

**IN THE SUPREME COURT OF 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,

v.

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

Defendants.

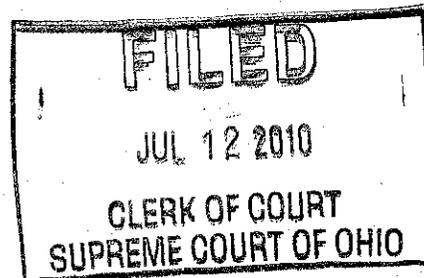
NATIONAL WILDLIFE FEDERATION, et al.,  
Intervening Defendants-  
Appellants/Cross-Appellees.

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-2008

Ohio Supreme Court Case  
Nos. 2008-L-007, 2008-L-008  
Consolidated



**BRIEF OF AMICI CURIAE JOSEPH SOMMER, FRANCES BUCHHOLZER,  
ROBERT TEATER, OHIO BASS FEDERATION, AND IZAAK WALTON LEAGUE OF  
AMERICA OHIO CHAPTER, AND NORTHEAST OHIO WATERSHED COUNCIL**

**IN SUPPORT OF DEFENDANTS STATE OF OHIO, DEPARTMENT OF  
NATURAL RESOURCES, AND INTERVENING DEFENDANTS NATIONAL  
WILDLIFE FEDERATION AND OHIO ENVIRONMENTAL COUNCIL**

RICHARD CORDRAY (0038034)  
Attorney General of Ohio

KATHLEEN M. TRAFFORD (0021753)  
Porter, Wright, Morris & Arthur, LLP  
41 S. High Street  
Columbus, Ohio 43215  
(614) 227-1915  
(614) 227-2100 (fax)  
ktrafford@porterwright.com

Special Counsel for Defendants-  
Appellants-Cross-Appellees,  
Ohio Department of Natural Resources and  
Sean Logan, Director

JAMES F. LANG (0059668)  
FRITZ E. BERKMUELLER (0081530)  
Calfee, Halter & Griswold, LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688  
(216) 662-8200  
(216) 241-0816 (fax)

Class Counsel and Counsel for Plaintiffs-  
Appellees,  
Robert Merrill, Trustee, et al.

HOMER S. TAFT (0025112)  
202200 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116  
(440) 333-1333  
(440) 409-0286 (fax)

Intervening Plaintiff-Appellee-  
Cross-Appellant, Pro Se

L. SCOT DUNCAN (0075158)  
1530 Willow Drive  
Sandusky, Ohio 44870  
(419) 627-2945  
(419) 625-2904 (fax)

BENJAMIN C. MIZER (0083089)  
Solicitor General, Counsel of Record  
STEPHEN P. CARNEY (0063460)  
Deputy Solicitor  
CYNTHIA K. FRAZZINI (0066398)  
Assistant Attorney General  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-8980  
(614) 466 5087 (fax)  
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendant-Appellant-Cross-  
Appellee,  
State of Ohio

NEIL S. KAGAN (*pro hac vice* pending)  
Senior Counsel, Counsel of Record  
National Wildlife Federation  
Great Lakes Regional Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
(734) 887-7106  
(734) 887-7199 (fax)

PETER A. PRECARIO (0027080)  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215  
(614) 224-7883  
(614) 224-4510 (fax)

Counsel for Intervening Defendants-  
Appellants-Cross-Appellees,  
National Wildlife Federation  
Ohio Environmental Council

**Intervening Plaintiff-Appellee, Pro Se and  
Counsel for Intervening Plaintiff-Appellee,  
Darla J. Duncan**

## TABLE OF CONTENTS

TABLE OF CONTENTS	4
TABLE OF AUTHORITIES	5
THE INTEREST OF AMICI CURIAE	6
ARGUMENT	8
I. <u>The Court of Appeals Ruling Makes Activities of Amici Impossible         By Denying Citizens Access to Lake Erie</u>	
II. <u>Contrary to Plaintiffs' Claims, Preservation of the Public Trust Does         Not Advocate for Unlimited Citizen Use of Shore</u>	
III. <u>The Court of Appeals Misapplies Century Old Ohio Supreme Court Case         Law on the Boundary of Lake Erie Public Trust</u>	
CONCLUSION	16
PROOF OF SERVICE	17

