

**ORIGINAL**

**IN THE  
SUPREME COURT OF OHIO**

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

Appellees and Cross-Appellees,

v.

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

Appellants and 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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**FILED**  
SEP 20 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## STATEMENT OF THE CASE AND FACTS

For brevity, Cross-Appellant will not discuss editorial content of Appellants' Statements of Fact or matters that extend beyond the record on appeal, particularly those raised by various Amici. The State's Statement of Case omits the Answer, Counterclaim and Cross Claim filed by the state defendants that was actually a third party claim against the United States of America. The United States removed the case to United States District Court, whereupon the federal court dismissed all claims against federal third party defendants and remanded the case to trial court below. (T.d.93, 94, 204).<sup>1</sup> The State's Brief inaccurately states OLG and Taft "appealed", naming the State as an "Appellee". The State and NWF each appealed as Appellants below. OLG and Taft each filed a cross-appeal, and all parties referred to the State as "Appellant" and "Cross-Appellee." The State asserts Taft did not respond in the trial court objecting to the Attorney General's brief. Cross-Appellant Taft had no further brief permitted in response to the State's Reply Brief and Response to OLG's cross-appeal of July 25, 9 days after the joint notice substituting counsel for ODNR.

## LAW AND ARGUMENT

- A. The Attorney General has no inherent power to initiate an appeal except upon requirements enacted by the General Assembly. (State of Ohio Proposition of Law No. 1 and ODNR Proposition of Law No. 1)**

For brevity, Cross-Appellant will not restate all argument, especially scholarly articles, of the Supplemental Response Memorandum of Cross-Appellant Homer S. Taft To Supplemental Jurisdictional Memorandum Of State of Ohio previously requested by the Court, relying in part on and referring to the extensive discussion of the issue in that Memorandum.

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<sup>1</sup> Consistent to the Court rule below, references to the trial court docket will be "T.d.".

The Attorney General attempts to confuse the issue dealt with by the Court of Appeals below with whether the State of Ohio, or for that matter ODNR and its Director, were “parties” in the trial court, or Cross-Appellees on Appeal. No party asserts that the State of Ohio was not a party. All parties below, including the Attorney General, referred to the State of Ohio and NWF as “Appellants” and “*Cross-Appellees*”, never as “Appellees” The State of Ohio was a party at all times in these proceedings and was a Cross-Appellee below even if the Attorney General’s appeal was improper. The Attorney General spends much time asserting the obvious to avoid the question appropriately framed by this Court:

“Does the attorney general have standing to appeal a judgment against the State of Ohio if that appeal is contrary to the directive of the governor and the attorney general is not representing an administrative agency?”

ODNR and its Director were also Appellees below, so designated. Those parties elected to neither appeal nor participate in any form before the court of appeals. The jurisdictional effect of that lack of participation will be discussed below as to their attempted appeal now. The State of Ohio is the primary party against whom judgment might subsequently be rendered in mandamus proceedings that may follow this appeal, but are not part of the present appeal.

The Attorney General now claims the Governor “approved” the appeal filed by the Attorney General below. The record is completely devoid of support and seems to contradict any positive act of the Governor, who simply stated Attorney General Mark Dann had “informed” him he would continue participating in the *trial court*. The Attorney General asserted in his Notice of Appeal, her brief and at oral argument that the office had inherent and independent authority to represent the State of Ohio as the office saw fit, never asserting the late-discovered “approval” now claimed.

The Attorney General asserts broad, self-executing common law powers to represent the State of Ohio in the manner he deems appropriate, without authorization or direction of the other offices and branches of Ohio government. He claims that R.C. §109.02 merely provides an “additional” method by which the Attorney General may represent the State, reducing the statute to meaningless surplusage. This contradicts and eviscerates the Ohio Constitution, Ohio statutory law and history for the entire 207 years since Ohio was admitted to the Union.

The question before this Court is whether the Attorney General has that claimed “inherent” power to prosecute actions and appeals on his own authority absent any authorization of the General Assembly or the Governor, especially where it is obvious by words and conduct below that the Governor, his Department and Director neither appealed nor appeared before the court of appeals by brief or oral argument, thereby accepting the decision of the trial court. To hold the Attorney General, as a constitutional officer, has “inherent” powers neither expressed nor suggested by the Ohio Constitution at variance with the history of that office and the Ohio Constitution will result in a vast expansion of power for every constitutional officer of the executive branch completely at variance with the Ohio Constitution, legislative command, and the decisions of this Court. It would convert the Attorney General from lawyer for the State to policy making office independent of the General Assembly and all state officers and agencies. State officers and agencies would be prohibited from resolving litigation except by prior blessing of the Attorney General. Where the Attorney General was not authorized to prosecute the appeal or represent the party, the court of appeals chose the proper remedy in striking all assignments of error and all briefs filed by a lawyer acting without authority. The court’s affirmance of the trial court on all relevant points would have made striking the Attorney General’s Brief on behalf of a Cross-Appellee harmless error in any event.

In justifying his asserted right to initiate and prosecute an appeal for a party without authority, the Attorney General misleadingly begins by stating that OLG and Taft “appealed” the ruling of the Lake County Court of Common Pleas, only discussing the appeal filed by the Attorney General or by NWF subsequently as though in response. To the contrary, no party representing any plaintiff filed an appeal within the initial time limits. Had no defendant filed an appeal, the case would have proceeded to mandamus relief on “taking”. However, the Attorney General filed a Notice of Appeal nominally on behalf of the State of Ohio on the last day when such an appeal could be filed, as did the NWF in a coordinated filing. Only after those appeals and the time limit for initial appeals, on separate issues, did OLG and Taft file “cross-appeals.” The Attorney General chose his ground below. The Notice of Appeal names Appellant as “the State of Ohio, by and through Attorney General of Ohio Mark Dann”, asserting an independent right of appeal. State of Ohio Notice of Appeal at 1. *State ex rel. Merrill v.ODNR*, Case No. 2008-L-008, (9<sup>th</sup> Dist. 2009). (T.d. 192).

After having first represented to this Court that the issue was never raised nor briefed in any way by any party before the court of appeals, the Attorney General now shifts to avoid what Cross-Appellant Taft or the court of appeals raised as to the Attorney General’s sudden independent authority to appeal, responding instead to other parties’ arguments before this Court on the State’s status as a party in the trial court. Cross-Appellant raised the jurisdictional matter that the independent authority of the Attorney General to initiate the appeal, or for that matter conduct any litigation for the State of Ohio not before this Court, absent authorization from the Governor or General Assembly, should be seriously doubted. Footnote 1 to the Cross-Appellant’s Answer Brief to the State below concluded:

“... the authority of the Attorney General to prosecute an appeal in opposition to the Governor exercising the full executive power of the State of Ohio is unclear.”

Nor could Cross-Appellant have raised an Assignment of Error as the Attorney General suggests, as the issue was appellate jurisdiction first arising in the court of appeals upon filing of the Notice of Appeal. The court of appeals similarly inquired as to the Attorney General's standing to sue, or in this matter, prosecute an appeal, independent of the authority granted by the General Assembly, not as to the State's standing as a party. The court concluded it could "... find no authority for the attorney general to prosecute this matter on his own behalf...", App.Op. at ¶ 44, as the Attorney General had explicitly argued he had authority to do in his Notice of Appeal and her Reply Brief to Cross-Appellant Taft's cited footnote.

While there is no showing of authority to file Briefs for the State as either Appellant or Cross-Appellee, if there were error in striking the State of Ohio's briefs as Cross-Appellee filed by the Attorney General, the error would be harmless. The court of appeals unanimously ruled on the issues raised on Cross-Appeal adverse to Cross-Appellants except on a minor technical issue no party objected to. However, striking the Assignments of Error and Brief in support is the appropriate and necessary remedy where an appeal and Briefs are filed improperly without authority. The same arguments and assignments of NWF were also unanimously rejected by the appeals court below on the merits in any event.

Whether, as suggested by the Attorney General and Amici, the General Assembly's limitations on the Attorney General's powers are bad policy is properly addressed with the General Assembly, and to a lesser extent the constitutional officers such as the Governor whose lack of authorization he seeks to confuse and avoid, and are not matters properly for determination by this Court. *State ex rel Heffelfinger v. Brunner*, 116 Ohio St.3d 172, 2007-Ohio-5838, at 182.

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

The history of the Ohio Attorney General's office is incompatible with creation of "common law" powers. When Ohio adopted a Constitutional document in preparation for statehood, no Attorney General was authorized. Rather, an intentionally weak single executive office of Governor was created out of Jeffersonian distrust of the office and hostility to the performance of the Governor of the Northwest Territories, General St Clair. *State v. Bodyke*, 2010-Ohio-2424, at ¶43, Steinglass, S. & Scarselli, G., *The Ohio State Constitution: A Reference Guide* (Praeger, 1964). The 1803 Constitution reposed virtually all power in the General Assembly. Unlike the Attorney General, the Secretary of State, Auditor and Treasurer were constitutional officers in 1803, but their selection and duties were determined by the General Assembly. 1803 Ohio Const. Art II, §16; Art VI, §2 For the next 43 years, no Attorney General was deemed necessary.

When the office was first created in 1846, it was a purely statutory creation whose occupant was similarly selected by the General Assembly with limited powers the General Assembly established. 44 Ohio Laws 45 (1846). As a statutory creation in a state which has legislatively rejected the wholesale importation of English common, 4 Ohio Laws 38 (1806), claims the office holds "inherent" "common law" powers continued from early history are unsupportable. By contrast, the first Ohio Attorney General, well conversant with the authorization and history of his office, considered his duties to be strictly limited and modest. Miller, C. & Miller, T, *The Constitutional Charter of Ohio's Attorney General*, 37 Ohio St. L.Rev. 801, 804-805 (1977).

In the 1851 Constitution, the office created by the General Assembly was first recognized as a constitutional executive officer when the office of Lt. Governor was also created. These offices, plus the previously recognized offices of Secretary of State, Auditor, and Treasurer were made elective by popular vote. However, the 1851 Constitution is completely silent on the duties of these officers, excepting limited powers granted the Governor and Lt. Governor. Their duties and empowerment remained in the control of the General Assembly as it had been for 48 years, and the statutory enactments preceding the 1851 Constitution continued in effect until amended or replaced. Ohio Const. Schedule, §1 . The General Assembly recognized this when it re-enacted the powers it had previously granted to the Attorney General with minor amendments. Section 27 of that statute provides that the prior enactments of 1846 and 1848 regulating the Attorney General's duties had remained in effect and were replaced by the substantially similar enactment of 1852 shortly after the adoption of the 1851 Constitution. 50 Ohio Laws 267 (1852).

