right of the state as trustee to enact regulatory legislation. In *Squire*, the court quoted with approval from *State v. Cleveland & Pittsburgh Rd. Co.*⁶⁹ and stated, “His [the landowner’s] right *must yield* to the paramount right of the state as such trustee to enact regulatory legislation.” (emphasis added). Hence, “The littoral owners of the upland have no title beyond the *natural* shore line; they have only the right of access and wharfing out to navigable waters. That right is a property right, although not a tangible one, that is subject to the superior right of the state as the owner of title in trust for the people of the state, and of the United States with the authority accruing to it by virtue of its exclusive power over interstate commerce.”⁷⁰

[¶167] If the state enacts regulations in aid of the navigation, water commerce, or fishery aspects of its trust responsibilities, and those regulations negatively affect the littoral rights of the landowners, then the state has not taken any rights from the upland owner. This is so because the state’s trust rights are generally superior to the landowner’s littoral rights.⁷¹ However, when the state acts in a way that is not in aid of navigation, water commerce, or fishery, and that state action harms the littoral rights of the landowner, then the landowner’s property rights have been harmed. In *Squire*, the court held that lighthouses, wharves, docks, and like instrumentalities were clearly aids to navigation, and that roads connecting wharves and docks could be aids to navigation. However, under the facts before the court in *Squire*, the court held that there was a question of fact about whether the construction of the shoreway along the south shore of Lake Erie in Cleveland, Ohio, was an aid to navigation. Accordingly, the court declined to decide as a matter of law whether the property rights of the littoral landowners had been harmed in a compensable way by the construction of the highway.⁷²

Statutes set the “Territory” boundary as the “Natural Shoreline”

[¶168] Plaintiffs point to R.C. 1506.10 and 1506.11 as expressly establishing the farthest landward boundary of the public trust territory as the “natural shoreline.”

[¶169] Plaintiffs argue that, because of the express definitional language set forth in R.C. 1506.11, the primary and controlling definition of the landward boundary of the Territory

⁶⁹ *State v. Cleveland & Pittsburgh Railroad Co.* (1916), 94 Ohio St. 61, 113 N.E. 677, 1916 Ohio LEXIS 164.

⁷⁰ *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 82 N.E.2d 709, 725-726, 1948 Ohio LEXIS 375.

⁷¹ *Id.*, 82 N.E.2d 709, at 726.

⁷² *Id.*, 82 N.E.2d 709, at 730.

described in R.C. 1506.10 and 1506.11⁷³ is the “natural shoreline,” and this statutory definition controls the court’s application of the statute. Plaintiffs further argue that using the “natural shoreline” as the definition of the boundary comports with the holdings of Ohio case law.⁷⁴

[¶170] The court agrees that the “natural” shoreline is the statutorily-defined landward boundary of the territory as a matter of statutory law and as a matter of Ohio case law.

The “shoreline” is where the water touches the land on shore

[¶171] Plaintiffs argue that the ordinary dictionary definition of the “shoreline” is the line where a body of water and the land on shore meet. Specifically, plaintiffs reference the Merriam Webster Online Dictionary to define “shoreline” as “the line where a body of water and the shore meet.” Similarly, plaintiffs reference the 1916 edition of Webster’s New International Dictionary, which defines the “shoreline” as the “line of contact of a body of water with the shore.” The 1916 edition was published the year before the language currently in R.C. 1506.10 and 1506.11 was first adopted by the General Assembly as part of the General Code. Therefore, it is fair to say that this definition accurately reflects the common usage of the term at that time. Third, plaintiffs refer to OAC 1501-6-10(T), in which the term “shore” is defined to mean “the land bordering the lake” and OAC 1501-6-10(U), in which the term “shoreline” is defined to mean the “line of intersection of Lake Erie with the beach or shore.”

[¶172] The court agrees, as a matter of law, that the “shoreline” is the place where the water of Lake Erie actually touches the land on shore.

The “shore” means the land between high and low water marks

[¶173] Because the foregoing definitions of the shoreline refer to the “shore” and the “beach,” plaintiffs next seek to establish the definition of these terms as a matter of law. Starting with Black’s Law Dictionary, and referencing several pertinent dictionaries, Ohio case law,⁷⁵ and the Ohio Administrative Code,⁷⁶ plaintiffs argue that these terms are synonyms that mean the same thing: “the land between low and high water marks.”

⁷³ R.C. 1506.11(A) expressly defines the term “Territory” as used in this section in terms of the “natural shoreline.”

⁷⁴ *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 339, 82 N.E.2d 709, 1948 Ohio LEXIS 375; *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 27 N.E.2d 485, 1940 Ohio LEXIS 412; *Hogg v. Beerman* (1884), 41 Ohio St. 81, 1884 Ohio LEXIS 290.

⁷⁵ *Busch v. Wilgus* (1922), 24 Ohio N.P. (n.s.) 209 at *217, 1922 Ohio Misc. LEXIS 272 at *14.

⁷⁶ O.A.C. 1501-6-10(E).

[¶174] The court agrees that the “shore” and the “beach”⁷⁷ are synonyms in the context of the issues in this case and that, as a matter of law, they mean “the land between low and high water marks.”

The “Territory” includes lands presently underlying Lake Erie waters

[¶175] Plaintiffs also note that R.C. §1506.11 specifically defines the “Territory” as including “the waters and the lands presently⁷⁸ underlying the waters of Lake Erie.” (emphasis added). Because there is an approximately six-foot fluctuation between the elevation of ordinary high water mark and ordinary low water mark in Lake Erie, the land “presently” underlying the waters of Lake Erie varies at any given time.

[¶176] Accordingly, with respect to the “shore” or the “beach,” the court finds that the boundary of the area of the “Territory” varies with the place where the water actually touches the shore at any given time.

Ohio Supreme Court allegedly held “natural shoreline” is LWM

[¶177] Plaintiffs next argue that the Ohio Supreme Court, and other courts in Ohio, have already interpreted the language at issue in this case, and that the courts have found the “natural shoreline” to be the low water mark.

[¶178] First, plaintiffs cite *Mitchell v. Cleveland Electric Illuminating Co.*⁷⁹ In that case, the Ohio Supreme Court noted that it was “undisputed” in that case that “Avon Lake’s territorial limits extend only to the low water line of Lake Erie.” The Supreme Court’s observation that the parties in the *Mitchell* case chose not to dispute the validity of the low water mark as the proper boundary is not a legal holding on which this court is willing to rely as a statement of the law in Ohio.

[¶179] Next, plaintiffs look to *Lembeck v. Nye*.⁸⁰ However, *Lembeck* involved a small, non-navigable lake in Medina County known as Chippewa Lake, in which the State of Ohio held no

⁷⁷ Defendants-Respondents argue that the term “beach” is distinguishable from the term “shore” in that “beach” can refer to uplands well-above the high water mark. However, the court takes the view that any discussion of the term “beach” as it may apply to uplands above the high water mark is inapplicable to the context of the issues in this case. When “beach” is used to discuss the rights and responsibilities of the respective parties in this case, it refers to the land between the ordinary low water mark and the ordinary high water mark.

⁷⁸ Although the word “presently” sometimes has a secondary meaning that refers to what is about to happen, the primary meaning of this term in American English refers to what is currently happening. See, *A Dictionary of Modern Legal Usage, Second Edition*, by Bryan A. Garner (1995).

⁷⁹ *Mitchell v. Cleveland Electric Illuminating Co.* (1987), 30 Ohio St.3d 92, 507 N.E.2d 352, 1987 Ohio LEXIS 270.

⁸⁰ *Lembeck v. Nye* (1890), 47 Ohio St. 336, 24 N.E. 686, 1890 Ohio LEXIS 79.

trust ownership. The *Lembeck* case, therefore, does not apply to the boundaries of the public trust territory in a large navigable body of water such as Lake Erie.

[¶180] In *Wheeler v. City of Port Clinton*,⁸¹ the court of appeals for the sixth district stated in passing that, “The north territorial boundary of Port Clinton extends to, but not beyond, the Lake Erie shoreline.” The main issue in *Wheeler* was whether the City of Port Clinton could be held liable for the injuries that plaintiff sustained on submerged rocks located some distance lakeward from the shoreline of Lake Erie. Accordingly, the precise definition of the territory of the public trust in Lake Erie, and the delineation of the title and littoral rights of lakeside landowners, was not before the *Wheeler* court; therefore, *Wheeler*’s mention of the “shoreline” fails to establish low water mark as the boundary of the Territory.

[¶181] Plaintiffs then turn their attention to the Ohio Supreme Court’s opinion in *James v. Howell*,⁸² arguing that in that case the Ohio Supreme Court “equated the shoreline both with the low water line and the boundary of the public trust territory.” However, the holdings in the *James* case did not have to do with defining the shoreline of Lake Erie or equating the shoreline of Lake Erie with the low water mark. As noted in the syllabus of that case, the holdings in the *James* case had to do with: (1) clarifying that the ordinary purpose of a surveyor’s meander line is not to set a border but to calculate acreage, especially in a marshy area; and (2) establishing an exception to that general rule where the documentary evidence clearly shows an intent to run the meander line as a border or boundary. Since the present case does not involve the meaning or effect of meander lines, the court concludes that the *James* case has no direct bearing on the issues in this case.

[¶182] Finally, plaintiffs cite to a United States Supreme Court decision – *Niles v. Cedar Point Club*⁸³ – as holding that marsh land bordering Lake Erie, but not permanently covered with water or continuously submerged, did not belong to the State of Ohio as submerged land, and that it could be sold separately from the parcel of dry upland already sold by the United States to another person. This much is true. However, the *reason* the court reached this holding had nothing to do with defining the shoreline of Lake Erie. It had to do instead with interpreting the intent of the federal government when it issued a patent to land that was surveyed as stopping

⁸¹ *Wheeler v. City of Port Clinton* (1988), 1988 Ohio App. LEXIS 3702.