## TABLE OF AUTHORITIES

### Cases

<i>Seaman v. Smith</i> (Ill. 1860), 24 Ill. 521	13
<i>Sloan v. Biemiller</i> (1878), 34 Ohio St. 492	8
<i>State v. Cleveland &amp; Pittsburgh Railroad Company</i> (1916), 94 Ohio St. 61	14
<i>State ex rel. Merrill v. State of Ohio</i> (11th Dist.), 2009-Ohio-4256	8
<i>State ex rel. Squire v. Cleveland</i> (1948), 150 Ohio St. 303	11

### Constitutional Provisions, Statutes, Rules

O.A.C. 1501-6	9
R.C. 721.04	9
R.C. 1506.10	11
R.C. 1506.11	9
R.C. 1506.11(B)	11
R.C. 1506.11(G)	11
S. Ct. Prac. R. 6.6	6

## THE INTEREST OF AMICI CURIAE

Pursuant to S.Ct. Prac. R. 6.6, Joseph Sommer and Frances Buchholzer, Robert Teater, the Ohio Bass Federation, the Izaak Walton League of Ohio, and Northeast Ohio Watershed Council (collectively "amici curiae" or "amici"), respectfully submit this brief in support of defendants, intervening defendants, appellants State of Ohio, National Wildlife Federation, and Ohio Environmental Council. Amici share a common interest in assuring that the public trust doctrine is upheld in the state of Ohio as it pertains to Lake Erie and in protecting the rights of Ohioans to fish and recreate from shore. They also have an interest in protecting the shoreline of Lake Erie from the negative impacts of unfettered development.

### Amici Sommer, Buchholzer, and Teater

Amicus Joseph J. Sommer is a resident of Canton, Ohio. He served as Director of the Ohio Department of Natural Resources (ODNR) from 1985-91, capping a long career in public service. He has also served as director of the Ohio Department of Development and Department of Administrative Services, as Administrator of the Ohio Bureau of Workers Compensation, and as a top official with the Governor's Office, the Ohio General Assembly, and the State Auditor's Office.

Amicus Frances Buchholzer is a resident of Summit County, Ohio. In 1991, Governor George V. Voinovich appointed Buchholzer as the first female Director of ODNR and held that position until 1994. Currently, Buchholzer is a Park Commissioner for Metro Parks Serving Summit County and an active board member of the Ohio and Erie Canal Association. She continues to be involved with environmental and conservation issues and organizations at the state and national level. She and her husband, Richard, own and manage Chapel Hill Mall and related real-estate that form one of the largest retail and commercial sites in northeast Ohio.

Amicus Dr. Robert W. Teater served as director of ODNR from 1975 to 1983, and his leadership inspired some of the most significant and long-lasting developments in the department's history. In his distinguished career, he has also served as associate dean of the College of Agriculture at The Ohio State University and was director of its School of Natural Resources. He has played a key role in many of the state's natural resource advancements, including establishment of the International Center for the Preservation of Wild Animals, and has been widely honored for his many contributions to Ohio's leading conservation organizations.

Amici Mr. Sommer, Ms. Buchholzer, and Dr. Teater file this brief in their individual capacities as citizens of the state of Ohio, in whose name the State of Ohio holds the Lake Erie shoreline in trust. Further, they file this brief in as former Directors of the ODNR. Part of their duty during their tenures as Director of the ODNR was to protect and preserve the state of Ohio's public trust as it relates to Lake Erie; to protect the waters of Ohio; and to preserve the right of citizens to access the shoreline. Ohioans have always held the right to access Ohio's 300-plus miles of Lake Erie coast, and ODNR has always had the duty to protect this coastline from erosion and reasonably regulate development on the shore. The decision by the Court of Appeals for the Eleventh District is contrary to the established law of the public trust doctrine in this state and across the nation.