The Ohio Attorney General's office therefore differs fundamentally from many other states, particularly original States, where the office continuously existed both preceding and after independence and Statehood and the office was usually expressly imbued with powers by state constitutional provisions. Rather, Ohio has long been recognized as a "code" state where the office of Attorney General was created by statute, later ratified by constitution, similar to New York, West Virginia, New Mexico, Arizona, Kansas and Hawaii among others. For at least 128 years after creation of the office until 1976, Ohio's Attorneys General themselves appear to have recognized that they were a "code" office solely empowered as provided by the state legislative body. Miller, C. et al., *supra*, at 803 & fn 9;

The fundamental authority of the Attorney General today appears in R.C. §109.02, which has existed in virtually identical form since the 1846 enactment and the recodification in 1852.

§109.02 of the Revised Code provides in pertinent part:

The attorney general is the chief law officer for the state and all its departments ... . Except as provided in division (E) of section 120.06 and in sections 3517.152 to 3517.157 of the Revised Code, no state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When 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. Upon the written request of the governor, the attorney general shall prosecute any person indicted for a crime.

Though there were actions by and against the State in courts inferior to the Supreme Court, the General Assembly distinguished between cases or controversies before this Court that might lead to indisputable finality of Ohio law and of the Attorney General's participation in lower courts. It carefully chose words to empower the Attorney General to participate in all proceedings, civil and criminal, before this Court, not only where the State was directly involved, but also where the State might be indirectly affected. However, the same enactment empowered the Attorney General to appear in inferior courts only where "required" by either the Governor or General Assembly. This provision both removes independent authority to appear where the State is directly or indirectly affected and adds the condition that the Attorney General must be authorized by the Governor or General Assembly.

If the General Assembly can regulate the Attorney General's authority, the Attorney General's assertion requires this Court indulge the presumption that the General Assembly in enacting R.C. §109.02 did not intend its explicit words distinguishing authority to appear of right for the State before this Court, but before the lower courts only upon request of the Governor or the General Assembly. This Court has always held that words in a statute may neither be added

or deleted in interpretation, e.g., *State v. Lowe*, 113 Ohio St.3d 507, 2007-Ohio-606; *Erb v Erb*, 91 Ohio St. 3d 503, 2001 Ohio 104, 747 N.E.2d 230; *Cleveland Elec. Illuminating Co. v Cleveland* (1988), 37 Ohio St. 3d 50, syllabus 3, and that the legislature is presumed if it chooses differing words or distinctions within a statute to have intended those distinctions. E.g., *Stansell v. Roberts* (1844), 13 Ohio 148; *Hollingsworth v. State* (1876), 29 Ohio St. 552.

Since enacting the predecessors of current R.C. §109.02, the General Assembly has enacted literally hundreds of statutory requirements or authorizations to the Attorney General to both initiate action and to defend actions against the State, its political branches, officers and agencies in various courts of this State as well as in federal courts, usually at the request of an administrative department.. Frequently, the statutes require that the Attorney General must be provided a “written request”. In Title 15 of the Revised Code alone, authorizations appear in 26 sections of 12 Chapters, including four in Chapter 1506 on coastal management. R.C. §§ 1506.04, 1506.09, 1506.33, 1506.35; see also §§ 1503.05, 1509.04, 1509.32-33, 1511.07-071, 1513.15, 1513.37, 1514.03, 1514.05-.071, 1515.081, 1518.05, 1520.03, 1520.06 et seq., 1533.35. Several sections of Chapter 109 regulating the Attorney General would be meaningless under the Attorney General’s theory. E.g. R.C. §109.09, §109.10. The Attorney General’s asserted authority requires the leap of faith that the legislature has enacted each of these provisions unnecessarily and should be disregarded. However, this Court long ago held:

“The Constitution of Ohio, especially Section 1 of the Article III, makes the attorney general one of the executive officers of the state of Ohio. In the exercise of the police power of the state, the general assembly of Ohio may delegate to him *any such legal, administrative or executive duties as it deems best* and which are not otherwise delegated by the constitution.” *State ex rel. Doerfler v. Price*(1920), 101 Ohio St. 50, Syllabus 3 (emphasis supplied).

Appellants and their amici also misconstrue this decision. This Court, speaking through its prepared Syllabus, relies on the General Assembly's authority, not "inherent" power or the Constitution, to find the actions proper.

Nothing in Ohio decisional law contradicts this history and limitation on the Attorney General, while many decisions recognize and apply the statutory scheme determined by the General Assembly. On the precise question before this Court, the United States Court of Appeals found it was an undecided question of state law and declined to determine whether the Attorney General might appeal on behalf of the "State" against the request of the Secretary of State he represented. *North East Ohio Coalition for the Homeless v. Blackwell* (6<sup>th</sup> Cir. 2006), 467 F.3d 999. Prior determinations of this Court have found circumstances where the Attorney General is not empowered to represent the "State of Ohio", especially where the Governor and leaders and branches of the General Assembly did not "request" or authorize the Attorney General's representation. *DeRolph v. State* (2001), 2001-Ohio-5092, 94 Ohio St. 3d 40. Most Ohio cases relied upon by the Attorney General and Amici former Attorneys General to support "common law" powers actually rely on explicit statutory construction, not common law, as the basis of their decision. E.g., *State ex rel. Doerfler*, supra; *State ex rel. S. Monroe & Sons Co. v. Baker* (1925), 112 Ohio St. 356 (state officials' authority is regulated by Gen. Assembly); *State v. Finley* (2<sup>nd</sup> Dist. 1998), 1998 Ohio App. Lexis 2693, m.c.o. (1998) 83 Ohio St. 3d 1449 (R.C. §109.02 does not require Governor's request where R.C. §109.14 directly authorizes). Appellant also relies on *State ex rel. Duffy v. Lakefront East Fifty-Fifth Corp.* (1940), 137 Ohio St. 8, but that case involved an authorized original action in this Court. Even where "common law" is discussed, the reference is generally to use "common law" as a rule of construction as to the meaning of words appearing in a statute, not as an independent body of law. This is consistent

with R.C. §1.49, a rule of construction adopted by the General Assembly, that in determining legislative intent a court “may consider among other matters ... [t]he common law or former statutory provisions... “ These cases do not extend the powers of any governmental office beyond the statutory enactments.

**2. Other “Code” jurisdictions follow similar rules as to the independent, policy making authority of State Attorneys General.**

The view that the Attorney General holds limited powers is not unique to the court of appeals ruling in this case, the decided precedent in Ohio or the laws of many states. As to the right to initiate an appeal, the Arizona Supreme Court, deciding an issue under similar statutory provisions, held the Attorney General did not have the right to appeal on behalf of the “State” where not authorized by the officers or entities who could “require” such action as set forth in the statute. *Santa Rita Mining Co. v. Dept. Of Prop. Valuation* (1975), 111 Ariz 365. While few cases deal explicitly with appellate standing, several enforce limitations on the powers of an Attorney General to set policy and act independently of other authorities, particularly in states which do not accept the “common law” theory or where the Attorney General acts contrary to the determination of agencies or other officers. E.g., *State ex rel. Morrison v. Sebelius* (2008), 285 Kan. 875, at Syllabus 6, 8; *Blumenthal v. Barnes* (Conn. 2002), 804 A.2d 152; *State v. City of Oak Creek* (2000), 232 Wis. 2d 612; *In re Sharp’s Estate* (1974), 63 Wis.2d 254; *Motor Club of Iowa v. Dept. of Transp.* (Iowa 1977), 251 N.W.2d 510; *State v. Davidson* (1929), 33 N.M. 664. Extensive scholarly examination of these decisions and other cases dealing with the presence or absence of various powers of State Attorneys General was provided in Cross-Appellant’s Supplemental Response Memorandum of Cross-Appellant Jurisdiction To Supplemental Jurisdictional Memorandum at 8.

- 3. The Attorney General made no claim of the Governor’s “approval” below, much less positive “request”, because it is unsupportable in the record, and determination of “all matters” relating to the “territory” of Lake Erie are textually committed by the General Assembly to ODNR.**

The Attorney General employs selective emphasis and editing to argue that the determination of the State’s interests respecting the subject matter of Plaintiffs’ suits is not within the authority of the Governor and his Director of Natural Resources. However, the General Assembly has declared “all matters” related to “enforcement of the state’s rights” in the “territory” of the State in Lake Erie shall be reposed in that department. R.C. §1506.10. That the General Assembly previously transferred the statutory powers from another department or renamed that department during its administration of those duties is irrelevant. The General Assembly can and has committed many matters to other agencies and officers, to the exclusion of the Attorney General’s interference. *State ex rel. Brown v. Rockside Reclamation, Inc.* (1976), 47 Ohio St.2d 76; *State ex rel. Rogers v. New Choices Community School* (2<sup>nd</sup> Dist. 2009), 2009-Ohio-4608.

The Attorney General reads the Governor’s mind to discern unstated beliefs and align the Governor’s positions on his authority and the substantive “public policy” issues with the Attorney General. The record does not support affirmative approval of the Governor or the administrative agency charged with responsibility. The Supplemental Memorandum of Special Counsel for ODNR observes:

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

Similarly, and more binding, the Attorney General directly asserts “[t]he only ‘directive’ from the Governor was his directive to ODNR, a department subordinate to him.” Supplemental Jurisdictional Memorandum of State of Ohio, at 2. These are direct admissions of the Attorney General and the Governor’s department that there was no affirmative directive to Attorney General Dann to proceed, contradictory to the belated discovery of the Governor’s approval.

The Governor’s “understanding” that the litigation was continuing cited by the Attorney General would apply to the continuing claims of Plaintiffs, Intervening Plaintiffs and Intervening Defendants in the trial court. Even if the Governor “understood” the Attorney General would continue to represent the “State of Ohio” on the Motion for Summary Judgment nine days later, opposing Plaintiffs’ claims and the Governor’s policy change, that does not rise to the affirmative requirement to continue in the trial court, much less a requirement to appeal the determination of the trial court to a higher court. In the trial court, the Attorney General entered appearance on behalf of the administrative agency, its Director, and the “State of Ohio” in care of and at the request of the Governor. That the Attorney General was initially requested to provide representation to the State (with the Governor being its named representative), the Director and the Department by the request of the Governor and his Director and Department, jointly, appears uncontested. No evidence appears after the Governor made the determination not to proceed further that any party authorized the Attorney General to proceed independent of his former clients, nor did the Attorney General intervene in his own right in the trial court. The Attorney General chose to file an appeal on behalf of the “State of Ohio, by and through Attorney General of Ohio Mark Dann” independently, not by request or requirement.