⁸² *James v. Howell* (1885), 41 Ohio St. 696, 710, 1885 Ohio LEXIS 261.

⁸³ *Niles v. Cedar Point Club* (1899), 175 U.S. 300, 308-309, 20 S.Ct. 124, 44 L.Ed. 171, 1899 U.S. LEXIS 1566.

short of the marsh in question. Manifestly, the *Niles* case did not involve littoral property; therefore, it does not apply in this case.

[¶183] In light of the foregoing analysis of the cases cited by the plaintiffs, the court disagrees with the plaintiffs' contention, and concludes that the Ohio Supreme Court has not ruled, as a matter of law, that ordinary low water mark is the "natural shoreline" boundary of the public trust territory.

State of Ohio has previously declared the boundary to be LWM

[¶184] In support of their claim that the State of Ohio has already officially adopted LWM as the official boundary of the public trust territory, Plaintiffs point first to a letter, dated October 12, 1970, from the State of Ohio Department of Public Works to Mr. Edward L. Feick, P.E. (Exhibit 2 attached to plaintiffs' MFSJ). In that letter, the State of Ohio stated that the Ohio Revised Code⁸⁴ provided that "the land underlying the waters of Lake Erie belongs to the State of Ohio as proprietor in trust for the people of the State of Ohio" and that "Such land is defined as that which is inundated by water when the Lake level is at an elevation of 568.6 feet." At that time, the elevation of 568.6 feet was recognized as the low water datum for Lake Erie.

[¶185] Plaintiffs also point to the legal position taken by the State of Ohio in the *Rheinfrank*⁸⁵ case to support their argument that the State of Ohio has officially acknowledged the Low Water Mark as the proper boundary of the public trust territory of Lake Erie. However, *Rheinfrank* is a shaky foundation on which to rest such a legal conclusion because the stipulations that were involved in that case eliminated the relevance of the state's position with respect to the low water mark.

[¶186] Accordingly, although it appears that 37 years ago the State of Ohio was indeed informing members of the public through written correspondence that the low water mark defined the boundary of public trust area of Lake Erie, it does not appear from *Rheinfrank* that

⁸⁴ Then R.C. §123.03.

⁸⁵ *Rheinfrank v. Gienow*, 1973 Ohio App. LEXIS 1671. As noted above, although the court of appeals in *Rheinfrank* decided against the State of Ohio on the merits of the case, holding that the plaintiffs' land adjoined the waters of the Maumee River and not Lake Erie, the court did not challenge the State's reliance on the low water datum to determine the boundaries of Lake Erie. Instead, the court of appeals acknowledged that the parties had already stipulated in the common pleas court that low water datum was not a standard for determining where the Maumee River ends and Lake Erie begins. This stipulation had the effect of eliminating the probative value of the state's expert, Charles Edward Herdendorf – who is plaintiffs' expert in this case – who at that time was employed by the Ohio Department of Natural Resources, Division of Geological Survey, and who testified in *Rheinfrank* that low water datum was the proper standard for determining the boundary of Lake Erie.

this position was actually adopted as the position of the State of Ohio in that case. To the contrary, in *Rheinfrank*, the State of Ohio appears to have stipulated in the common pleas court to the opposite position.

[¶187] It is not clear to this court what the legal effect is of such 37-year-old correspondence between an agency like ODNR and a private citizen, and plaintiffs have provided the court with no case law to establish what that legal effect might be. As a mere letter, unsupported by a sworn affidavit, or written admission by the party-opponent, or some other means of satisfying the requirements of Rule 56(C) of the Ohio Rules of Civil Procedure, the letter does not appear to comply with the evidentiary requirements of Rule 56. Therefore, the court declines to consider the letter as being persuasive on this issue at the summary judgment stage of the proceedings.

Case law and common meaning says “shoreline” cannot be HWM

[¶188] Plaintiffs argue that the defendants’ position – using the ordinary high water mark using mid-1980s data as the boundary of the public trust territory – would conflict with common usage, the definitions in OAC 1501-6-10, the OAG opinion (*supra*), and the holdings of the Ohio courts. In light of these alleged conflicts, plaintiffs argue that proper rules of statutory construction under R.C. 1.49 (governing the interpretation of ambiguities in statutory language) require the court to find that the “shoreline” cannot be interpreted to mean the “ordinary high water mark” as used by ODNR. Plaintiffs make this argument in three parts: First, that HWM conflicts with statutory provisions; second, the HWM contradicts the holdings in various Ohio Supreme Court cases; and third, using the HWM violates private property rights of lakeside property owners. And finally, the plaintiffs argue that HWM cannot be the proper boundary because the Ohio Attorney General already advised ODNR in a written opinion that the public trust did not extend to the high water mark.

Using HWM as public trust boundary violates ODNR’s own rules

[¶189] Plaintiffs point out that ODNR’s own regulations – as set out on O.A.C. 1501-6-10 and as approved by the Joint Committee on Agency Rule Review (“JCARR”) – should not conflict with or render meaningless the term “shoreline” as used in R.C. 1506.10 and 1506.11. Yet a “shoreline” at the ordinary high water mark does conflict with the statutory terms.

[¶190] Plaintiffs argue further that, “ODNR defines the ‘shoreline’ in its regulations as the ‘line of intersection of Lake Erie with the beach or shore.’ O.A.C. 1506-6-10(U). As noted above,

ODNR defines both the 'shore' and 'beach' as the land between the ordinary high and low water marks. Thus, according to plaintiffs, the shoreline under ODNR's regulations and as approved by JCARR sits at ordinary low water mark."

[¶191] Most significantly, plaintiffs observe that "if the 'shoreline' for purposes of R.C. §1506.10 is the ordinary high water mark as the State contends here, then ODNR has a 'shoreline' at the foot of the shore for its erosion rules, which were approved by the General Assembly, and another 'shoreline' at the top of the shore for its submerged lands lease policy, which was not approved by the General Assembly." Indeed ODNR's 'shoreline' proposed here directly conflicts with the 'shoreline' in its erosion rules, as a 'shoreline' fixed at 573.4 feet IGLD (1985) sweeps under state control much of the beach or shore (while also ignoring 'beach' that could exist landward of that fixed line of elevation.) Such a result is nonsensical and impermissible under *Geier*⁸⁶ and R.C. 1.47(B).

[¶192] Although the plaintiffs make no direct reference to the language of the erosion regulations, O.A.C. 1501-6-01(M) specifically defines the "littoral zone" to mean "the indefinite zone between the shoreline extending lakeward to the furthestmost line where waves begin to break." (emphasis added). In addition, O.A.C. 1501-6-01(W) provides that, "Where the territory has been artificially filled, the director shall determine the natural shoreline as accurately as possible, using the best practicable measures including, but not limited to, an analysis of the earliest known chart, maps, or photographs." (Emphasis added).

[¶193] It is apparent to the court that neither of these erosion zone regulations sets the boundary of the public trust territory as the high water mark or the low water mark. Instead, these regulations set the boundary as the place where the waves begin to break. Accordingly, the court agrees with the plaintiffs that using the HWM as the boundary of the public trust area contradicts the ODNR's own rules.

Using HWM as public trust boundary violates Ohio Supreme Court case law

[¶194] Plaintiffs next assert that Ohio courts have pointed to the shoreline, in one manner or another, as the boundary of the territory.

[¶195] First, plaintiffs cite *Sloan v. Biemiller*,⁸⁷ in which the Ohio Supreme Court stated in paragraph 4 of its syllabus that a littoral owner's property rights extend to the boundary line at

⁸⁶ *Geier v. National GG Industries, Inc.* (1999), 1999 Ohio App. LEXIS 6260, *9-10.

⁸⁷ *Sloan v. Biemiller* (1878), 34 Ohio St. 492, 1878 Ohio LEXIS 176.

which the “water usually stands when free from disturbing causes.” However, as noted above, a strong argument can be made that this was not the actual holding in *Sloan v. Biemiller*. As discussed in Opinion No. 93-025 by Attorney General Lee Fisher, *Sloan v. Biemiller* “did not hold that a littoral property owner on Lake Erie holds title to the low water mark.” Instead, the fact-specific holding in *Biemiller* established that the public retains a right to fish in the waters of Lake Erie regardless of attempts by private littoral landowners to reserve shoreline fishing rights to themselves through deed restrictions, and that the public right to fish is still available to a grantee of shoreline property, notwithstanding reservation language in the grant specifically reserving the right to fish to the grantor. In passing, the court also made reference to various methods by which the boundary of littoral property may be determined in different jurisdictions, but that was not the precise issue before the court.

[¶196] Second, plaintiffs cite *Busch v. Wilgus*.⁸⁸ In *Busch*, the Logan County Common Pleas Court held that: (1) where an “island” was formed in a canal by reservoir-building actions of the state, and (2) where the island was then conveyed by the state as “Orchard Island,” using a deed conveyance description that incorporated survey language referring to the “ordinary low water mark” as the boundary of the island being conveyed, and (3) where the platted island shows lots fronting on the surrounding water without any space or margin between the lot and low-water mark, the lot owner, in the absence of restrictions to the contrary, takes title to the land fronting on the lake to ordinary low water mark. Elsewhere in the *Busch* opinion, the court makes clear that the owner of the island takes title to the water’s edge. Part of the court’s rationale for reaching this conclusion included the thought that, by definition, an island is bounded by nothing but water. Therefore, the boundary of an island must be the water’s edge.