As former directors of the Ohio Department of Natural Resources, Amici Sommer, Buchholzer, and Teater have served governors of both political parties, holding responsibility for the protection and wise use of our state's irreplaceable land and water resources. They join to voice their concern regarding the Court of Appeals' decision, which threatens Ohio's single most important natural resource: Lake Erie.

### **Amici Ohio Bass Federation and Izaak Walton League of America, Ohio Chapter**

Amici Ohio Bass Federation and Izaak Walton League of America, Ohio Division

("IWLA"), are Ohio not-for-profit corporations with thousands of active members throughout the state. Their membership represents anglers and sportsmen who use Lake Erie and its shoreline for fishing and other activities. The lower courts' decisions would inhibit Amici's pursuit of their recreation opportunities. Further, the missions of these organizations include conserving, maintaining, protecting, and restoring the waters of the United States, including Lake Erie. These organizations rely on the public trust doctrine as it relates to Lake Erie and the State of Ohio's responsibility to protect the lake and its shoreline, to not only provide the access to recreation on the lake but also to further the protection of necessary aquatic habitat for their activities and interests.

### **Amicus Northeast Ohio Watershed Council**

Amicus the Northeast Ohio Watershed Council is a forum of community-based watershed groups in Northeast Ohio formed in 2001. The Council's mission is to provide networking and mentoring opportunities for watershed groups in Northeast Ohio, and to provide a collaborative forum for education, discussion, assessment, and adoption of advocacy positions regarding water quality, quantity, restoration, preservation, and distribution issues. The Council's membership includes 15 watershed groups (and the associated individual members of the groups) and dozens of other organizations dedicated to preserving the water quality, open space, the natural, recreational, resources of the rivers and tributaries that feed Lake Erie. The Council's member organizations conduct not only education and training on how to protect local watersheds in the Lake Erie Basin, but many conduct on-the-ground restoration projects, including habitat creation, wetland planting creek clean-up and dam removal.

While the member organizations and the Council focus on individual watersheds within the Lake Erie Basin, the ultimate goal is to protect the waters of Lake Erie. Under the Eleventh District's decision, the efforts of the Council and its membership will be hindered because the State of Ohio's ability to reasonably regulate potentially devastating development on the shoreline will be lost. Uncontrolled development could drastically impair the waters of Lake Erie.

## ARGUMENT

### **I. The Decision of the Court of Appeals Will Inhibit Amici's Activities Because They Will Be Prevented From Using the Shore of Lake Erie.**

The present case addresses (1) whether the State of Ohio holds in trust for the public the submerged lands of Lake Erie up to the ordinary high water mark and (2) whether the State of Ohio's public trust includes the right of citizen passage along the shore of Lake Erie for recreational purposes. For a century, the courts of Ohio have recognized the ordinary high water mark as the boundary of the State's public trust. *Sloan v. Biemiller* (1878), 34 Ohio St. 492. In direct opposition to this well-established view, the Court of Appeals held that the boundary of the public trust is not the ordinary high water mark, but the "actual water's edge". *State ex rel. Merrill v. State of Ohio* (11th Dist.), 2009-Ohio-4256, ¶ 127 ("App. Op.") (State's Appx. Ex. 3). In so doing, the Court of Appeals has given littoral property owners the right to exclude citizens from the land below the ordinary high water mark. It also extended littoral landowners' property rights and deprived the state of the property it previously held in trust up to the ordinary high water mark.

This redefinition of the public trust boundary by the Eleventh District as the point where

the water meets the land at any given moment will have detrimental effects on Amici, the citizens of Ohio and on visitors to the region. Since littoral property owners may now exclude the public from the shore, citizens wishing to visit Lake Erie will be forced to walk in the water whenever they stray from the 17 percent of the shoreline owned by the State. All activities requiring access to the shore will become impossible or unenjoyable. Children will no longer be able to walk along the shore to collect shells. Nature enthusiasts will be restricted in their abilities to watch birds, look for fossils, and study plants. Conservationists will be prevented from removing trash and debris from the lake's shore. Fishing from the shore will be impossible anywhere that the littoral property is not also owned by the State.