The Attorney General seeks to strip the Governor’s position as the “supreme executive” officer, Ohio Const., Art. III, §5, and eviscerate the authority of R.C. §109.02. Where the

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

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

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

For the Attorney General then to seek broad independent powers by judicial declaration without the intervening checks and balances of the political institutions of the General Assembly and the other members of the executive, and especially the Governor, seems in derogation of the traditions of American representative government. The scholarship on the relatively amorphous and undocumented “common law” powers of the Attorney General from 16<sup>th</sup> to 18<sup>th</sup> Century England and the countervailing policy arguments on broad or inherent powers are extensively discussed in Supplemental Response Memorandum of Cross-Appellant at 8 & 12-13.

If the Attorney General believes the office should be more broadly empowered, he may request such authority from the Governor or General Assembly, subject only to the Governor's veto power. In some instances where the Attorney General seeks substantive public policy input independent of the other executive officers or the General Assembly, the General Assembly might consider it appropriate to grant the Attorney General discretion and independence on public policy issues, even contrary to the wishes of the other executive officers. However, such determinations are properly those of the General Assembly, which may also feel that there need to be restrictions on the complete independence of the Attorney General from the determinations of the administrative entities or officers charged with responsibility in the various public policy areas where the Attorney General seeks policy making or litigation authority. *In re Wieland* (2000), 89 Ohio St.3d 535, 2000-Ohio-233.

**5. Creating "inherent" constitutional powers beyond the authority of the General Assembly in Art III, §1 of the Ohio Constitution would overturn Ohio's entire constitutional scheme of limited government and separation of powers, allowing all constitutional officers to be unfettered and often warring policymakers.**

Nor is the limitation of powers of executive officers to those expressly enumerated by constitutional or statutory provision unique to the Attorney General. This Court has frequently limited other executive officers such as the Governor, Auditor and Secretary of State, all offices which pre-date creation of the office of Attorney General and have actually existed since the original Ohio Constitution upon admission to the Union, to the express constitutional and statutory empowerments of their respective offices. *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 393, 2007-Ohio-3780, ¶30.; *State ex rel. Herbert v. Mitchell* (1939), 136 Ohio St. 1, 6; *State ex rel McCrehen v. Brown* (1923), 108 Ohio St 454, 456-57. Absent amendment, the Ohio Constitution favors the General Assembly's primacy in determining the proper scope and exercise of authority and powers by the constitutional

executive branch. *Oriana House v. Montgomery*, 2006-Ohio-1325, 108 Ohio St.3d 419; *State ex rel Poe v. Raine* (1890), 47 Ohio St. 447; *Rocca v. White* (1<sup>st</sup> Dist. 1977) , 53 Ohio App.2d 8

The court of appeals below correctly determined that the Ohio Constitution and statutes do not allow the Attorney General to act independently or contrary to the direction of the Governor, other constitutional officers or General Assembly, substituting his office as litigant instead of a lawyer on behalf of the State. That is not the role contemplated by the Constitution or the General Assembly.

**B. Ohio law has consistently rejected “ordinary high water mark” as the boundary limit of private upland property, and only applies that term as the upper limit of “public trust” relating to actual waters not rising above the OHWM, not land privately owned. (State of Ohio Proposition of Law No. 2 and NWF Proposition Of Law No. I)**

Appellants argue for “ordinary high water mark” (OHWM) terminus for “public trust” lands, yet now seek to avoid defining or deciding that term, leaving a total vacuum as to the meaning of the Court’s decision. Their prior claims proved greatly overstated, asserting a mark the water actually never reaches in almost any year. Further, Appellants argue that over the past two centuries this Court and other courts did not mean the words they chose when they strictly limited public trust lands to “subaqueous”, “submerged” lands “underlying”, “covered” or “lying beneath” the waters of Lake Erie at the “natural shoreline” “below” or ” beyond the ordinary high water mark”. Rather, Appellants argue every court and the General Assembly meant OHWM which none used. Appellants thus continue to ignore the distinction in law between the public trust in “navigable waters”, meaning actual water (the navigational servitude), and the “soil” lying beneath or adjacent to waters. In avoiding all definition of OHWM, Appellants seek to adopt a “term of art” without meaning and without reference to whether the standard so adopted conforms to Ohio law or whether the term as used in other states or other applications

could apply under Ohio law. The very conflict among some jurisdictions as to how to even determine the meaning of OHWM is powerful argument that this Court ought not enter that swamp. Fortunately, Ohio law offers a very different answer.

- 1. Ohio's courts and legislature have never used "ordinary high water mark" to define or describe the boundary of the "territory" or the "public trust", universally holding a more lakeward boundary and using words at variance with "ordinary high water".**

Appellants urge that "natural shoreline" and "where the water usually stands in an undisturbed condition" are terms of art that actually mean OHWM. That in itself is recognition that no Ohio court nor the General Assembly<sup>2</sup> have used OHWM to define the "territory". Though OHWM has been a well-known legal term in English and early American (colonial) law from the 1600s and before, Ohio's courts and General Assembly chose the terms "natural shoreline" and "subaqueous" land "underlying" Lake Erie to describe public interests. As Appellee OLG showed below, the term "shoreline" is well recognized in the law and in common usage of language as the terminus of the "shore" at low water, the "shore" being that area between OHWM and low water mark as the state conceded. OLG's Appellee and Cross-Appellant Brief, *State ex rel. Merrill v. ODNR*, 11<sup>th</sup> Dist. C.A. No. 2008-L-008, at 28. The

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<sup>2</sup> The State implies General Assembly inaction on bills favored by Appellees provides support for their position. State's Merit Brief at n.1. However, in addition to its enactments of 1910 1917, 1945 and 1955 inconsistent with OHWM, the General Assembly rejected OHWM as the property boundary on two occasions.. In the later H.B.218, the House adopted a "water's edge" oriented property line. In the earlier, Am. H.B. 1183 was introduced in 1973 upon Dept. of Admin. Services request (agency then administering the submerged lands). The request sought to define the shore at OHWM and to extend "public trust" submerged lands up rivers as "estuaries" to the point the river bottomlands were above OHWM, reacting to a court decision, *Rheinfrank v. Gienow*, 1973 Ohio App. LEXIS 1671, finding the Dept. acted inappropriately in allowing mining of sand and gravel from the bed of the Maumee River for state revenue. The House amended the request to the mean average of all lake water levels recorded since 1860 and excluded rivers. 135 House Journal 2157, 2172. The Senate Judiciary Committee further amended the bill to "ordinary low water" defined as the Low Water Datum (the lowest level normally reached). 135 Sen. Journal 1611. The Dept. withdrew support, and the Senate Rules Committee didn't schedule a vote on the reported bill.

Fleming Act's plain language as commonly understood in 1917 under legislative rules of construction, using the words "natural shoreline", supplemented by the plain language of lands "underlying the waters of Lake Erie", described those lands permanently submerged beyond the natural low water mark.

As Appellees Duncans are believed to further discuss, this Court has consistently chosen words and results at variance with Appellants' theory from the earliest land and water boundary decisions of Ohio law. In the early case *Lockwood v. Wildman* (1844), 13 Ohio 430, relating to lands on Sandusky Bay, this Court found that even certain submerged waters might be included in grants in the "Firelands," as intended by the surveyors who determined its quantity. In *East Bay Sporting Club v. Miller* (1928), 118 Ohio St. 360 this Court held the *soil* underlying a triangle of water beyond the Black Channel and Plum Brook in Sandusky Bay east of the west Huron township line was privately owned. In that portion of the Bay not included in the Black Channel and Plum Brook, the public was not excluded from fishing in the Bay's *waters*. Similarly, in *Hogg v. Beerman* (1884), 41 Ohio St. 81, relating to East Harbor, this Court held that while the waters of Lake Erie within the embayment could be fished and navigated by water, the soil was all privately held to the lakeward terminus of the island beach and private owners might place stakes in the soil and structures over the waters. *Id.* at 98-99. Hunters are prohibited from wading on the *soil* for hunting. *East Harbor Sportman's Club v. Clemons* (6<sup>th</sup> Dist 1921), 15 Ohio App. 27.

Appellants, Cross-Appellant and Appellees agree that four unanimous decisions of this Court in *Sloan v. Beimiller*(1878), 34 Ohio St. 492 ("*Sloan*"); *State v C&P Rd. Co.* (1916), 94 Ohio St. 61 ("*C&P Rd.*"); *State ex rel. Duffy v. Lakefront East Fifty-Fifth Corp.* (1940), 137

Ohio St. 8 (“*Duffy*”); and *State ex rel Squire v. Cleveland* (1948), 150 Ohio St. 303 (“*Squire*”) are fundamental and controlling decisions.

The early definitive case respecting the shores of both the unconfined waters of Lake Erie and Sandusky Bay was *Sloan v. Beimiller*. The Court held that the entire “shore” was owned exclusively by the upland owner, could be alienated (transferred) separately from the upland above the shore, and that the owner of the shore had the right of any private landowner to exclude all others to fish from or “land” upon the “shore”, plainly referring to the area between high and low water. Speaking through its Syllabus, the Court held:

“4. *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.*”

“5. ... Held, ... The right reserved to the grantor is the *exclusive* right of landing on either shore ...” *Sloan* at 492 (emphasis supplied)

This Court spoke approvingly of cases involving “low water mark” and stated that lands above water when the water was free from disturbing causes were all privately held. *Sloan* at 512.-513. At the very least, by common usage, waters can only “usually” be at a location something more than half the time, if not almost all of the time, thereby completely rejecting OHWM of a seasonal Great Lake as the boundary. Further, the Court never employed the term OHWM. The *Sloan* court cites an Illinois case, *Seaman v. Smith* (1860), 24 Ill. 521 (“*Seaman*”) and quotes a passage where that court discusses “ordinary high water mark” on oceans. However, Illinois is in fact a “water’s edge” jurisdiction, defined as “where the water usually stands” (to low water), as was applied and meant by *Seaman*. *Revell v. Illinois* (1898), 177 Ill. 468, 479; *Brundage v. Knox* (1917), 279 Ill. 450. In *Brundage*, the Illinois Supreme Court

applied *Seaman* and its progeny to hold that the upland owner had full control of all “dry sand” beach to the water’s edge including accretions and relictions thereto.