[¶197] Third, plaintiffs cite to *Hogg v. Beerman*,⁸⁹ noting that the referee from the district court found that the water’s edge is the boundary of property abutting Lake Erie as a matter of law. Accordingly, *Hogg* supports the plaintiffs’ claim that wherever the boundary line may be set, the one place where it simply can not be set is ordinary high water mark. Similar holdings were reached in *State ex rel. Squire*⁹⁰ (“upland owners have title only to the natural shore line of Lake

⁸⁸ *Busch v. Wilgus* (1922), 24 Ohio N.P. (n.s.) 209, 215, 1022 Ohio Misc. LEXIS 272, at *11.

⁸⁹ *Hogg v. Beerman* (1884), 41 Ohio St. 81 at 89, 1884 Ohio LEXIS 290.

⁹⁰ *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 339, 82 N.E.2d 709, 1948 Ohio LEXIS 375.

Erie”) and in *State ex rel Duffy*⁹¹ (“littoral owner owns land formed by extension of the shoreline”). Plaintiffs argue that these references in the case law require the legal conclusion that the proper location of the “shoreline” can not be ordinary high water mark. The court agrees.

Using HWM as public trust boundary violates property rights

[¶198] Referring again to *Biemiller*,⁹² the plaintiffs argue that the holding in that case simultaneously affirmed the right of the public to fish in the waters of Lake Erie as well as the right of littoral property owners to “own” the lakeshore and exclude others from the area above the lakeshore. Accordingly, as long as members of the public are willing to fish from boats on the water, or by standing in the waters of Lake Erie, littoral landowners have no right to stop them from doing so. However, under *Biemiller*, littoral landowners do have the right to exclude people from standing on the dry shore of the littoral landowner’s property.

[¶199] In *Lamb v. Ricketts*,⁹³ the Ohio Supreme Court held that – in the computation of the number of acres in a survey that uses the courses of the bank of a stream as one of the called boundaries – the stream at low water mark is the proper boundary. The court reasoned that the use of the low water mater mark was required in such instances to ensure that the grantee of the land retained access to the stream notwithstanding changes to the course of the stream due to alluvion.

[¶200] In the present case, plaintiffs have previously submitted to the court several deeds in which the metes and bounds in the legal description used calls defining the northernmost border of the land by reference to the shoreline of Lake Erie. To the extent that the metes and bounds legal description contains a call to the shore of Lake Erie, or an equivalent reference to the water’s edge, if *Lamb v. Ricketts* was on all fours with the facts of this case, then the class member’s titled ownership would extend to the low water mark of Lake Erie. However, *Lamb v. Ricketts* is not on all fours with this case. *Lamb* involved the categorically-different situation of the riparian rights of a landowner whose property bordered a river, as opposed to Lake Erie. Accordingly, even though *Lamb* is not binding on the categorically-different facts in this case, the court nonetheless agrees with the plaintiffs that the use of HWM as the boundary of the “territory” would violate the property rights of the plaintiffs in that it would impermissibly

⁹¹ *State ex. rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 27 N.E. 2d 485, 1940 Ohio LEXIS 412.

⁹² *Sloan v. Biemiller* (1878), 34 Ohio St. 492, 1878 Ohio LEXIS 176.

⁹³ *Lamb v. Ricketts* (1842), 11 Ohio 311, 1842 Ohio LEXIS 87.

intrude into the area of the shore that lies below the HWM and above the water's edge (i.e., the place where the water actually touches the land).⁹⁴

Ohio AG advised ODNR that public trust did not extend to HWM

[¶201] Plaintiffs-Relators next refer to an Ohio Attorney General Opinion⁹⁵ issued on October 27, 1993, in response to a request from ODNR for a legal opinion clarifying the boundary of the public trust territory. In that opinion, the attorney general opined that a littoral owner of land bordering Lake Erie holds title to the extent of the natural shoreline, and no farther, even if the deed describes a northern boundary that is lakeward of the natural shoreline. In addition, the littoral owner has littoral rights that permit the owner to do things such as access the waters of Lake Erie, and to wharf out to the point of navigability.

[¶202] It appears, therefore, that the plaintiffs are correct in arguing that the State of Ohio's Attorney General did advise ODNR that the public trust territory did not extend to HWM but ended at the "natural shoreline." The court agrees with the attorney general's opinion.

OHWM cannot be set at 573.4 IGLD

[¶203] Plaintiffs argue that the line of 573.4 feet IGLD (1985) relied on by ODNR is not "ordinary," and that it destroys long-recognized rights of littoral property owners to new lands formed from accretion or reliction and to restore lands lost to avulsion. Plaintiffs cite to *U.S. v. Marion L. Kincaid Trust*,⁹⁶ as an example of the federal courts rejecting the Army Corps of Engineers' ordinary high water mark standard for Lake Michigan (581.5 feet IGLD in 1985). The court in *Kincaid* noted that the data used by the Army Corps contained the historic *maximum* lake levels (rendering the term "ordinary" inapplicable), and that there were no federal regulations authorizing the Army Corps to establish an administrative ordinary high water mark. The *Kincaid* court further noted that the Michigan courts had rejected attempts by the Michigan legislature to use the Army Corps' high water mark to delineate the "rights, privileges,

⁹⁴ *Massachusetts v. New York* (1926), 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838, 1926 U.S. LEXIS 608 (In a case involving territory bounded by the "shore" of Lake Ontario, the U.S. Supreme Court held that the rule that a grant whose boundaries extend to the "shore," or "along the shore," of the sea carries only to high water, is inapplicable to conveyances of land on non-tidal waters because such a rule would be impracticable, and because it would deny access to the waters of the lake except on the irregular and infrequent occasions of flood.)

⁹⁵ 1993 Ohio Op. Atty. Gen. 128; 1993 Ohio Op. Atty. Gen. No. 25; 1993 Ohio AG LEXIS 27.

⁹⁶ *U.S. v. Marion L. Kincaid Trust* (2006), 463 F.Supp.2d 680, 2006 U.S. Dist. LEXIS 88250 (Although this case was, strictly speaking, about whether the defendants were the prevailing parties for purposes of making an award under Federal Rule 11, the court engaged in a substantial discussion of the merits, in which the environmental action brought by the United States had been dismissed).

obligations, and responsibilities of shoreline landowners.” Accordingly, the court concluded that the federal government’s reliance on the Army Corps’ high water mark was an unreasonable way to define its geographic jurisdiction to enforce environmental laws against the lakeside landowner.

[¶204] Similarly, in the present case, the high water mark set by the Army Corps for Lake Erie is based on historically extraordinary record data from 1985, and the adoption of that high water mark by the ODNR was not the result of legislation or the promulgation of administrative rules, regulations, or orders by ODNR.

[¶205] Plaintiffs also argue that setting the boundary at 573.4 IGLD (1985) would destroy the upland owner’s rights created by reliction and accretion, as well as the upland owner’s right to access the waters of Lake Erie, by creating a gap between the boundary of the upland owner’s title and the actual edge of the water.

[¶206] The court agrees that, in the absence of Ohio legislation establishing the high water mark, or the promulgation of administrative rules, regulations, or orders by ODNR, the “ordinary” high water mark cannot be set at 573.4 feet IGLD (1985). Furthermore, as explained elsewhere in this opinion, the boundary of the public trust territory in Ohio is not the ordinary high water mark on Lake Erie, but rather it is the water’s edge.

The parties have different rights in the “territory”

[¶207] Plaintiffs argue that, under R.C. 1506.10 and *State ex rel. Squire v. City of Cleveland*,⁹⁷ the public trust extends to protecting the public’s rights to navigation, fishery, and water commerce. Plaintiffs also attempt to restrict the public’s rights in the public trust to these three categories, expressly ruling out any additional categories such as hunting. However, although plaintiffs’ citations to *Bodi v. The Winous Point Shooting Club*,⁹⁸ and *Biemiller*⁹⁹ do support the conclusion that the public has the right to navigation, fishery, and water commerce, those cases do not support the categorical conclusion that the public has no right to hunt while in or on the waters of Lake Erie. Nevertheless, any right that the public has to hunt in the waters of Lake Erie does not extend landward beyond the water’s edge.

⁹⁷ *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 82 N.E.2d 709, 1948 Ohio LEXIS 375.

⁹⁸ *Bodi v. The Winous Point Shooting Club* (1897), 57 Ohio St. 226, 48 N.E. 944, 1897 Ohio LEXIS 114.

⁹⁹ *Sloan v. Biemiller* (1878), 34 Ohio St. 492, 516-17, 1878 Ohio LEXIS 176.

Littoral rights include access, exclusion, new property, and reclamation

[¶208] Plaintiffs' final argument alleges that littoral property owners have the same rights as the rest of the public to use the waters of Lake Erie for navigation, water commerce, and fishery, and that they also have specific "littoral" property rights by virtue of their ownership of property adjoining the waters of Lake Erie. These littoral rights extend beyond the natural shoreline and include: (1) the right to make reasonable uses of the waters in front of or flowing past their lands, (2) the right of access to navigable waters, and (3) the right to wharf out to navigable waters.¹⁰⁰ Littoral property owners also have the right to all lands gained through accretion or reliction,¹⁰¹ and maintain ownership of lands lost by avulsion.¹⁰² And finally, littoral property owners have the right to exclude others from using the shore down to the water's edge.¹⁰³

[¶209] The court agrees with plaintiffs' description of the littoral property rights of lakefront property owners; however, this court has not been asked to define categorically all of the littoral rights that are recognized under Ohio law for land adjoining Lake Erie. Accordingly, notwithstanding the argumentation of the parties, the court declines to make a comprehensive, categorical declaration of what those littoral rights are with respect to all members of the class. Such questions are probably best left to the resolution of specific disputes involving individual parties who are asserting such littoral rights with respect to a specific parcel of land, according to specific deed language, and pertaining to a specific area of the Lake Erie coastline.¹⁰⁴

SJ arguments of Plaintiffs Taft and Duncan

[¶210] Intervening Plaintiffs Taft and Duncan's ("Taft plaintiffs") arguments for summary judgment on Count I, together with the court's assessment of those arguments, can be summarized as follows.