If the decision were to stand, the result would also strip away essential responsibility given to state and local governments to enforce reasonable and very necessary protection of the Lake Erie shore. This would put our coastal resources at risk by giving those few Ohioans who own land directly on the lakeshore the ability to extend their holdings across the shore and into the lake itself. By handing them this additional property, the decision would also give them new rights to develop the Lake Erie coast up to the waterline without regard for the impact their actions would have on the lake, neighboring property owners or the general public's right to use this public resource. R.C. 1506.11 and O.A.C. 1501-6 (providing for state granting of leases for improvement and development of its Lake Erie "territory"); R.C. 721.04 (providing for regulation by municipal corporations by ordinance of that same territory "within the limits of the municipal corporation and extending into Lake Erie to the distance of two miles from the natural shore line.")

A small but vocal handful of coastal landowners have opposed responsible management of the Lake Erie coast and are seeking through this litigation to extend their control over

resources that are the heritage of all Ohioans. After a generation of hard work and millions of dollars in public investment, Lake Erie has now begun to recover from its sad history of neglect and abuse. Today, it is an extraordinary economic and recreational resource. Upholding the Eleventh District's decision would put severe limitations on the ability of Amici and all Ohioans to make use of this resource that they have all paid and helped to restore.

**II. Contrary to Plaintiffs' Assertions, Protection of the Public Trust does not Enable Unlimited Citizen Use of Shore**

The Ohio Lakefront Group, the group organizing the appellees' class in this case, has begun an advertising campaign of misinformation regarding the rights of Ohio's citizens to use land protected by the public trust. According to their website and fundraising letters, they allege that the publicly accessible recreation areas on the lake require citizens to abide by restrictions of time of day, season, and regulation, and are policed by law enforcement officials. The group then argues that public access to beaches adjoining private property provides none of the above restrictions regarding time of day, littering, and criminal behavior. The appellees allege that upholding the ordinary high water mark as the boundary for the public trust will result in an area where polluting and unlawful acts can and will occur without any consequences.

The appellee organization has also claimed that restoring the public trust doctrine to the ordinary high water mark would mean anyone and everyone could have a noisy bonfire in landowners' backyards at any time. To support this claim, the group points to an incident involving alcohol use and firearms on a Lake Erie beach near a landowner's residence. If such an incident were to occur on Ohio's Lake Erie shore, the Amici and all who advocate for the protection of Ohio's public lakeshore would stand with the plaintiffs in making sure that those who break the law on public land are punished and that the people walking the shore are safe

from illicit and dangerous behavior. Aside from the alleged incident mentioned in their fundraising letter, there is no evidence of a history of abuse of private property on the Lake Erie shoreline. It is unclear why they believe such rampant misuse would start now. Even if there was a history of abuse, the landowners would always have the right and ability to notify their local law enforcement agents if such activities occurred.

Amici, and others who support the preservation of Lake Erie's public trust, are not suggesting that the public should have unrestricted freedom to use the Lake Erie shore. Those who advocate for public access to Lake Erie do want to ensure that the Lake Erie shore below the ordinary high water mark is available to the public for its full enjoyment. Any activity destructive to the shore or the use thereof would detract from this enjoyment, and would be contrary to the appellants' intentions. Amici join appellants in opposing the construction of campfires on the shore, littering of the shore, and any other activity that would be harmful to the shore.