Following *Sloan*, this Court decided what is regarded as foundation of the distinction between public and private rights in and along Lake Erie and adjoining private property. Appellants characterize *State v. C&P Rd. Co.* as an “ordinary high water” decision. This contradicts the syllabus holdings provided by the Court as well as the opinion’s text. The Court uniformly speaks of “subaqueous” soil, and “land under the waters of Lake Erie”. Syllabus 2, 3, 6. The body of the opinion makes crystal clear that the Court means lands under water, as it consistently uses the term “subaqueous”. It also cites with approval the language from *Sloan* in turn quoting *Canal Commissioners v. The People*, 5 Wend. 423, that “... 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.” *C&P Rd.* at 81.

When the Ohio General Assembly then took up Justice Johnson’s suggestion in *State v. C&P Rd.* to enact law regarding the “public trust”, the resulting law used words that are most consistent with a “low water” standard of lands permanently submerged, and by plain and unambiguous terms exclude OHWM being the demarcation. R.C. §1506.10, prior to amendment and recodification, was first enacted in 1917 as G.C. §3699-a as follows:

“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 ... shall not be considered as having prejudiced the rights of the public in such domain. ...” 107 Ohio Laws 587 (1917)

The section remained undisturbed until an enactment in 1955, when the section was restated as Sec. 123.03 of the Revised Code, in pertinent part as follows:

*“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 between the United States and Canada, 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 as proprietor in trust for the people of the state, for the public uses to which it may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and further subject only to the property rights right of the littoral owners, including the right 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 accretion, erosion and avulsion. Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, ...”* 126 Ohio Laws 137 (1955) (amended language italicized and stricken language with strike-through)

Were there any doubt of the General Assembly’s meaning, it cannot be mistaken when reading the above in pari materia with R.C §721.04. Originally adopted in 1910 before *C&P Rd.* as G.C.§3699-1, it authorized leases and “grants” by municipalities “on and over any made or submerged land ....” 101 Ohio Laws 236 (1910). The Fleming Act amended the provision, referring to the “territory” as “over and on any submerged or artificially filled land ... within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land ....” (emphasis added). Read in the context of the Fleming Act, the territory referred to is plainly only that which is permanently submerged or “covered” by the waters of Lake Erie. The provision remains in effect substantively the same as R.C. §721.04 presently.

Further, R.C. §1506.11, first enacted by the 1955 Act as §123.031 of the Revised Code.

Subsection (A) provided:

“(A) “Territory”, as used in this section, means the *waters and the lands presently underlying the waters of Lake Erie* and lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shore line and the harbor line or the line of commercial navigation where no harbor line has been established.” (emphasis added)

The General Assembly has consistently, from 1910 until today, avoided OHWM in favor of language that requires actual physical covering of water over the land.

Since the Fleming Act, this Court has also consistently continued the rule that private owners' property rights extend to, but not into, the waters of Lake Erie "beyond" the natural shoreline and that only submerged or "subaqueous" land may be within the domain of the State's "public trust". This Court unanimously held that the private landowner had the right to fill on top of an *unnaturally* accreted shore to prevent re-inundation or loss so long as no substantial fill was placed *beyond* the shore into the "waters" of Lake Erie. *State ex rel. Duffy v. Lakefront East Fifty-Fifth Corp.* *supra*. Thus, this Court explicitly permitted the filling of accreted *shore beach* to the water's edge during a low water cycle, excluding the return of waters at any time.

*State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303 also heavily relied on by Appellants, upholds provisions of the Fleming Act. This Court's Syllabus of its holdings unequivocally rejects Appellants' position:

"2. The state of Ohio holds the title to the *subaqueous* soil of Lake Erie ..."

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"5. Where a littoral proprietor has *filled in the shallow waters* of Lake Erie *in front of* his upland property, for the purpose of wharfing out to navigable waters..." *Squire*, at 303-304. (emphasis added)

Many passages in Justice Stewart's opinion for a unanimous court demonstrate that OHWM was not this Court's holding:

"The owners of these properties have title which extends to the natural shore line of Lake Erie, which is the 1914 *shore line as determined by survey*" *Id* at 317 (emphasis added)

"... the other upland owners conceding that they did not *fill in any of the lake* beyond the 1914 natural shoreline ..." *Id.* at 321 (emphasis added)

"The claim was made by the state that the *submerged territory* in front of the lands of the railroad companies was owned by the state of Ohio and that the companies were filling up *the waters* of Lake Erie ..." *Id.* at 323 (emphasis added)

”to dump waste and fill material *into the shallow waters in front of plaintiff’s upland property.*” *Id.*, at 340 (emphasis added)

“that plaintiff and its predecessor in title had the waste material dumped *into the shallow waters in front of their uplands.*” *Id.* at 340 (emphasis added)

The Court further cites Section 3699-1 of the General Code, discussed above. In summary, neither Ohio’s courts nor legislature has used either the term OHWM or language compatible with that term. Even “public trust” advocate Coastal States Organization publications acknowledge Ohio is not an OHWM state. Slade, David C., et al, Putting the Public Trust Doctrine To Work, 72 & 87, fn. 33-34, (Coastal States Org., 2<sup>nd</sup> Ed. 1997)

**2. The lands in question were largely granted by an original State, while part of the territory of that State, by metes and bounds and actual surveys at variance with limiting private ownership to “ordinary high water mark”.**

Appellants fail to acknowledge that virtually all of Ohio’s Lake Erie shoreline was transferred into private ownership as part of Connecticut, and sold into private ownership by survey with metes and bounds descriptions as that State was fully entitled to do. Ohio’s power over lands adjacent to navigable waters is limited to those lands not granted prior to its formation. *Knight v. U.S. Land Assoc.* (1891), 142 U.S.161.

Most Lake Erie front lands now in Ohio were transferred into private ownership by 1795 to the Connecticut Land Company and the “Firelands” or “Sufferors” company by the State of Connecticut from reserved lands never ceded to the United States. Those transfers and subsequent transfers had their titles “quieted” by Act of the United States Congress, approving a report of Congressman John Marshall, and subsequent execution of a patent by the President John Adams. The original transfer was to all “soil” or lands for 120 statute miles west of the Pennsylvania boundary from the 41<sup>st</sup> latitude to 42 degrees 2 minutes of latitude, a line that is in the middle of Lake Erie and beyond the present International border with Canada at most points.

Congressman and future Chief Justice Marshall's report to Congress preparatory to the Quietting Act provides an excellent history of claims and grants in Ohio prior to statehood. *Connecticut Western Reserve*, American State Papers, Public Lands, Vol 1, p 83. Cross Appellant will not repeat that entire history here, discussed extensively in the briefing on Motions for Summary Judgment below. (T.d. 168, T.d. 172, T.d 179, T.d. 180), and by Appellees Duncan here, but will highlight the principal transfers.

Connecticut ceded most of its land claims to the United States in 1786, following an actual war and treaty with Pennsylvania. However, the cession was subject to reservation of the Western Reserve, permitting adoption of the Northwest Ordinance of 1787. In 1792, Connecticut granted the Reserve's westernmost 500,000 acres south of Lake Erie to its citizens who had suffered losses from the British in the Revolutionary War. The Sufferors' company originally organized in Connecticut, but was later incorporated in Ohio as one of the earliest Acts of the General Assembly in its first month in 1803. 1 Ohio Laws, Chap. XXIX, p. 106 (1803). In 1795, Connecticut sold the rest of the Western Reserve, based on its metes and bounds description, to the Connecticut Land Company. Pursuant to John Marshall's report, Congress passed the "Quietting Act". Under the Act (Act of April 28, 1800, 6th Cong., Sess. I, Ch. 38, S. 56-57), Congress authorized the President to quit-claim the United States' interest in soil of the Western Reserve to Connecticut and its grantees, providing that Connecticut surrender all juridical title to the Western Reserve to the U.S.. Upon Connecticut's agreement, President John Adams issued a patent for the Western Reserve to Connecticut for the benefit of Connecticut's grantees on March 2, 1801. An authenticated copy of the patent was offered in evidence uncontested on Cross-Appellant's Motion for Summary Judgment. (T.d. 168, Exhibit 1; T.d. 180, Exhibit 1) Since the entire Western Reserve passed into private ownership before cession, the

littoral lands bordering Lake Erie within the Western Reserve were never Public Lands. This paved the way for Ohio's statehood two years later.

The next transfers were at the township level, by actual physical survey and description of the lands. The first draft of townships was based on a 1797 survey of lands lying east of the Cuyahoga River and not subject to Indian claims prior to Ohio's admission. The second, after resolution of those claims by treaty *with the Connecticut Land Company* in 1805, accepted by the United States of America, was of the remaining lands of the Company. During this survey process, the exact division of the Firelands from the lands of the Connecticut Land Company was agreed between the surveyors and representatives of the Companies. The final survey, in 1808, was for the division of the lands of the Firelands, *See generally, Lockwood v. Wildman, supra*. Appellees Duncans, whose lands lie in the Firelands, show that the surveys, including "the whole beach" of Cedar Point peninsula where their property is situate, was necessary for the 500,000 acres and the division of townships and lots include all lands above water. (T.d. 168, Exhibit 3, p. 2-3 & Exh. 2-B ) These original surveys, transfers and townships became legal records of Ohio by Ohio legislative enactment. 10 Laws of Ohio 163 (1812). As the surveys and early deeds themselves showed, the lands along Lake Erie were measured and described by metes and bounds along the easterly and westerly boundaries, usually to the waters of Lake Erie or referencing from a post or monument to Lake Erie and meandered along the shore. As these townships were subdivided into lots (usually of 160 acres) shortly after acquisition, the lands were further surveyed to Lake Erie and customarily meandered along the waters of Lake Erie. This record of land history, or chain of title, constitutes the most complete and accurate physical and legal description of the lands conveyed and the legal standards of the time. If Ohio is to be admitted on an "equal footing" with the original States, then the grants of that original State

before Ohio was formed are especially entitled to recognition in accordance with the historic conveyances and surveys. This Court has long recognized the presumptive regularity of such metes and bounds descriptions and surveys. E.g., *Lockwood v. Wildman*; *Hogg v. Beerman*, *Squire*; *Broadsword v. Kauer* (1954), 161 Ohio St. 524, 120 N.E.2d 111

- 3. To the improbable extent “ordinary high water mark” has any significance in the ownership of “public trust “ territory along Lake Erie, or any other lands, the determination of OHWM is a federal question, determined at the time of admission.**

While Cross-Appellant and Appellees maintain Ohio law has clearly, consistently rejected OHWM as the terminus of privately held lands along Lake Erie as well as other inland waters, any rights Ohio gained upon admission to the Union to the foreshore up to the ordinary high water mark present in the first instance a federal question as to where that mark existed upon the date of admission. *United States v. Oregon* (1935), 295 U.S. 1; *United States v. Holt Bank* (1926), 270 U.S. 46. Even under federal standards, OHWM has differing meaning under different constitutional and statutory authorities. Care must be taken to differentiate those used for boundary as opposed to regulatory purposes. *Kaiser Aetna v. United States*(1979), 444 U.S. 16. Under no circumstances can the state relocate its mark landward from that point, as evidenced by historic surveys. Even as to very limited lands remaining in Ohio west of Connecticut’s lands, where the State might argue a different view of OHWM, all lands not actually submerged were granted to the farthest lakeward point, nor did they necessarily employ OHWM as the boundary at that time. *Niles v. Cedar Point Club*.(1899), 175 U.S. 300.