[¶211] First, the Taft Plaintiffs support OLG's memorandum in support of their motion for summary judgment.

¹⁰⁰ *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 82 N.E.2d 709, 1948 Ohio LEXIS 375.

¹⁰¹ *State ex. rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 27 N.E. 2d 485, 1940 Ohio LEXIS 412.

¹⁰² *United States v. 461.42 Acres of Land* (1963), 222 F.Supp. 55, 1963 U.S. Dist. LEXIS 6602.

¹⁰³ *Eastwood Mall, Inc. v. Slanco* (1994), 68 Ohio St.3d 221, 1994-Ohio-433, 626 N.E.2d 59, 1994 Ohio LEXIS 48 ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.")

¹⁰⁴ The court's reluctance to issue such a comprehensive, categorical declaration of littoral rights is also related to the fact that some of the land along the shore of Lake Erie is swampland which may be owned by individuals or other persons, free of the restrictions of the public trust.

[¶212] In addition, the Taft plaintiffs argue that the historical record, including the existing laws and surveying practices at the time of Ohio's statehood must be considered in order to understand the intent of the major grants by the Connecticut Legislature and the United States Congress which occurred before Ohio's statehood. This court agrees, which is why the court has set forth a good portion of the historical record above.

[¶213] The Taft plaintiffs argue that the "cadastral"¹⁰⁵ survey definition at the time of the original patents or grants controls the extent to which HWM or LWM is applicable to this case, and that today's many regulatory definitions do not control because they were set for administrative convenience without legislative enactment or judicial review.

Landward boundary of Public Trust Should Allegedly be LWM

[¶214] The Taft plaintiffs argue that the landward boundary of the public trust territory is the low water mark as it existed in 1803 when Ohio became a state. The essence of the plaintiffs' argument is that, since the entire Western Reserve passed into private ownership under patents or grants issued in 1795, before the federal cession of land under "Quieting Act," the littoral lands bordering Lake Erie within the Western Reserve were never public lands of the United States. Plaintiffs then cite to the exception described in *Massachusetts v. New York*,¹⁰⁶ in which the court held that title to the soil under navigable waters is in the sovereign, *except so far as private rights have been acquired by express grant or prescription.* (emphasis added).

[¶215] The Taft plaintiffs reviewed the development of the cadastral survey system in Ohio, beginning with the Land Ordinance passed by Congress in 1785, and including the Northwest Territory Act of 1787, and argue that three pre-statehood surveys¹⁰⁷ consistently set the boundary of the public trust territory as the low water mark. Plaintiffs further argue that the low water mark boundary set for lands held privately prior to Ohio's statehood is the proper boundary of the public trust territory today. In support of this argument, the plaintiffs cite to four cases.¹⁰⁸ However, none of those cases involved boundary disputes involving the shores of Lake Erie.

¹⁰⁵ "Cadastral" refers to a survey that defines the boundaries of a tract of land, usually for the purposes of taxation.

¹⁰⁶ *Massachusetts v. New York* (1926), 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838, 1926 U.S. LEXIS 608.

¹⁰⁷ The three surveys defined: (1) the lands of the Connecticut Land Company, which encompassed the Western Reserve, but did not include the Firelands; (2) the Firelands, also known as the "Sufferers' Land;" and (3) the public lands of the United States, located west of the Western Reserve. The federal lands were surveyed and sold to the public under the authorization of the land ordinance of 1785.

¹⁰⁸ *Handly's Lessee v. Anthony* (1820), 18 U.S. 374, 5 L.Ed. 113, 1820 U.S. LEXIS 262, 5 Wheat. 374 (state's grant of land to bordering state did not include the river, so the boundary was the low water mark on the northwest side of the river); *Ohio v. Kentucky* (1973), 410 U.S. 641, 93 S.Ct. 1178, 35 L.Ed.2d 560, 1973 U.S. LEXIS 101 (Ohio sought a judicial declaration defining its boundary with Kentucky as being one of several locations, including the

[¶216] Next, the Taft plaintiffs argue that the Quieting Act of 1801 passed all federal claim of title to the soil of the Western Reserve to the State of Connecticut in trust for its grantees under metes and bounds descriptions that used terms such as “to Lake Erie,” “traversing along the shore of Lake Erie,” or “to the shore,” or “including the whole beach.” Subsequent to these grants from Connecticut, the initial grantees in turn passed title using similar terms. Plaintiffs further argue that the federal Submerged Lands Act reconfirmed the congressional grants under the Quieting Act and provided new grants to the states along the coasts.

[¶217] Next, the Taft plaintiffs argue that, since 1795, the responsibility for determining the boundaries of lands under the public land survey system (PLSS) has rested with the Geographer of the United States and not the Army Corps of Engineers. Plaintiffs point out that the Land Ordinance of 1785 originally appointed a Surveyor General to establish the boundaries of the Public Lands of the United States, including those along the shore of Lake Erie west of the Connecticut Western Reserve, and that this authority currently rests with the Bureau of Land Management. Citing to *Niles v. Cedar Point Club*,¹⁰⁹ Plaintiffs also point out that it was not until 1891 that the term “ordinary high water mark” was used in public land surveying instructions, and that when it was adopted as a surveying term in 1891, it replaced the previous standard of “ordinary low water mark.”

[¶218] In light of the foregoing factors, plaintiffs argue that the only definition of the “natural shoreline” which is fully compatible with the early laws of Ohio, Virginia, Connecticut, and the United States is the low water mark as it existed in 1803 or at any lower level to which the water has since receded. Plaintiffs also argue that any alternate definition for the term “natural shoreline” through new statutes or regulations more than 200 years after the initial grants and

low water mark on the northerly shore of the Ohio River as it existed in 1792, rather than the more modern low water mark. Procedurally, Ohio’s motion to amend its complaint was denied, and the court held that Ohio was foreclosed by its long-term acquiescence from contesting the boundary); *Lessee of Blanchard v. Porter, Collins* (1841), 11 Ohio 138 (Under the Northwest Ordinance, land on the Ohio river, lying between high and low water mark, is not common to the public, but may be conveyed by the adjacent proprietor, whose land bounds on the river; *Lessee of McCulloch v. Aten* (1826), 2 Ohio 307 (In a case involving conflicting deeds to property adjoining a creek, the court held that the landowner’s boundary was the water’s edge and not the bank).

¹⁰⁹ *Niles v. Cedar Point Club* (1899), 175 U.S. 300, 20 S.Ct. 124 44 L.Ed. 171, 1899 U.S. LEXIS 1566 (Plaintiff was the holder of a federal patent to land bordering a marsh along the shore of Lake Erie. The plaintiff’s land was originally surveyed in 1834 and 1835 when the waters of Lake Erie were above their ordinary stage. In 1844, defendant’s predecessor purchased land bordering the marsh. The area was again surveyed in 1881 and was patented and sold. The court held that the amount of land contained in the defendant’s parcel could not be expanded by arguing that the survey contained an error extending the boundary across the meander line of the marsh).

contracts would violate the U.S. Constitution, the Northwest Territory Act, and the Ohio Constitution.

[¶219] In the present case, as discussed above, the court disagrees that low water mark is the only definition of the “natural shoreline” that is compatible with the relevant law in Ohio. The court is of the opinion that the proper legal definition of the “natural shoreline” is the water’s edge, meaning the place where the water touches the land at any given time.¹¹⁰

[¶220] The Taft plaintiffs next argue that because both the Quieting Act and the Submerged Lands Act of 1953 have been found to be constitutional,¹¹¹ the federal government had the power to dispose of lands below 573.4 feet (IGLD 1985) under or adjacent to the waters of Lake Erie in the same manner as a private individual.

[¶221] The Taft plaintiffs’ final arguments are: (1) that if HWM is the boundary, then the boundary must be established factually on a property-by-property basis; (2) that the LWM – as it existed when the original cessions of land were made – should be used instead of using 573.4 feet IGLD (1985); and (3) in addition to the littoral rights described by class plaintiffs, littoral landowners also have the right to protect their fast lands from inundation, erosion, and avulsion by the waters.¹¹² Plaintiffs point out that Ohio’s Fleming Act provided in 1917 that the littoral rights of lakeside landowners were superior to the public rights held in trust by the State of Ohio.¹¹³

[¶222] In the State of Ohio’s brief in opposition to the Taft Plaintiffs’ motion for summary judgment, filed July 16, 2007, defendants-respondents cite to *Barney v. Keokuk*¹¹⁴ for the proposition that, “In those territories bounding navigable non-tidal waters, such as the Great Lakes, the lands reserved to the states extend to the ordinary high water mark.” However, in

¹¹⁰ In their brief in opposition, filed July 16, 2007, the defendants-respondents argue on pages 34 and 35 that using the moveable boundary of the water’s edge would be an unconstitutional abdication of the state’s trust responsibilities whenever the water receded lakeward, and an unconstitutional taking whenever the water advanced landward.