Amici strenuously object to the false assertion that public access to our shoreline is a precursor to lewd and harmful activities. Upholding the public trust will do nothing more than maintain Ohioans' guaranteed rights to make use of Lake Erie for fishing and other traditionally recognized activities. R.C. 1506.10; 1506.11(B) (recognizing the public rights of navigation, water commerce, and fishery); R.C. 1506.11(G) (recognizing the public right of recreation). The public trust doctrine, as it has existed for over 100 years, does not provide limitless rights to make use of public property. The public's rights have always been subject to regulation by the state as trustee, and the State may, "by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, syllabus ¶ 2.

### III. The Court of Appeals Misapplied Century Old Ohio Supreme Court Case Law on the Boundary of Lake Erie Public Trust

The State of Ohio, National Wildlife Federation, and Ohio Environmental Council correctly assert that the right of the public to walk on the lands below the ordinary high water mark is necessary for the full enjoyment of the public trust purposes of navigation, commerce, fishing, recreation and aesthetic enjoyment. To maintain these rights of use for the public, the boundary of Ohio's public trust must be reestablished at the ordinary high water mark, where this Court had previously set it over a century ago. Otherwise, Amici's ability to make use of the remaining property in the public trust will be severely limited.

In ruling against the State of Ohio's and OEC/NWF's contention that the public trust boundary has always been the ordinary high water mark, the Eleventh District frequently quotes an 1878 Supreme Court of Ohio ruling in *Sloan v. Biemiller*. The court quotes *Sloan* to reach its holding that "the 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." App. Op. at ¶97. However, the court fundamentally misinterprets the holding in *Sloan*, by interjecting its own definition of the boundary into the Supreme Court's ruling and attempting to rewrite precedent. However, the Eleventh District, ten pages earlier in the decision, quotes from the case, revealing the 1878 ruling to be the ordinary high water mark—not where the water physically meets the land as the Eleventh District later decides. The court states in paragraphs 60-61 of the decision:

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:

"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.)

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 in the body of its opinion:

“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 15 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.

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.” *Sloan* at 512-513 (quoting *Seaman* at 524-525).

To the extent that *Sloan* established the boundary of Lake Erie, it established it as “the line at which the water usually stands when free from disturbing causes.” *Sloan* at syllabus ¶4. As the Court of Appeals noted, that formulation was enunciated in *Seaman*, which rejected the high water mark as the boundary in favor of the ordinary high water mark. *Seaman* at 524-525.

The court in *Seaman* acknowledged that the Great Lakes, unlike the oceans and sea, have no appreciable tides. *Seaman* at 524. Yet, as that court further acknowledged, “the rules that

govern boundaries on the ocean, govern this case.” *Id.* In the *Seaman* court’s words, “the highest point” water may reach is not “the point where the owner’s rights terminate, nor yet . . . the lowest point . . . it may recede.” *Id.* at 525. Rather, the point of demarcation is the “ordinary high water mark,” which the court also called the “usual high water mark,” and described as “that line where the water usually stands when unaffected by any disturbing cause.” *Id.* at 524-525. Thus, the *Sloan* court accepted the boundary of Lake Erie as the ordinary high water mark, and not the highest, nor lowest mark, and clearly not where the water meets the land at any given time.

As previously mentioned, the Supreme Court of Ohio has acknowledged the public trust doctrine, the concept that the state holds the waters and subaqueous lands of Lake Erie in perpetual trust for the people, while acknowledging that littoral owners retain a right to “wharf out” from the shore to the lake’s navigable waters. *State v. Cleveland & Pittsburgh Railroad Company* (1916), 94 Ohio St. 61. The public trust in subaqueous lands was reaffirmed over a quarter of a century later in *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303. But in the *Merrill* opinion, the Court of Appeals continues to misapply Supreme Court case law. The Eleventh District acknowledges the ruling in *Squire v. Cleveland*, and its reaffirmation of *Cleveland & Pittsburgh R.R. Co.*, and even cites the *Squire* court’s reference to the *Cleveland & Pittsburgh R.R. Co.* case by stating that:

“[I]n *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:

“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.) App. Op. at ¶¶ 69-70.