If OHWM becomes relevant to this Court, Appellants suddenly avoid any inquiry as to its meaning. However, under federal law, OHWM for ownership of lands on navigable waters relates not to a point that the waters of Lake Erie never attained until after unnatural changes to the regulation of those waters and have almost never attained since. Such a boundary can hardly

be considered “usual”, “ordinary” or “the place where the water usually stands”. Rather, on non-tidal lakes where the question has been determined relevant, the United States Supreme Court has applied used the term “mean or ordinary high water mark”. *United States v. Oregon* (1935), 295 U.S. 1. This requires a mathematical element to the formulation. On lakes where the waters rose and receded significantly, the Court held that “ordinary high water mark” could not extend beyond that point at highest that was the mean average of the location where the water actually covered land during the higher water season of every year. *United States v. Oregon*, supra; *United States v. Otley* (CA 9 1942), 127 F. 2d 988. In determining the quantity and quality of land that was appropriate for ownership by private individuals to the exclusion of the state’s interest, the Supreme Court has also often emphasized the importance of the regular and constant actual contact of the upland with the water itself. *San Francisco v. Le Roy*(1891), 138 U.S. 656. The Supreme Court has also held that surveys, particularly surveys by the Surveyor General and other governmental surveys, are presumptively correct as to public land transfers and not subject to collateral attack before the federal courts. *Knight v. U. S. Land Assn.* (1891) supra at 176.

Other standards such as the riverine “vegetation” test are inappropriate for inland seas like the Great Lakes subject to frequent storm and wave run-up similar to tidal coasts. Similarly, tests that make reference as ODNR previously has to the occasional presence of water and regulation of federal responsibility under the Rivers and Harbors Act of 1899 or Clean Water Act have been held not to be an appropriate reference point by the Supreme Court. *Kaiser Aetna*, supra. That defined upper limit, as conditionally adopted by the Corps of Engineers, explicitly recognizes that it has no relationship whatsoever to determination of OHWM for property ownership or “equal footing” purposes. 33 C.F.R. §329.11(a)(2). A competent federal court

subsequently declared the Corps' Great Lakes standards improper in any event. *United States v. Marion L. Kinkaid Trust* (E.D. Mich. 2006), 463 F.Supp.2d 680.

Were this Court to hold OHWM to be the terminus of private ownership along Lake Erie, the Court needs to provide definition to guide the courts below as to what is meant by that mark, though all parties agree that there would be fact issues to be sorted out. Appellants' new found avoidance of any definition is an invitation to litigate the question endlessly before the lower courts only to return to this Court for further review of the adopted standard, probably resulting in further refinement and remand for further fact finding in an unending loop of litigation.

- 4. The "equal footing" and "public trust" doctrines do not prohibit private ownership below the OHWM, and "jus publicum" relates to ownership of the waters below OHWM, particularly as applied under Ohio law. Appellants' public trust narrative is at odds with state law and American jurisprudence generally as well as English history and common law.**

Appellants assert the United States was prohibited from transferring lands below OHWM in Ohio before statehood under the "equal footing" doctrine absent language satisfactory to Appellants as to the intent of the United States government, and was further prohibited in any event from doing so before or after statehood by force of the "public trust" doctrine, and that Ohio was similarly prohibited from doing so by the same doctrine. Appellants' arguments rely on misapplications of *Shively v. Bowlby* (1894), 152 U.S. 1, *Illinois Central R Co. v. Illinois* (1892), 146 U.S. 387, and the Submerged Lands Act, 43 USC sec 1301 et seq. In asserting their overbroad reading of these precedents, Appellants have failed in the trial court, court of appeals and this Court to explain how Ohio can declare the ownership of all navigable waters other than Lake Erie at a place below OHWM, being the center of rivers, which they admit Ohio has done, and low water mark of navigable lakes. Ohio's courts have consistently held from *Gavit v. Chambers* (1828), 3 Ohio 496 and *Lamb v. Ricketts* (1842), 11 Ohio 311 to *Busch v. Wilgus*

(Logan Co. 1922), 24 Ohio N.P.(N.S.) 209, and *Portage Cty. Bd. of Commrs. v. Akron* (Dist. 11, 2004), 156 Ohio App.3d 657 *affd.*, *Portage Cty. Bd. of Commrs. v. Akron* (2006), 109 Ohio St.3d 106, the beds of all navigable streams, rivers and lakes (except Lake Erie) within the state are in private ownership below OHWM.

Claims that under the Equal Footing Doctrine no lands along the shore below OHWM can be ceded to private ownership or control of anyone but the new State upon admission is contradicted by many decisions, from *Handly's Lessee v. Anthony* (1820), 18 U.S. 374, to *Vermont v. New Hampshire* (1933), 289 U.S. 593, to *Ohio v. Kentucky* (1973), 410 U.S. 641, to *Alabama v. Texas* (1954), 347 U.S. 272. As to the lands of Lake Erie *Niles v. Cedar Point Club* (1899), 175 U.S. 300 and *Massachusetts v. New York* (1926), 271 U.S. 65, demonstrate that lands at least to the historic low water mark may and have been transferred into private ownership before and after statehood by both federal authority and the transfer of a prior claimant "sovereign state" to private ownership in what became part of another state by treaty. While *Shively* discussed possible public ownership of the sea shore to the mean high tide level, the Court subsequently held in *Massachusetts v. New York* that the rule of law of *Shively* does not apply to tideless seas (the Great Lakes). 271 U.S. at 92-93

Appellants "public trust" narrative prohibits transfer of the foreshore to private ownership in all cases. United States Supreme Court decisions Appellants use to advance their immutable, federalized "public trust" argument actually applied the law of each respective state as best it could discern, and even held that certain permanently submerged lands below OHWM could be privately owned. *Illinois Central, supra*, does not prohibit the State from transferring any lands under the "public trust" theory, even if actually submerged. Rather, it holds Illinois would not

transfer the “entire” bed of Lake Michigan, nor the “entire” bed of any bay or harbor within it, into private ownership:

“It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of the congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.” *Illinois Central* at 435.

The Court even explicitly recognized the “right to use or dispose of a portion thereof ...”

The Court confirmed certain land holdings of the railroad that were on actual filled submerged lands. A complete history of the grants and interests in the case and its outcome may be found at Kearney, J.D & Merrill, T.W., *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U.Chi.L.Rev. 801 (2004). Any credence to Appellants’ interpretation is rendered unsustainable by the Court’s subsequent unanimous decision in *Appleby v. City of New York* (1926), 271 U.S. 364. There, permanently submerged tidal lands had been granted to the upland owner, but the City of New York attempted to dredge those lands and prevent their fill for wharfing or water use as private dockage. The Court held that under New York law those permanently submerged lands were privately owned, and the City was prohibited from altering (dredging) or controlling the submerged soil without a compensated taking. The Court held that “public trust”, even as applied in *Illinois Central*, is strictly a matter of state law. 271 U.S. at 395. Appellant NWF makes a similar argument based upon *Shively* which significantly misreads the opinion and turns its holding upside down, but any such interpretation is similarly vitiated by *Appleby*.

Appellants NWF/OEC cite many “public trust” cases that actually support Appellees at fn. 3, p. 17 of their Brief: *St Louis v. Myers* (1855), 113 U.S. 565 (appeal of state court award for

taking below OHWM dism'd. for want of federal question); *Weber v. Bd. Of Harbor Comm'rs.*, (1873), 85 U.S. 57 (state may grant title to submerged lands); *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1870), (may own to thread of stream and have right to fill). In *St. Paul & Pacific Rd. Co. v. Schurmeir* (1868), 74 U. S. 272, the Court extensively discusses the legal authority of public surveys and patents, and affirms the Minnesota court's judgment that the riparian owner owned to the waters, including an island separated by a channel, in a survey meandering the bank of the river without the island.

Nor does the Submerged Lands Act, 43 U.S.C. §1301 et seq., give Appellants' a solid footing for their arguments. The legislative history cited by Appellant discusses the history of the oil drilling disputes and cases that provided impetus for the Act's adoption, and the effects, which Appellees Duncan may further discuss. The central point, however, is that the Act recognized that State's may determine their own rules of ownership at or below OHWM, including low water. Accordingly, the Act confirms those lands in whomever owned them in 1950, not exclusively in the States themselves. 43 U.S.C. §1311.