However, if the boundary moves with the water’s edge, then neither of these problems arises. There is no abdication of the trust because, when the water recedes gradually, the boundary of the trust territory also recedes with the water; similarly, there is no unconstitutional taking when the water advances landward gradually, because the moveable boundary of the littoral owner’s title also moves landward with the water. And when the waters recede or advance suddenly, such as through reliction or avulsion, the boundary remains where it was prior to the sudden change.

¹¹¹ *Alabama v. Texas* (1954), 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689, 1954 U.S. LEXIS 2335; *United States v. Texas* (1950), 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221, 1950 U.S. LEXIS 1814.

¹¹² *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.*, (1940), 137 Ohio St. 8, 27 N.E. 2d 485, 1940 Ohio LEXIS 412.

¹¹³ General Code Section 3699-a, as enacted in 107 Ohio Laws 587, 1917.

¹¹⁴ *Barney v. Keokuk* (1877), 94 U.S. 324, 24 L.Ed.2d 224, 1876 U.S. LEXIS 1869.

Keokuk, the issue concerned the title boundary along the Mississippi River, not the Great Lakes. In addition, the *Keokuk* court acknowledged that the title of the state to navigable waters is bounded to the extent that it might interfere with vested rights and established rules of property. In that case, the court held that the City of Keokuk held title to the high water mark, but that the city also had the right, as a riparian landowner, to “build wharves and levees on the bank of the Mississippi below high water.” The State of Ohio also cites to *Illinois Central Rd. Co. v. Illinois*,¹¹⁵ and *State of Ohio v. Cleveland & Pittsburgh Railroad Co.*¹¹⁶ for the proposition that the ordinary high water mark is the proper boundary of the territory. However, in *Cleveland & Pittsburgh*, the court acknowledged that the courts of Illinois have declared that, under the common law, ownership on the shore of Lake Michigan extends to the water’s edge.

[¶223] The court finds that neither HWM nor LWM is the proper boundary between the title ownership of the littoral owner and the trust title held by the State of Ohio, but rather that the proper boundary is the water’s edge at any given time, subject to the right of the littoral owner to reclaim property lost through avulsion. However, without ruling on the matter, the court does agree with the Taft plaintiffs that, in some cases, the littoral rights of the owners of lakeside property appear to include the right to protect their fast lands from inundation, erosion, and avulsion by the waters of Lake Erie.

SJ Arguments of Defendants State of Ohio, ODNR

[¶224] Defendants-Respondents’ motion for summary judgment is structured around three basic points:

[¶225] (1) As a matter of law, the furthest landward boundary of the “territory” as that term appears in R.C. 1506.10 and 1506.11, is the ordinary high water mark, and the State of Ohio holds title to all such “territory” as proprietor in trust for the people of the state;

[¶226] (2) The furthest landward boundary of the “territory” is the ordinary high water mark as a matter of law, and that line may be located at the present time using the elevation of 573.4 feet IGLD (1985); and

[¶227] (3) The rights and responsibilities of littoral owners in their upland property, as well as the respective rights and responsibilities of the federal government, the State of Ohio, the public,

¹¹⁵ *Illinois Central Rd. Co. v. Illinois* (1892), 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018, 1892 U.S. LEXIS 2208.

¹¹⁶ *State of Ohio v. Cleveland & Pittsburgh Railroad Co.* (1916), 94 Ohio St. 61, 113 N.E. 677, 1916 Ohio LEXIS 164.

and the littoral owners in the “territory,” have long been settled in state and federal law, as has the hierarchy of those rights.

[¶228] With respect to the first basic point, defendants-respondents argue that the question of the landward boundary of the lands beneath navigable waters of Lake Erie granted to the State of Ohio at statehood is a question of federal law. As a question of federal law, the issue is controlled by the holdings of the U.S. Supreme Court interpreting the Equal Footing Doctrine, and by Congress’s re-affirmation of those holdings through the passage of the Submerged lands Act.¹¹⁷ According to those authorities, defendants-respondents argue that the states were granted title in trust to all lands below the HWM of non-tidal navigable bodies of water within their territorial boundaries upon their admission to the union. Defendants-respondents also argue that after a state’s admission to the Union, the federal government cannot make any grant of title to the lands below HWM. In addition, defendants-respondents argue that after statehood, any title recognized or conveyed by the State of Ohio in the lands beneath that boundary to the owners of the adjacent lands is a question of state law.

[¶229] Defendants-respondents then argue that the State of Ohio has never granted title to lands below HWM, Ohio’s Fleming Act reaffirms that the “territory” conveyed to the State of Ohio at statehood is what the state continues to hold in trust for its people, and the State of Ohio has never abdicated its title in trust to lands below HWM.

[¶230] In light of the foregoing reasoning, the defendants-respondents conclude that the plaintiffs cannot claim title to the lands below HWM on the basis of grant language from post-federal grantees or the legal descriptions of the current deeds.

[¶231] With respect to the second basic point, the defendants-respondents assert that the appropriate method for locating the ordinary high water mark on the Great Lakes is an unsettled question of federal law. They further assert that the method used must conform to the Equal Footing Doctrine, and that the use of 573.4 feet IGLD (1985) conforms to that doctrine. In addition, they argue that, under R.C. 1506.11, ODNR has authority to manage the use and

¹¹⁷ As noted elsewhere in this court’s opinion, and as stated in *Hogg v. Beerman* (1884), 41 Ohio St. 81, 1884 Ohio LEXIS 290, “The question as to the ownership of the soil under the water, is one which each state is at liberty to determine for itself, in accordance with its views of local law and public policy” Accordingly, with respect to grants made or patents issued prior to Ohio’s statehood, the scope of the grant or patent depends on the intent of the grantor or issuer of the patent. Similarly, there is a variety of rules among the various states. Some of the Great Lakes states (e.g., Michigan, Wisconsin, and Minnesota) have adopted high water mark as the appropriate boundary, and some of the Great Lakes states (e.g., New York, Pennsylvania) use low water mark as the boundary.

occupation of the “territory” by issuing a lease from the state for any portion of the “territory” occupied by an artificial improvement.

[¶232] With respect to the third basic point, the defendants-respondents make four assertions in which they attempt to describe a hierarchy of rights that places the private property rights of littoral owners at the bottom of the hierarchy. At the top of the hierarchy, the defendants-respondents place the rights and responsibilities of the federal government. Next in the hierarchy come the rights and responsibilities of the State of Ohio as proprietor in trust. Next in the hierarchy come the rights of the public to use the “territory.” And finally, *at the bottom of the hierarchy*, the defendants-respondents place the title rights and littoral rights of upland owners.

[¶233] As this court noted in its introduction and discussion of the American view of sovereignty, in the hierarchy of rights involving private property rights held by individuals and other persons, state and federal governments have limited authority, under the state and federal constitutions as well as under the common law, to regulate those rights. Contrary to the defendants-respondents’ description, it is the right of private property that belongs *at the top* of the hierarchy. Under the American system of government, one of the crucial functions of government – indeed, one of the reasons for even having governmental institutions – is to serve and protect the private property rights of individuals and other persons. The limited powers that have been delegated to governmental institutions may take precedence over individual private property rights in a particular case, but that precedence only exists because it has first been granted by the people to the state and federal governments. The granting of those limited powers does not entitle state or federal governments to extend the scope of their authority beyond what was granted.¹¹⁸

[¶234] While it is true that, under the U.S. Constitution, the federal government retains various servitudes over navigational waters,¹¹⁹ and while it is true that the State of Ohio holds title in trust to the waters of Lake Erie and the lands submerged beneath those waters, those governmental interests do not in any way change the primacy of the titled private property rights, together with the littoral rights, that individuals and other persons have in littoral property they

¹¹⁸ This point is illustrated by the language of the Tenth Amendment to the U.S. Constitution, which states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

¹¹⁹ It is worth noting that this case was removed to the Federal District Court for the Northern District of Ohio on March 29, 2005, and that the district court dismissed the federal action, in part, because “the U.S. has no interest in title to the disputed property, and there is no way it could have an interest[.]” (Emphasis added).

own along the shores of Lake Erie in Ohio. Under both the U.S. Constitution and the constitution of the State of Ohio, if the government takes these property rights from individuals or other persons, it must provide reasonable compensation for the taking. In the present case, to the extent that ODNR has been intruding on the title rights of littoral owners above the waters edge, or the owners' littoral property rights, ODNR has overstepped its authority.

[¶235] In their reply brief, filed by the Taft plaintiffs on July 16, 2007, the plaintiffs assert that the defendants-respondents made various misrepresentations of Ohio case law. Without rehearsing all of the points made in the reply brief, suffice it to say that the court agrees with the Taft plaintiffs. For example, prior to Ohio's statehood, the lands along the shores of Lake Erie were not part of federal lands, but were claimed by Connecticut, Virginia, and New York. These conflicting claims to the "backlands" pre-dated both the formation of the United States, as well as the formation of the State of Ohio. Therefore, the defendants-respondents' argument to the contrary – that prior to Ohio's statehood, the lands in question were federal lands – is incorrect. Similarly, as the reply brief points out, there are cases, statutes, and attorney general opinions in Ohio's jurisprudence that support the conclusion that the proper riparian and littoral boundary is not the high water mark.

[¶236] This court also agrees with the Taft plaintiffs' assessment of the Michigan case of *Glass v. Goeckel*¹²⁰ as being poorly decided, and as not disturbing the littoral owner's title to the water's edge, but merely providing beachcombers in Michigan with an easement to walk on the dry portion of the shore as opposed to restricting the rights of beachcombers to the wet sand. The court also agrees with the Taft plaintiffs' analysis of the development of surveying techniques and how that development affected the language used in legal descriptions for property adjoining Lake Erie.¹²¹ In addition, the court agrees that "Ohio's land grant history is unique and clearly distinguishes its applicable boundary law from that of western states admitted to the union more than half a century later from public lands."