This statement by the state’s high court, that title of lands beyond the high water mark are the property of the people of Ohio, supports the OEC’s arguments in favor of the ordinary high water mark as the public trust boundary. The Court of Appeals even emphasizes the phrase “beyond the ordinary high water mark,” seemingly to draw attention to that phrase as being, as it is, the Supreme Court of Ohio’s understanding of the term “natural shoreline.”

However, the Eleventh District disregards the case law citation they reference, and instead holds 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 R.R. 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.” App. Op. at ¶ 84. With this, the court disregards their own citations to over 100 years of Ohio case law, and moves the boundary of the public trust from the ordinary high water mark to the “water’s edge.”

### CONCLUSION

Amici, as sportsmen’s organizations, conservation advocates, former resource conservation agency directors, and citizens of Ohio, respectfully request this court to overrule the decision of the Eleventh District Court of Appeals. Prohibiting citizens of Ohio from walking along the shoreline will make many of the Amici’s activities impossible or exceedingly difficult to continue. Appellants are correct in their assertions that the lower court improperly overturned more than 100 years of precedent in holding that the boundary between public trust and private

land should be the point of physical contact between water and land rather than the ordinary high water mark. This court should reset that boundary at the ordinary high water mark to protect the rights of Ohio's citizens to make use of their public trust property.

Respectfully submitted,



---

Colin William Bennett (0085595)  
The Law Office of Colin Bennett, LLC  
P.O. Box 340  
Bellbrook, OH 45305  
(937) 985-3407  
(937) 660-9320 (fax)  
colin@cwbenettlaw.com

**Counsel for Amici Curiae**

## CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Amicus Curiae was served by Regular U.S. Mail on this 12th day of July, 2010, on the following counsel:

RICHARD CORDRAY (0038034)  
Attorney General of Ohio

KATHLEEN M. TRAFFORD (0021753)  
Porter, Wright, Morris & Arthur, LLP  
41 S. High Street  
Columbus, Ohio 43215  
(614) 227-1915  
(614) 227-2100 (fax)  
ktrafford@porterwright.com

*Special Counsel for Defendants-  
Appellants-Cross-Appellees,  
Ohio Department of Natural Resources and  
Sean Logan, Director*

JAMES F. LANG (0059668)  
FRITZ E. BERKMUELLER (0081530)  
Calfee, Halter & Griswold, LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688  
(216) 662-8200  
(216) 241-0816 (fax)

*Class Counsel and Counsel for Plaintiffs-  
Appellees,  
Robert Merrill, Trustee, et al.*

HOMER S. TAFT (0025112)  
202200 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116  
(440) 333-1333  
(440) 409-0286 (fax)

*Intervening Plaintiff-Appellee-  
Cross-Appellant, Pro Se*

BENJAMIN C. MIZER (0083089)  
Solicitor General, Counsel of Record  
STEPHEN P. CARNEY (0063460)  
Deputy Solicitor  
CYNTHIA K. FRAZZINI (0066398)  
Assistant Attorney General  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-8980  
(614) 466 5087 (fax)  
benjamin.mizer@ohioattorneygeneral.gov

*Counsel for Defendant-Appellant-Cross-  
Appellee,  
State of Ohio*

NEIL S. KAGAN (*pro hac vice* pending)  
Senior Counsel, Counsel of Record  
National Wildlife Federation  
Great Lakes Regional Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
(734) 887-7106  
(734) 887-7199 (fax)

PETER A. PRECARIO (0027080)  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215  
(614) 224-7883  
(614) 224-4510 (fax)

*Counsel for Intervening Defendants-  
Appellants-Cross-Appellees,  
National Wildlife Federation  
Ohio Environmental Council*

L. SCOT DUNCAN (0075158)  
1530 Willow Drive  
Sandusky, Ohio 44870  
(419) 627-2945  
(419) 625-2904 (fax)

*Intervening Plaintiff-Appellee, Pro Se and  
Counsel for Intervening Plaintiff-Appellee,  
Darla J. Duncan*