Appellants claim a consistent 1500 year history of their public trust narrative which does not square with English or American law. Roman law, as surveyed in the Justinian Institutes, may have relevance to civil law jurisdictions in Southern Europe or their later New World acquisitions, but was never adopted in English common law, especially prior to the 18<sup>th</sup> Century separation of the American colonies from the rule of English monarchs. American courts and scholars have recognized that the asserted Justinian and English common law foundation of a "public trust" doctrine are of questionable scholarship.<sup>3</sup> *Bell v. Town of Wells* (1986), 510 A.2d

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<sup>3</sup> Generally, Farnham, Henry Phillip, 1 Law of Water and Water Rights, at §§ 39-61, p.180-217 (L.Coop 1904); Gould, J.M. A Treatise on the Law of Waters, (2<sup>nd</sup> Ed. 1891) §203 at 302 Both are comprehensive Treatises of water boundary and rights law as developed in the 18<sup>th</sup> and 19<sup>th</sup>

509. Deveney, P. , Title, Jus Publicum and The Public Trust: An Historical Analysis, 1 Sea Grant Law J. 13 (1976) (Deveney)

The “public trust” in English law originally protected the public interest in navigating and fishing on water, with no application to soil. Deveney at 41, 46. Appellees never claimed title to the water nor challenged the right of the federal and state governments, in exercise of jurisdiction over navigable waters, to protect, regulate and utilize all waters up to the ordinary high water mark, though any unnatural inundation or flooding beyond that point grants no public rights, as the court of appeals below correctly recognized. The origins of what is now Appellants’ public trust theory are in the practice of English monarchs to sell the beds of rivers and the foreshore and shallow submerged lands the crown owned to private owners including exclusive rights in oystering and taking fish, building dams for mills, and the like. “Title hunters” led by Thomas Digges invented from whole cloth a rebuttable presumption that the foreshore and submerged lands were still owned by the crown and could be sold (re-sold) to new owners unless the old claimant had compelling proof of the King’s intention to sell the foreshore and shallow submerged lands. The title hunters’ attempts to reclaim and resell the foreshore were rejected by English judges and juries until Charles I removed a judge for ruling against him, appointing a new judge who changed the ruling as dictated by the King:

The first case to accept Digges’ prima facie theory was the notorious case of *Attorney-General v. Phillpott*, in which Charles I dictated the opinion of the court. One of the repercussions of that case was the beheading of Charles for, among other things, the

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Centuries in America. Gould is available as a Google (scanned) book, found at [http://books.google.com/books?id=0KcOAAAAYAAJ&printsec=frontcover&dq=Treatise+on+the+Law+of+Waters&as\\_brr=3&rview=1](http://books.google.com/books?id=0KcOAAAAYAAJ&printsec=frontcover&dq=Treatise+on+the+Law+of+Waters&as_brr=3&rview=1) or by searching Google Books for “Treatise on the Law of Waters”. Chapters III (esp. §§79, 82,) and Chapter V (§203) are particularly helpful to understanding the American view of fresh waters that served as the background against which early Ohio legislative and judicial determinations can be viewed. The conclusions support the trial court’s conclusion, which it termed the American view of sovereignty. Gould, §82.

‘taking away of men’s rights under color of the King’s title to land between the high and low water mark.’ Deveney, at 42 (footnotes omitted).

Appellants rely on a modern perversion of the evidentiary presumption invented by title hunters seeking new “divine rights” to enrich the monarch by *re-selling* the foreshore and submerged tidal areas his predecessors had granted. Such “precedent” offers sorry support to reject the trial court’s reliance on a new American view of sovereignty, in which the rights of the individual are primary and the rights of government limited.

In this context, even Roman law did not exclude private ownership and exclusion of the foreshore if someone built upon, improved or harvested it. Further, Roman law did not recognize any public rights beyond the low water mark, limiting its law to the foreshore. Slade, David C. et al, *Putting the Public Trust Doctrine To Work*, 27 (Coastal States Org., 2<sup>nd</sup> Ed. 1997). However, the English common law never adopted the Roman (Justinian) law, and certainly not before the independence of the United States. See Generally, MacGrady, G.J. , *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance and Some Doctrines That Don’t Hold Water*, 3 Fla. St. L.R. 511 (1975). Even today, under substantially refined English law, Parliament is not prohibited from devising the foreshore and submerged lands into private ownership and there is no general right to access and walk the shore. Further, Ohio has rejected the common law as being incorporated into its law from its earliest history, leaving no basis for such a claim in Ohio.

Prof. James Huffman has written several scholarly articles disputing Appellants’ public trust narrative that are too extensive for discussion here. They may be found at Huffman, J.L., *Speaking of Inconvenient Truths – A History of the Public Trust Doctrine*, 18 *Duke Envtl.L. & Pol’y.F.* 1 (2007-2008); *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 *Envtl. L.* 527 (1988-89); *Avoiding the Takings Clause Through The Myth Of*

Public Rights: The Public Trust And Reserved Rights Doctrines At Work, 3 J. Land Use & Envtl. L. 171 (1987).

- 5. Though the law of other states should be used with considerable care to fully understand the application of water boundaries in that state, the rejection of “ordinary high water mark” and adoption of a “low water mark” find virtually unanimous agreement as to the Great Lakes and inland fresh waters generally with the original States which claimed or held parts of Ohio as their territory and were Connecticut’s and Ohio’s neighboring original States at the time of devise.**

Appellants and their amici consistently misstate and misapply decisional law of original and other Great Lakes states as precedent for public ownership to OHWM. Most cases cited, as well as other precedent, actually support rejecting OHWM. Care must be taken in how, if even relevant, OHWM is defined and that definition is applied to littoral lands and rights. Ohio is also distinguished from all other Northwest Territory States because virtually all of its lakefront lands were devised by original States or the United States prior to its formation, whereas other states actually acquired title and devised some lands within their borders and were free to define OHWM after admission as they chose on their owned lands.

Many leading “common law”, tidal Colonies that formed the original Union, including Massachusetts, New York Pennsylvania, Delaware and Virginia, most of which had original land claims in Ohio, used “low water mark”, or “mean low tide” as the boundary that private land ownership ended both on inland lakes and on bays and estuaries of the ocean as well as to some extent Atlantic Ocean property. *Rockwood v. The Snow Inn Corp.* (1991), 409 Mass. 361; *Sprague v. Nelson* (1924 Pa. Dist. & Cnty. Dec), 6 Pa. D. & C. 493; *State ex rel. Buckson v. Pennsylvania Rd. Co.* (1967), 1967.DE.19 , 228 A.2d 587, aff’d (1969), 1969 De 216 , 267 A.2d 455; *Miller v. Commonwealth* (1932), 159 Va. 924. In New Jersey, ownership was at least to OHWM, the upland owner had the right to fill to the low water mark and take title to the filled

lands. *O'Neill v. State Highway Dep't.* (1967), 50 N.J. 307, 324-25; *Stevens v. Paterson & Newark R.R. Co.* (E&A 1870), 34 N.J.L. 532, 544-49; *Borough of Spring Lake v. Polak* (Ch. 1909), 76 N.J. Eq. 212, 213-14. The first new State admitted to the Union used low water mark on Lake Champlain. *Fletcher v. Phelps* (1856), 28 Vt. 257.

Most central to the context in which lands were conveyed in what is now Ohio is the law of the original States with Great Lakes shores on which Ohio is on “equal footing.” Both New York and Pennsylvania are squarely “low water mark” jurisdictions which reject “OHWM” on the Great Lakes and all inland waters unaffected by the tide, and in the case of Pennsylvania even those affected by the tide. Pennsylvania has applied low water mark on lakes including Lake Erie, *Harborcreek Twp. v. Ring* (1980), 48 Pa. Commw. 542, subseqt. appeal (1990), 131 Pa. Commw. 502; *Sprague v. Nelson*, (1924 Pa. Dist. & Cnty. Dec), 6 Pa. D. & C. 493, and even allows the private ownership of filled lands in the shallow waters of Lake Erie, and Presque Isle Bay in particular. *City of Erie v. R.D. McCallister & Son* (1964), 416 Pa. 54; *Harbor Marine Co. v. Nolan* (Pa.Super. 1976), 244 Pa.Super. 102; *Sprague v. Nelson*, (1924 Pa. Dist. & Cnty. Dec) 6 Pa. D. & C. 493. Notably, the court in *Sprague* cited to and relied upon Ohio’s *Sloan v. Biemiller* decision in determining that private property along Lake Erie extends to the low water mark. *Sprague*, at 494, 495-96. Pennsylvania’s legislature also enacted submerged land lease requirements only for lands lakeward of low water datum. 25 Pa. Code § 105.3. The cases relied upon by Appellants support Cross-Appellant’s statement of Pennsylvania law. In *Freeland v. Penn. R. Co.*, (1901) 197 Pa. 529, ownership of a navigable river extends to low water mark is declared “long settled” since at least 1810. The Court held that where the railroad constructed an embankment into the river which caused sand to low water mark plaintiff had always removed and sold to wash away and deprived him of future deposits of sand, the railroad

was liable for injuring plaintiff's private interest in the soil to low water mark. The Court also cited *Zug v. Commonwealth*, (1864) 70 Pa. St. 138, holding that the owner could use the river between those marks for private purposes "if he did not interfere with the rights of the public".

In New York, along with Massachusetts one of the "leading" original States in legal development, the low water mark has always been the terminus of private ownership of the soil on both Lakes Erie and Ontario as well as all non-tidal lakes. *Stewart v. Turney* (1923), 237 N.Y. 117. Applied to privately owned lands along Lake Ontario in a dispute with Massachusetts, the Supreme Court of the United States explicitly approved that mark as the only logical place, unanimously observing:

The lack of clear definition, by natural landmarks, of the shore of non-tidal waters, would make its application impracticable. It would deny to grantees all access to such waters except on the irregular and infrequent occasions of flood, since there are no public rights in the shores of non-tidal waters, and the abutting owner could not cross the shore to the water without trespass. Such a result would contravene public policy and defeat the intention with which such conveyances are normally made. New York has consistently refused to apply the rule to non-tidal waters, holding that a conveyance 'to the shore' or 'along the shore' of such waters carries to the water's edge at low water...(citations omitted), and the local rules for interpreting conveyances should be applied by this court in the absence of an expression of a different purpose ...(citations omitted). The same rule is, however, generally followed elsewhere. See *Castle v. Elder*, 59 N. W. 197, 57 Minn. 289; *Lamb v. Rickets*, 11 Ohio, 311; *Daniels v. Cheshire R. R.*, 20 N. H. 85; *Kanouse v. Slockbower*, 21 A. 197, 48 N. J. Eq. 42, 50; *Seaman v. Smith*, 24 Ill. 521; *Slauson v. Goodrich Transp. Co.*, 69 N. W. 990, 94 Wis. 642; *Burke v. Niles*, 13 New Bruns. 166; *Stover v. Lavoia*, 8 Ont. W. R. 398." *Massachusetts v. New York* (1926), 271 U.S. 65, at 92-93 .