SJ Arguments of NWF and Ohio Environmental Council

[¶237] In the motion for summary judgment filed by the defendants and counterclaimants, National Wildlife Federation ("NWF") and Ohio Environmental Council ("OEC"), the movants

¹²⁰ *Glass v. Goeckel* (2005), 473 Mich. 667, 703 N.W.2d 58, 2005 Mich. LEXIS 1314.

¹²¹ The Taft plaintiffs state that "In 1881, for the first time, surveyors were instructed to survey to the low water mark. Previously, there had been no mention of the terms low water mark or high water mark in the cadastral survey instructions."

concluded with the motion for summary judgment filed by the defendants-respondents, and referred to the arguments raised by NWF and OEC in their motion to intervene, filed June 5, 2006.

[¶238] In addition, NWF and OEC submitted two affidavits to bolster their standing in this case by establishing: (1) their respective organizational purposes as protecting and preserving the environment of the State of Ohio; and (2) the adverse affect that plaintiffs' position has on the rights of the public seeking to use the waters of Lake Erie for fishing, swimming, and launching boats.

Conclusions and Rulings of the Court

Summary of the Court's Rulings and Rationales

[¶239] In summary, and as explained in more detail below, the court concludes that: (1) each owner of Ohio real estate that touches Lake Erie owns title lakeward as far as the water's edge; (2) if the lakeside owner's deed contains a legal description that extends into the lake beyond the water's edge, then that legal description is hereby reformed so that the legal description ends at the water's edge; (3) likewise, the State of Ohio has ownership in trust of the waters of Lake Erie and the lands beneath those waters landward as far as the water's edge, but no farther. With respect to Lake Erie, this is the boundary of the "territory" that is subject to the regulatory authority of the State of Ohio's Department of Natural Resources; and (4) the lakeside landowner also has littoral rights, such as the right to wharf out to navigable waters, and those littoral rights extend into the lake as an incident of titled ownership of property adjoining the lake.

[¶240] Balancing the sovereign rights of the private owners of lakefront property against the sovereign authority and trust ownership of the State of Ohio of the waters of Lake Erie and the lands submerged beneath those waters, the court recognizes that the American view of sovereignty is unique in its historical development. The sovereign authority of civil governments to regulate or take privately-owned property is ultimately derived from individuals by their consent, which authority is confirmed and limited by the U.S. and Ohio constitutions.

[¶241] The authority delegated to civil governments is limited, and its ultimate purpose is, in part, to enable civil governments to secure and protect the unalienable rights of private property owners, and to enable civil governments to be a good steward of the rights of the public in the waters and submerged lands held in trust by the State of Ohio.

[¶242] Prior to the conclusion of the American Revolution, the respective colonies had the

authority, and did, in fact, issue land grants and patents to individuals and corporations, and some of those grants and patents were issued for lands that are currently located along the southern shore of Lake Erie. When the United States successfully concluded the Revolutionary War, the sovereign rights of the British Crown vested directly in “the people” of the United States, and not in the state governments or the federal government. The sovereign rights of “the people” were then delegated, in a limited way, to the federal and state governments in accordance with the language of the U.S. Constitution, the Northwest Ordinance, and the Ohio Constitution; however, the limited delegation of this authority to the federal, territorial, and state governments did not constitute a wholesale abandonment of previously-acquired private property rights.

[¶243] Defendants-Respondents and Intervening Defendants have failed, as a matter of law, to show that the *landward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary High Water Mark of 573.4 IGLD (1985), and Plaintiffs-Relators and Intervening Plaintiffs have failed to show that the *lakeward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary Low Water Mark. The court declares that the law of Ohio is that the proper definition of the boundary line for the public trust territory of Lake Erie is the water’s edge, wherever that moveable boundary may be at any given time, and that the location of this moveable boundary is a determination that should be made on a case-by-case basis.

[¶244] The court’s decision does not attempt to list or comprehensively define all of the littoral rights of landowners of Ohio property adjoining Lake Erie, preferring instead to have those rights determined on a case-by-case basis. Similarly, the court’s decision does not attempt to cover swamp lands covered by the federal Swamp Land Act of 1850.

Summary Judgment

[¶245] Rule 56(C) of the Ohio Rules of Civil Procedure governs summary judgment motions in Ohio, and states, in pertinent part, as follows:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom

the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Thus, before summary judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.¹²²

[¶246] Although Rule 56(C) states that "No evidence or stipulation may be considered except as stated in this rule," Ohio courts have recognized that when the opposing party "fails to object to the admissibility of evidence under Civ. R. 56, the court may, but need not, consider such evidence in determining whether summary judgment is appropriate."¹²³

[¶247] The main purpose of the summary judgment procedure is to enable a party to go behind the allegations in the pleadings and assess the proof in order to see whether there is a genuine need for trial. The remedy should be applied sparingly and only in those cases where the justice of its application is unusually clear. Resolving issues of credibility, or reconciling ambiguities and conflicts in witness testimony is outside the province of a summary judgment.¹²⁴ In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion.¹²⁵

[¶248] In the present case, the certified questions concerning the declaratory judgment issues are matters of law. Accordingly, there is no genuine issue of material fact with respect to the declaratory judgment issues.

[¶249] In light of the foregoing discussions of the history of the State of Ohio, the law of the State of Ohio, the pleadings, the motions for summary judgment, the affidavits and other materials attached to the motions for summary judgment, the briefs and arguments of the parties, the court reaches the following conclusions as a matter of law.

¹²² *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267; *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 667 N.E.2d 1197.

¹²³ *Carver v. Deerfield Township* (Portage 2000), 139 Ohio App.3d 64, 742 N.E.2d 1182, citing *Felker v. Schwenke* (Cuyahoga 1998), 129 Ohio App.3d 427, 431, 717 N.E.2d 1165, 1168, *State ex rel. Spencer v. E. Liverpool Planning Comm.* (1997), 80 Ohio St.3d 297, 301, 685 N.E.2d 1251, 1255, and *Bowmer v. Dettelbach* (1996), 109 Ohio App.3d 680, 684, 672 N.E.2d 1081, 1084 (holding that "[w]hile the court of appeals may consider evidence other than that listed in Civ R. 56[C] when there is no objection, it need not do so.")

¹²⁴ *Napier v. Brown* (Montgomery 1985), 24 Ohio App.3d 12, 492 N.E.2d 847.

¹²⁵ *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St.2d 45, 517 N.E.2d 904; *Harless v. Willis Day Warehousing* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46.

Answers to the Nine Certified Questions

[¶250] The parties have agreed that the following nine certified questions of law must be ruled upon by this court, and the court hereby renders the following answers to these certified questions:

1. *What constitutes the farthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11?*

Answer:

The farthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11 is a moveable boundary consisting of the water's edge, which means the most landward place where the lake water actually touches the land at any given time. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis.

2. *What is the proper interpretation of the term, "southerly shore" as used in R.C. 1506.10?*

Answer:

The proper interpretation of the term, "southerly shore" in R.C. 1506.10 is the moving boundary of the water's edge, which means the most landward place where the lake water actually touches the land at any given time. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis.

3. *What is the proper interpretation of the term, "waters of Lake Erie" in R.C. 1506.10?*

Answer:

The term "waters of Lake Erie" in R.C. 1506.10 is properly interpreted to mean the waters of Lake Erie up to the moveable boundary where the lake water actually touches the land at any given time. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis.

4. *What is the proper interpretation of the term, "lands presently underlying the waters of Lake Erie" in R.C. 1506.11?*

Answer:

The proper interpretation of the term, "lands presently underlying the waters of Lake Erie" in R.C. 1506.11 is all lands currently beneath the lake up to the landward boundary where the lake water actually touches the land at any given time. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis.

5. *What is the proper interpretation of the phrase, "lands formerly underlying the waters of Lake Erie and now artificially filled" in R.C. 1506.11?*

Answer:

The proper interpretation of the phrase, "lands formerly underlying the waters of Lake Erie and now artificially filled" in R.C. 1506.11 is all lands formerly beneath the waters of Lake Erie, up to the landward boundary where the lake water actually touched the land, notwithstanding any subsequent artificial filling of those lands.

6. *What is the proper interpretation of the term, "natural shoreline" in R.C. 1506.10 and 1506.11?*

Answer:

The proper interpretation of the term, "natural shoreline" in R.C. 1506.10 and 1506.11 is the moveable boundary on the shore where the lake water touches the land at any given time. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis.

7. *If the farthest landward boundary of the "territory" is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985)?*

Answer:

No. First, the premise is invalid because the farthest landward boundary of the "territory" is not the location of the ordinary high water mark as a matter of law. Second, the use of the elevation of 573.4 feet IGLD (1985) is improper for establishing the farthest landward boundary of the territory because: (1) that elevation does not correspond uniformly to the moveable boundary of the place where the lake water actually touches the land at any given time; (2) the current selection of that elevation as the landward boundary has not been determined by legislative enactment; and (3) if such a uniform elevation were

declared by the legislature as the farthest landward boundary of the "territory," it would, in many cases, constitute a "taking" for which reasonable compensation would be due.

8. *If the line may be located at the present time using the elevation of 573.4 feet IGLD (1985), does the State of Ohio hold title to all such "territory" as proprietor in trust for the people of the State?*

Answer:

No. Again, the premise is false because the boundary line may not be located at the present time using the elevation of 573.4 feet IGLD (1985). However, the State of Ohio does hold title in trust for the people of the state to all submerged lands located lakeward from the place where the water actually touches the land at any given time. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis.

[¶251] 9. *What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the "territory?"*

Answer:

(A) *The rights of the class members*

Class members have the right to exercise their title rights to the water's edge and to exercise their littoral rights¹²⁶ as long as they do not interfere substantially with rights of the public to use the waters of Lake Erie and the lands submerged thereunder, or the servitudes of the federal government for navigation, commerce, international relations, and national defense. Class members also possess littoral rights that extend lakeward beyond the water's edge. However, the court declines to use this decision to define categorically what those littoral rights are in all cases. Similarly, the court declines to establish categorically whether all littoral rights are in the nature of a titled property interest, a franchise, a license, or a license coupled with an interest in land. And finally, the court declines to use this opinion to define categorically the rights of all class members when it comes to cases involving accretion, reliction, avulsion, erosion, etc.

¹²⁶ As noted above, this court has not been asked specifically to define all of the littoral rights that are recognized under Ohio law. Accordingly, notwithstanding the argumentation of the parties, the court declines to make a comprehensive, categorical declaration of what those littoral rights are with respect to all members of the class. Such questions are probably best left to the resolution of specific disputes involving individual parties who are asserting such littoral rights with respect to a specific parcel of land, according to specific deed language, and pertaining to a specific adjoining body of water.

In light of this declaratory judgment, the court hereby reforms the legal descriptions in all deeds to littoral property along the southern shore of Lake Erie, located within the territorial boundaries of the State of Ohio, and limits the lakeward boundary of title in those legal descriptions to the water's edge as it existed when the deed was filed. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis.

(B) The responsibilities of the class members

Class members are prohibited from using their title rights (to the water's edge) or their littoral rights to interfere substantially with the rights of the people of the State of Ohio in the public trust in the waters of Lake Erie, and in the lands submerged beneath those waters, in the "Territory" as defined in R.C. §§1506.10 and 1506.11. They are also prohibited from substantially interfering with the servitudes of the federal government for navigation, commerce, international relations, and national defense.

(C) The rights of the State of Ohio

The State of Ohio has the limited authority to enact laws and regulations necessary and proper to preserve and protect the public trust ownership of the waters of Lake Erie, and of the lands submerged beneath those waters, landward up to the water's edge. The State of Ohio does not have the authority to require littoral owners to lease the portion of the shore that lies above the water's edge.

(D) The responsibilities of the State of Ohio

The State of Ohio is prohibited from using its public trust ownership of the waters of Lake Erie, and of the lands submerged beneath those waters, in the "Territory" as defined in R.C. §§1506.10 and 1506.11, to interfere substantially with the title rights (to the water's edge) or the littoral rights of class members, or to interfere substantially with the servitudes of the federal government for navigation, commerce, international relations, and national defense. The State of Ohio's public trust responsibilities include the custodial¹²⁷ responsibility of protecting the public uses to which the waters of Lake Erie and the soils beneath them have been adapted. R.C. 1506.10.

¹²⁷ *State of Ohio v. C&P R. Co.* (1916), 94 Ohio St. 61, 113 N.E. 677, 1916 Ohio LEXIS 164 ([T]he state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use")

(E) The rights of the people of the State of Ohio

The people of the State of Ohio¹²⁸ have the right to exercise their individual rights as members of the public in the waters of Lake Erie, and in the lands submerged beneath those waters, up to the water's edge, for traditional purposes such as fishing, navigation, and recreation. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis.

(F) The responsibilities of the people of the State of Ohio

The people of the State of Ohio, and other members of the public who make use of Lake Erie, are prohibited from interfering substantially with the title rights (to the water's edge) or the littoral rights of class members, or from interfering substantially with the servitudes of the federal government for navigation, commerce, international relations, and national defense. Similarly, the people of the State of Ohio, and other members of the public who make use of Lake Erie, are prohibited from substantially interfering with the State of Ohio's exercise of its responsibilities under the public trust.

SUMMARY JUDGMENT RULINGS

[¶252] In accordance with the foregoing declarations, the court grants the motion for summary judgment of the plaintiffs-relators, in part; the court grants the motion for summary judgment of the intervening Taft plaintiffs, in part; the court denies the motion for summary judgment of the Defendants-Respondents State of Ohio and ODNR; and the court denies the motion for summary judgment of Intervening Defendants NWF and OEC.

[¶253] The court finds there is no just reason for delay. In addition to the class action issues resolved by this decision, there remain several important issues to be resolved by this court. Among those issues are questions regarding whether any of the named plaintiffs-relators has been unconstitutionally deprived of property without due process of law and without reasonable compensation therefor. If any of the plaintiffs have been unlawfully deprived of their property, then the court must decide what the reasonable value of that property deprivation was. In the

¹²⁸ For purposes of these summary judgment rulings, the court limits its class action holding to the rights and responsibilities of the people of the State of Ohio, and makes no class action ruling on the rights and responsibilities of individuals who are not citizens of the State of Ohio. The reason for limiting the court's holding in this way is that the class was not defined in such a way that the rights and responsibilities of visitors to Ohio can be disposed of here. Reasonable notice to members of the class was published only within the eight counties along the southern shore of Lake Erie, and notwithstanding the able participation of Intervening Defendants NWF and OEC, it cannot be said that reasonable notice was given to out-of-state individuals who may seek to use the waters and submerged lands of Lake Erie.

process of making those findings, the court may also be called upon to make specific findings with regard to the nature and extent of the littoral rights of the named plaintiffs-relators. All of these issues will depend upon the validity of the court's rulings in the class action portion of this case.

[¶254] Accordingly, by finding that there is no just reason for delay, the court allows the parties to test this court's ruling on appeal before proceeding with the individual claims of the named plaintiffs.

[¶255] IT IS SO ORDERED.



JUDGE EUGENE A. LUCCI

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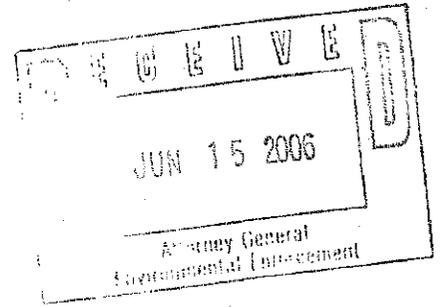
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FINAL APPEALABLE ORDER
Clerk to serve pursuant
To Civ.R. 58(B)

FILED

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LENN E. MATE
LAKE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL.)	CASE NO. 04CV001080
ROBERT MERRILL, TRUSTEE, et al.,)	
)	
Plaintiffs-Relators,)	JUDGE EUGENE A. LUCCI
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents.)	

STATE OF OHIO EX REL.)	CASE NO. 04CV001081
HOMER S. TAFT, et al.,)	
)	
Plaintiffs-Relators,)	JUDGE EUGENE A. LUCCI
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents.)	

ORDER CERTIFYING CLASS ACTION ON COUNT ONE OF THE FIRST AMENDED COMPLAINT IN CASE NO. 04-CV-001080

{¶1} The court has reviewed and considered the Notice of Joint Stipulation to Class Certification on Count One of the First Amended Complaint filed by the parties in State ex rel. Merrill et al. v. State of Ohio, Department of Natural Resources, et al., Case No. 04-CV-001080 (hereinafter "Merrill") on June 8, 2006. The Stipulation seeks on Order certifying a class in this lawsuit limited to Count I of the First Amended Complaint, which seeks a declaratory judgment from this court. For good cause shown, the Stipulation is well-taken and is granted under the terms set forth herein.



Class Action Definition

{¶2} As stipulated by the parties, the class shall consist of "all persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property¹ bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio" (hereinafter "the Class"). To the extent that governmental entities are included in the class, they are included solely in their proprietary capacity as property owners and not for any purpose or capacity implicating their governmental authority or jurisdiction.

1. Civ.R.23(A)(1)

{¶3} The court finds that the class is so numerous that joinder of all members is impracticable. As stipulated by the parties, the shore of Lake Erie in the State of Ohio extends approximately 312 miles, eight counties in the State of Ohio abut the shore of Lake Erie (Ashtabula, Lake, Cuyahoga, Lorain, Erie, Sandusky, Ottawa, and Lucas), and approximately 14,000 parcels of littoral property abut Ohio's Lake Erie shore. Owners of littoral parcels of land may be ascertained from available property records.

2. Civ.R.23(A)(2)

{¶4} Pursuant to the stipulation of the parties, the court hereby finds that the following questions of law are common to the class:

- (1) What constitutes the furthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms "southerly shore" in R.C. 1506.10, "waters of Lake Erie" in R.C. 1506.10, "lands presently underlying the waters of Lake Erie" in R.C. 1506.11, "lands formerly underlying the waters of Lake Erie and now artificially filled" in R.C. 1506.11, and "natural shoreline" in R.C. 1506.10 and 1506.11.
- (2) If the furthest landward boundary of the "territory" is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and

¹ The parties have stipulated that "upland property" is defined as real property bordering a body of water and that, in Ohio, "littoral property" is defined as upland property that borders an ocean, sea, lake, or a bay of any of these water bodies, as opposed to "riparian property" which is defined as upland property that borders a river, stream, or other such watercourse.

does the State of Ohio hold title to all such "territory" as proprietor in trust for the people of the State.

- (3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the "territory."

3. Civ.R.23(A)(3)

{¶5} Pursuant to the stipulation of the parties, the court hereby finds that the claims or defenses of the named Plaintiffs in Merrill are typical of the claims or defenses of the class. Each of the named Plaintiffs in Merrill is either a member of the class or, with respect to Named Plaintiff Ohio Lakefront Group, Inc., a non-profit corporation representing its members who are members of the class. All of the named Plaintiffs in Merrill seek a declaratory judgment that resolves the questions of law common to the class. All members of the class have the same interests in a declaratory judgment that resolves the questions of law common to the class.