Among Northwest Territory States admitted after Ohio, Minnesota (Lake Superior) holds low water mark is the legal limit of private ownership of the soil. *State v. Korner* (1914), 127 Minn.60; *Mitchell v. St. Paul* (1948), 225 Minn. 390; *Lamprey v. Metcalf* (1893), 52 Minn. 181, 53 N.W. 1139. *Minnesota v. Slotness*, 1971) 289 Minn. 530, 185 NW2d 530, also actually rejects Amici Michigan's and Pennsylvania's argument and supports Cross-Appellant. The court held that where the State acquired a river dam and raised the lake's water level, it could not

assess owners for raising the level to the true OHWM from low water mark or intermediate levels (pursuant to navigational servitude) because there was no benefit to the private owners, and in fact a detriment in the permanent change of level. Though not directly at issue in appeal of a property assessment, the Court noted that the State had actually raised the level onto lands above water almost every year using the wrong OHWM, suggesting the “taking” those lands which might be compensable in separate proceedings.

Illinois applies a “water’s edge” standard which can extend to low water, even in the oft cited *Illinois Central R. Co. v Illinois* (1892), 146 U.S. 387. *Revell v. Illinois* (1898), 177 Ill. 468, 479. Illinois decisions refer to “shoreline”, including any accretions and recessions of water to the water’s edge to the exclusion of others, which customarily means low water mark. *Bowes v. City of Chicago*, (1954) 3 Ill.2d 175; *Brundage v. Knox* (1917), 279 Ill. 450; *Seaman v. Smith*, (1860) 24 Ill. 521. *Cobb v. Lincoln Park Comm’rs.*, (1903), 202 Ill. 437, cited by Amici, also rejects OWHM, holding that plaintiff Cobb had no right to wharf out onto the actually submerged lands beyond water’s edge of Lake Michigan that had been *granted* into exclusive private ownership of the Park Commissioners by the State of Illinois. The actual quote from the case given by Amici Michigan and Pennsylvania discusses Lord Hale’s opinion of English law separately discussed, but nevertheless limits “jus publicum” to the public right of navigation and fishing, activities conducted on and in the water.

Michigan (Lakes Superior, Michigan, Huron, St. Clair and Erie) also uses low water mark as the standard in the controlling decisions. *Hilt v. Weber* (1930), 252 Mich. 198; *Klais v. Danowski* (1964), 373 Mich. 262. “Water’s edge” is mentioned in some decisions. *E.g.*, *Boekeloo v. Kuschinski* (1982), 117 Mich. App. 619 (boundary is water’s edge or shoreline). Nor did *Glass v. Goeckel* (2005), 473 Mich. 667, disturb *Hilt’s* rule. While Appellants and

Amici urge OHWM as the terminus of private lands in Michigan after the decision in *Glass*, the court there actually explicitly left undisturbed the ownership of the shore to at least the water's edge and potential low water mark as held in *Hilt v. Weber*. *Glass* at 689. Michigan also distinguishes in its own law for determination of ownership and leasing on "Great Lakes Submerged Lands" between "patented" lands that were devised by the United States or private grant and "unpatented" lands that were left for Michigan's transfer. Mich. Stat., Chap. 324, Part 325, §324.32501 et seq..

Indiana has never unequivocally determined its standard, perhaps because most of its Great Lakes shoreline is owned either by the State or the United States. However, its statutes permit the transfer of State owned submerged lands of Lake Michigan into private ownership. Ind. Code 14-18-6-4. *Sherlock v. Bainbridge* (1872), 41 Ind. 35, an Ohio River case cited by Amici, is inapposite because it relates only to the right to navigate and dock upon the Ohio River beyond the shore. The only reference in Indiana to OHWM on Lake Michigan appears in a special definition added to the Indiana Administrative Code that relates to when permits must be obtained to dredge or fill the Lake's bed and does not relate to ownership. 327 IAC 17-2-2.

Only Wisconsin (Lakes Michigan and Superior) actually uses the words "ordinary high water" discussing the boundary. It now uses the term for all navigable waters within the state (Great Lakes, navigable inland lakes with or without inlets and outlets, rivers and streams), unlike every other Great Lakes state and virtually every state in the eastern United States. *State v. McFarren* (1974), 62 Wis. 2d 492. But see, *Mariner v. Schulte* (1860), 13 Wis. 692 (to low water mark on shore of a lake or pond). Though Wisconsin says the public trust applies for the purposes of navigation and fishing on waters to the ordinary high water mark (navigational servitude on the water), Wisconsin has also held from the earliest times that the upland owner

acquires title and exclusive use of all recessions and accretions to the water's edge and has a riparian property right to exclude all persons from transiting or landing upon the shore below ordinary high water mark in front of their land, resulting in the same practical effect as the other states. *Jansky v. Two Rivers* (1938), 227 Wis. 228; *Doemel v. Jantz* (1923), 180 Wis. 225. Even Canada and Ontario Province, with clear "common law" and colonial roots, rejects OHWM for the water's edge to low water on the Great Lakes. *Ontario (Atty. Gen.) v. Rowntree Beach Assn.* (Gen.Div. 1994), 17 Ont.Rep.3d 174 ; *Ontario (Atty. Gen.) v. Walker* (S.Ct. Canada), [1975]1 S.C.R.. 78.

On Lake Erie, where there is negligible tidal influence, the levels are very seasonal and variable randomly from year to year, Ohio has only claimed lands over which there is water cover "so continuously as to prevent their use and occupation", assuring the littoral owner's regular contact with the water. The proper point for such a determination is at the low water of the normal annual cycle, as has been held in all Lake Erie states and confirmed by the Supreme Court of the United States. *Massachusetts v. New York*, (1926) 271 U.S. 65. One certainty is that "where the water *usually* stands in an undisturbed condition" as set forth in *Sloan v. Beimiller* cannot mean a level of 573.4 ft., where the water almost never has stood at any time in recorded history. Ohio decisions and statutes plainly reject OWHM and select another boundary.

**C. The court of appeals did not err in discussing "fill", which properly distinguished fill to the shoreline not encroaching into the waters of Lake Erie. (ODNR Proposition of Law No. 2)**

In discussing the court of appeals statements on "fill", a jurisdictional issue of appeal before this Court must be noted. Nominal Appellants ODNR and its Director did not appeal the trial court's ruling, which was affirmed excepting only the reformation of deeds not requested by ODNR or any party, not supported in law, and not objected to by any party before this Court.

Nominal appellants are not prejudiced by the court of appeals decision, which they did not raise or preserve below, nor did they offer any proposition on appeal. *Niskanen v. Giant Eagle, Inc.* (2009) 2009-Ohio-3626.

Other parties have argued the question. The courts of appeals observed:

“{\¶127} ... As we have identified, the shoreline is the 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.” *State ex rel Merrill v. ODNR*, 2009-Ohio-4256.

The court previously had observed the language in *Squire* limiting owners’ to filled in lands beyond the natural shoreline. App.Op., ¶70. More directly, *Duffy* held the owner could artificially fill all of the dry sand beach during a low water regime to exclude re-inundation, so long as he did not place “substantial” fill *into the water* (then near low water mark). The court of appeals recognizes fill placed above the waters of the lake and the “natural shoreline”, which does not alter the law respecting artificial fills of the waters of Lake Erie circumscribed by statute and this Court.

**D. The Court of Appeals correctly held that private owners have the right to exclude others from the “shore”. (NWF Proposition of Law No. II)**

This Court spoke authoritatively through its syllabus in *Sloan v. Biemiller*, at Syllabus 5, holding that an owner of lands along Lake Erie has the right to prevent others from “landing” or traversing any part of the “shore” of the Lake, on either the open waters of Lake Erie or Sandusky Bay. As Appellees demonstrate, this Court has frequently even before that decision held that the soil, as opposed to water, could be privately held and others excluded. In *Hogg v. Beerman*, the court even suggested that the right to construct structures over the water or place stakes into the soil of the privately owned bay lay exclusively with the littoral owners. 44 Ohio

St. 45. In *East Harbor Sportsman's Club. v. Clemons*, supra, hunters were prohibited from wading in on privately owned submerged soil. Aside from Ohio law, and the law of many other original and Great Lakes States over two centuries holding that the upland owner has the right to exclude others from the shore. As the U.S. Supreme Court said in *Massachusetts v. New York*,

“...there are no public rights in the shores of non-tidal waters, and the abutting owner could not cross the shore to the water without trespass. Such a result would contravene public policy.

Like exclusions of the public from the shore have been enforced in Wisconsin (*Doemel, Jansky*), Minnesota, Illinois (*Brundage*) as well as on many Atlantic Coast states.

### **Proposition of Law No. 1**

**The furthest landward boundary of the State of Ohio's public trust interest in the waters of Lake Erie and the lands underlying those waters is the low water mark of Lake Erie when those lands were conveyed into private ownership, subject to natural long term changes which occur thereafter. Where those lands are presently under water, the ownership of the soil beneath the waters is only affected where long term, imperceptible erosion is shown to reduce that grant by natural occurrence. The best evidence locating that boundary is usually contained in the conveyance documents to owners and the surveys and descriptions of conveyance in the chain of title of a particular property.**

No party has asserted unlimited private ownership of the entire bed of Lake Erie in Ohio waters. While some specific grants, particularly before Ohio's formation, lawfully and properly extend into the permanently submerged lands of Lake Erie at the time of their devise, Cross-Appellant and all Appellees have recognized that most uplands in Ohio terminate not beyond the initial surveyed boundary if presently underwater or the low water mark. The vast bulk of Lake Erie's bed is recognized in “public trust” ownership.

However, Cross-Appellant asserts the same right every ocean front owner in the United States possesses even in OHWM states, much less the “low water mark” states of the North and mid Atlantic that claimed and sold lands that are now Ohio—the right to actual contact with the

water every day of the year. Cross-Appellant urges recognizing the “low water mark” standard because that was the recognized and intended boundary law of inland fresh waters in the leading original colonies and States which claimed and devised virtually all of the Lake Erie lands of Ohio. Those grants were confirmed and approved by the Congress and President of the United States prior to Ohio’s formation. Care must also be exercised to protect ownership of lands physically surveyed and conveyed that may have since been rendered submerged occasionally or even usually, often under unnatural and avulsive circumstances.

Appellants argue that OHWM is the furthest possible lakeward boundary of private uplands. Yet the very cases upon which they rely recognize that even on ocean tidal lands, low water mark was recognized by most northern states. As Cross-Appellant has discussed extensively, *supra*, on inland fresh waters, OHWM was virtually never the terminus of riparian or littoral ownership, but rather the “thread of the stream” on rivers and the “low water mark” on navigable lakes and “Great Ponds”.