4. Civ.R.23(A)(4)

{¶6} Pursuant to the stipulation of the parties, the court hereby finds that the named Plaintiffs in Merrill will fairly and adequately protect the interests of the proposed class. No named Plaintiff in Merrill seeks rights that will prejudice any other member of the class. The named Plaintiffs in Merrill collectively are committed to the vigorous prosecution of this class action litigation. The court further finds that class counsel - Calfee, Halter & Griswold LLP - consists of over 170 lawyers who are members in good standing of the bar of the State of Ohio and have the experience and financial ability to protect the interests of the class.

5. Civ.R. 23(B)(2)

{¶7} Pursuant to the stipulation of the parties, the court finds that the allegations contained within the First Amended Complaint and Counterclaim in Merrill have demonstrated that actual and justiciable controversies exist, thereby making appropriate declaratory relief with respect to both the State and to the proposed class as a whole.

Class Action Certification

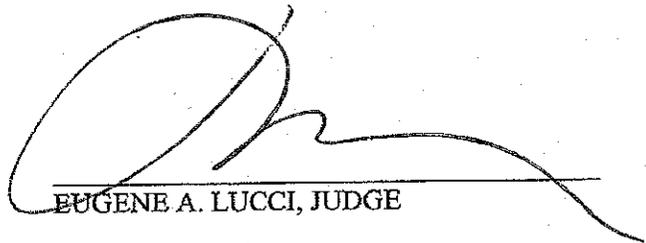
{¶8} As authorized by Civ.R. 23(C)(1) and 23(C)(4), the court determines that a class action shall be maintained on Count I of Plaintiffs-Relators' First Amended Complaint upon the common questions of law found herein, and hereby certifies that class action under the provisions of Civ.R. 23(B)(2). The two remaining counts of Plaintiffs-Relators' First Amended Complaint - "Count II - Mandamus/Inverse Takings Compensation" and "Count III - (In the

Alternative) Mandamus/Inverse Takings Compensation” – are hereby bifurcated pending final resolution of Count I.

{¶9} The class certification hearing in Merrill, scheduled for June 9, 2006 at 9:00 a.m., is no longer necessary and is cancelled.

{¶10} The parties in Merrill have requested that the consolidated case of State ex rel. Taft et al. v. State of Ohio, Department of Natural Resources, et al., Case No. 04-CV-001081 (hereinafter “Taft”), be stayed pending final resolution of the class action in Merrill, with the consent of counsel in Taft. The court will consult with all counsel in Taft before rendering a decision on this issue.

{¶11} IT IS SO ORDERED.



EUGENE A. LUCCI, JUDGE

cc: James F. Lang, Esq., Michael T. Mulcahy, Esq., K. James Sullivan, Esq., Attorneys for Plaintiffs/Relators in Case No. 04CV001080

Cynthia K. Frazzini, Esq. and John P. Bartley, Esq., Assistant Attorneys General for Defendants/Respondents in Case No. 04CV001080 and Case No. 04CV001081

Homer S. Taft, Esq. Plaintiff/Relator Pro Se in Case No. 04CV001081

L. Scot Duncan, Esq., Plaintiff/Relator Pro Se and Attorney for Plaintiff-Relator Darla J. Duncan in Case No. 04CV001081

1506.10 Lake Erie boundary lines.

It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shoreline of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 1506.11 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

The department of natural resources is hereby designated as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section.

Any order of the director of Natural Resources in any matter pertaining to the care, protection, and enforcement of the state's rights in that territory is a rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code.

Effective Date: 03-15-1989

EXHIBIT 6

A-121

1506.11 Development and improvement of lakefront land.

(A) "Territory," as used in this section, means the waters and the lands presently underlying the waters of Lake Erie and the lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the international boundary line with Canada.

(B) Whenever the state, acting through the director of natural resources, upon application of any person who wants to develop or improve part of the territory, and after notice that the director, at the director's discretion, may give as provided in this section, determines that any part of the territory can be developed and improved or the waters thereof used as specified in the application without impairment of the public right of navigation, water commerce, and fishery, a lease of all or any part of the state's interest therein may be entered into with the applicant, or a permit may be issued for that purpose, subject to the powers of the United States government and in accordance with rules adopted by the director in accordance with Chapter 119. of the Revised Code, and without prejudice to the littoral rights of any owner of land fronting on Lake Erie, provided that the legislative authority of the municipal corporation within which any such part of the territory is located, if the municipal corporation is not within the jurisdiction of a port authority, or the county commissioners of the county within which such part of the territory is located, excluding any territory within a municipal corporation or under the jurisdiction of a port authority, or the board of directors of a port authority with respect to such part of the territory included in the jurisdiction of the port authority, has enacted an ordinance or resolution finding and determining that such part of the territory, described by metes and bounds or by an alternate description referenced to the applicant's upland property description that is considered adequate by the director, is not necessary or required for the construction, maintenance, or operation by the municipal corporation, county, or port authority of breakwaters, piers, docks, wharves, bulkheads, connecting ways, water terminal facilities, and improvements and marginal highways in aid of navigation and water commerce and that the land uses specified in the application comply with regulation of permissible land use under a waterfront plan of the local authority.

(C) Upon the filing of the application with the director, the director may hold a public hearing thereon and may cause written notice of the filing to be given to any municipal corporation, county, or port authority, as the case may be, in which such part of the territory is located and also shall cause public notice of the filing to be given by advertisement in a newspaper of general circulation within the locality where such part of the territory is located. If a hearing is to be held, public notice of the filing may be combined with public notice of the hearing and shall be given once a week for four consecutive weeks prior to the date of the initial hearing. All hearings shall be before the director and shall be open to the public, and a record shall be made of the proceeding. Parties thereto are entitled to be heard and to be represented by counsel. The findings and order of the director shall be in writing. All costs of the hearings, including publication costs, shall be paid by the applicant. The director also may hold public meetings on the filing of an application.

If the director finds that a lease may properly be entered into with the applicant or a permit may properly be issued to the applicant, the director shall determine the consideration to be paid by the applicant, which consideration shall exclude the value of the littoral rights of the owner of land fronting on Lake Erie and improvements made or paid for by the owner of land fronting on Lake Erie or that owner's predecessors in title. The lease or permit may be for such periods of time as the director

determines. The rentals received under the terms of such a lease or permit shall be paid into the state treasury to the credit of the Lake Erie submerged lands fund, which is hereby created, and shall be distributed from that fund as follows:

(1) Fifty per cent of each rental shall be paid to the department of natural resources for the administration of this section and section 1506.10 of the Revised Code and for the coastal management assistance grant program required to be established under division (C) of section 1506.02 of the Revised Code;

(2) Fifty per cent of each rental shall be paid to the municipal corporation, county, or port authority making the finding provided for in this section.

All leases and permits shall be executed in the manner provided by section 5501.01 of the Revised Code and shall contain, in addition to the provisions required in this section, a reservation to the state of all mineral rights and a provision that the removal of any minerals shall be conducted in such manner as not to damage any improvements placed by the littoral owner, lessee, or permit holder on the lands. No lease or permit of the lands defined in this section shall express or imply any control of fisheries or aquatic wildlife now vested in the division of wildlife of the department.

(D) Upland owners who, prior to October 13, 1955, have erected, developed, or maintained structures, facilities, buildings, or improvements or made use of waters in the part of the territory in front of those uplands shall be granted a lease or permit by the state upon the presentation of a certification by the chief executive of a municipal corporation, resolution of the board of county commissioners, or resolution of the board of directors of the port authority establishing that the structures, facilities, buildings, improvements, or uses do not constitute an unlawful encroachment on navigation and water commerce. The lease or permit shall specifically enumerate the structures, facilities, buildings, improvements, or uses so included.

(E) Persons having secured a lease or permit under this section are entitled to just compensation for the taking, whether for navigation, water commerce, or otherwise, by any governmental authority having the power of eminent domain, of structures, facilities, buildings, improvements, or uses erected or placed upon the territory pursuant to the lease or permit or the littoral rights of the person and for the taking of the leasehold and the littoral rights of the person pursuant to the procedure provided in Chapter 163. of the Revised Code. The compensation shall not include any compensation for the site in the territory except to the extent of any interest in the site theretofore acquired by the person under this section or by prior acts of the general assembly or grants from the United States government. The failure of any person to apply for or obtain a lease or permit under this section does not prejudice any right the person may have to compensation for a taking of littoral rights or of improvements made in accordance with a lease, a permit, or littoral rights.

(F) If any taxes or assessments are levied or assessed upon property that is the subject of a lease or permit under this section, the taxes or assessments are the obligation of the lessee or permit holder.

(G) If a lease or permit secured under this section requires the lessee or permit holder to obtain the approval of the department or any of its divisions for any changes in structures, facilities, or buildings, for any improvements, or for any changes or expansion in uses, no lessee or permit holder shall change any structures, facilities, or buildings, make any improvements, or expand or change any uses

unless the director first determines that the proposed action will not adversely affect any current or prospective exercise of the public right of recreation in the territory and in the state's reversionary interest in any territory leased or permitted under this section.

Proposed changes or improvements shall be deemed to "adversely affect" the public right of recreation if the changes or improvements cause or will cause any significant demonstrable negative impact upon any present or prospective recreational use of the territory by the public during the term of the lease or permit or any renewals and of any public recreational use of the leased or permitted premises in which the state has a reversionary interest.

Effective Date: 03-18-1999