Whatever modern environmental sensibilities encourage, property law for inland waters on the Great Lakes when Ohio’s lands devolved into private ownership, including most lands before Ohio was formed, held that lands along the Great Lakes were held in private ownership to the low water mark of the Lake. Any subsequent change in the property rights acquired at that time would constitute a taking of property rights prohibited by the United States and Ohio constitutions:

the rights related to property, i.e., to acquire, use, enjoy, and dispose of property... are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty”. *Norwood v. Horney* (2006) 2006-Ohio 3799, 110 Ohio St.3d 353, ¶34 (citations omitted).

*Cf. Stop the Beach Renourishment v. Fla. Dept. of Env'tl. Prot.* (2010), 560 U.S. \_\_\_\_, 130 S.Ct.

2592. Cross-Appellant seeks nothing further than equal footing -- the low water mark

recognized in both original States New York and Pennsylvania -- whose territory encompassed Great Lakes, including Lake Erie.

Because of the changes in levels seasonally and from year to year, the key element of access to the lands from the earliest times was conditioned on the contact of such lands to the water. The low water standard was unanimously adopted and approved by the Supreme Court of the United States as to privately held lands along both Lake Ontario and Lake Erie in New York. *Massachusetts v. New York; Stewart v. Turney* (1923), 237 N.Y. 117, 142 N.E. 437. Similarly, Pennsylvania adopted a “low water” boundary along Lake Erie, as shown supra. In its brief, Pennsylvania confirms that it is a “low water” state. Brief of Amici Curiae States at 7. Pennsylvania Env’tl. Protection Dept.’s recently discovered administrative claim of a challenged “public trust” dry sand transit easement for privately owned lands below the OHWM, similar to Ohio’s non-rule claims, is not supported in Pennsylvania law. Minnesota similarly adopted a low water standard on Lake Superior, and allows exclusion of others from all exposed land. Illinois under *Seaman v. Smith* is a “water’s edge” state, not OHWM, and recognizes ownership of all dry land, as was applied not only in *Seaman* and subsequent state decisions, such as *Brundage, Cobb*, but also *Illinois Central*. Similarly, Wisconsin is truly a “water’s edge” jurisdiction which reserves private use of all area above water to the upland owner, though absolute ownership of land (if submerged or inundated) extends only to OHWM. *Doemel, Jansky* supra. Michigan also had and has a standard that is probably “low water” ownership under *Hilt v. Weber* and *Peterman v. State Dept. of Natl. Res.* (1994), 447 Mich. 177. That rule was expressly left undisturbed in the aberration of *Glass v. Goeckel* (2005), 473 Mich. 667, where the Michigan Supreme Court refused to follow long decisional law to the contrary in what amounted to an unconstitutional “judicial taking” under the standards set forth by both the

plurality and at least one concurring opinion in *Stop the Beach Renourishment v. Fla. Dept. of Env'tl. Prot.* (2010), *supra*. In *Stop the Beach Renourishment*, the Supreme Court looked carefully at the unique law of Florida, influenced by its civil law Spanish roots and massive ocean coastline, to discern whether the Florida Supreme Court had altered the law, resulting in a judicial taking. While the Court concluded under unique Florida decisions it had not, six of the eight justices believed a substantive change in state property law would constitute a “taking.”

The history of the surveys and conveyance of lands in what is now Ohio by the Connecticut Land Company and the “Sufferers” [Firelands] Company, as well as the survey and agreement between these two companies in determining the dividing line of the lands of each and the approval of the Firelands records and surveys by the General Assembly, 10 Ohio Laws 163 (1812), demonstrate the intention to convey into private ownership all soil that was capable of emergence under all water stages on Lake Erie and to assure private ownership of all lands necessary to always be in physical contact with water.

From the earliest decisions of this Court, there have been many cases which recognized ownership of lands beyond the OHWM, including in many instances permanently submerged lands along Lake Erie. In *Hogg v. Beerman*, involving the East Harbor of Catawba Island in Lake Erie, this Court recognized that all lands to the unconfined waters of Lake Erie, such as has been surveyed and deeded into private ownership, were privately owned whether above or below water, though that could not prohibit public navigation on or fishing in those waters. As Appellee Duncans discuss in depth, in *Lockwood v. Wildman* and *East Bay Sporting Club. v. Miller*, this Court and lower courts approved the private ownership of permanently submerged lands in Sandusky Bay that were surveyed and deeded into private ownership by the “Firelands” company and have subsequently been purchased in private ownership by the Erie Metroparks

with funding of Appellant Ohio Department of Natural Resources. In *Sloan*, this Court quoted approvingly of Chancellor Wentworth's conclusion under New York law that ownership extended to the "low water mark" on the Great Lakes, and held that the upland owner was prohibited under a deed restriction from using the entire foreshore for the purpose of hauling nets or landing for the purposes of conducting fishing equipment over the foreshore (between high and low water marks),

Even where the State of Ohio acquired private lands to create an artificial lake, thereby creating an island which it sold into private ownership, an Ohio court found against the State's claim to ownership of the foreshore of the island between high and low water mark. The court held that the State's deed conveying the island by no other designation conveyed all soils to the low water mark on a lake, and not to the higher point of the high water spillway. *Busch v. Wilgus* (Logan Co. 1922), 24 Ohio N.P.(N.S.) 209; Cf. *Akron Canal & Hydraulic Co. v. Fontaine* (9<sup>th</sup> Dist. 1943), 72 Ohio App. 93.

In *Duffy*, this Court unanimously approved the filling of Lake Erie foreshore artificially accreted through no fault of the upland owner to a relicted water's edge, thereby excluding any possibility of their reinundation upon the return of higher waters. Similarly, in *Squire*, this Court dealt with rights to fill beyond the natural shoreline into the waters of Lake Erie and control of the State to "subaqueous" soil.

Similarly, from the 1910 predecessor enactment of R.C. §721.04 through the Fleming Act which defined "territory" in a way only consistent with low water mark, the General Assembly empowered municipalities to grant interests in actually submerged lands along their shorelines. The statute required actual water cover or "submerged land" in front of littoral lands. Even Appellant State of Ohio's Brief recognizes that administration of the submerged lands of Lake

Erie was placed by the General Assembly under the control of local governments, not state agencies, until 1945. Merit Brief of State of Ohio at 13.

The State inaccurately equates the “shore line” as OHWM under common law, which is at complete variance with all accepted uses of “shore line”. As Appellee OLG fully showed below, the common language use of shoreline from both legal and general dictionaries over centuries has been the low water mark side of the “shore.” While Appellants objected to dictionary definitions that might supply plain or common meaning, “shore line” in common law, Ohio, federal, and other statutory and decisional law have universally used the term to mean low water mark, with the “shore” that area lying between ordinary high mark and low water mark. Any search of authorities and literature will provide pages of citations that “shoreline” is “low water”, a few instances for water’s edge, and almost no instances for “ordinary high water mark”. E.g., *State v. McFarren* (1974), 62 Wis.2d 492. In Ohio, many cases have used “shoreline” for the termination of shallow waters or water’s edge. *Mitchell v. Cleveland Elec. Illum. Co.* (1987), 30 Ohio St.3d 92; *State ex rel. Crabbe v. S., M. & N. Rd. Co.* (1924), 111 Ohio St. 512; *Hart v. Figueroa* (6<sup>th</sup> Dist.), 2008-Ohio-1230; *Smith v. Huron* (6<sup>th</sup> Dist.), 2007-Ohio-6370; *Galinari v. Koop* (12<sup>th</sup> Dist.), 2007-Ohio-4540; *Faulkner v. Bay Village* (8<sup>th</sup> Dist.), 2002-Ohio-16; *Haldeman v. Cross Enterprises, Inc.*, 2004-Ohio-4997; *Gulley v. Markey*, 2003-Ohio-335; *Mason v. Swartz* (6<sup>th</sup> Dist., 1991), 76 Ohio App.3d 43. Cf., *Busch v. Wilgus*, supra. The federal Submerged Lands Act defines “coastline” at “low water mark”. “Coast line” and “shoreline” were considered interchangeable by the Supreme Court to mean “low water” or lower low tide on the ocean coast line, and “submerged” lands were those seaward of the lower low water mark. *United States v. California* (1980), 447 U.S. 1.

There is also generally a distinction between the “high water mark”, which is referred to as “ordinary” or “mean” and the “low water mark” which customarily does not use that designation. As to the Great Lakes, decisional law is relatively unchallenged that “shore line” is the low water mark. The same definition of shore line also occurs in the survey manuals of the United States Bureau of Land Management, successor to the Surveyor General, in many glossaries of terms including learned treatises and organizations such as the Coastal States Organization, and many other sources.

The lands west of the Firelands and Western Reserve were largely public lands of the United States as to which it exercised certain rights, particularly as to “swamp lands.” *E.g.*, *Niles v. Cedar Point Club*, supra. Both state and federal authority appear to have treated those lands consistent with low water practice in the Western Reserve. There is sound reason, especially when virtually all of the Lake Erie shore of Ohio was ceded by another State and or granted by the federal government to or beyond the low water mark, to set that as the permanent boundary as it existed at that time. Deeded lands may have naturally eroded to a point where it is impossible to restore them, but that should be a matter proved, as to which the State should bear the full burden of proof as to the permanent imperceptible loss by erosion as opposed to avulsion, under natural water levels and events causing such loss.

**Proposition of Law No. 2**

**In an action of property owners against agencies of the State of Ohio respecting the boundary of submerged lands of Lake Erie with their littoral lands, membership organizations whose members claim a recreational right in public lands may not properly intervene as defendants under Civ. R. 24, especially as a matter of right where they neither claim nor demonstrate any property interest of such organization or even a property right generally and collectively of its members, in the boundary issue which is the subject of the “main action”.**

Cross-Appellant's concern is for the future effect holding NWF and OEC's intervention was "of right" on behalf of non-governmental organizations asserting the rights of the State and the public in a dispute by private property owners and the State. Neither organization nor even the members they seek to represent claim direct property interest in Appellees' land or even State lands. Such precedent would inject excessive litigation upon both the State and private parties without any showing of direct interest in Appellees' property under Civ. R. 24(A). It would more broadly inhibit the State's ability to set public policy through its properly authorized agencies and officers and subject both public and private litigants to the additional filter of every special interest group's legal agenda. It substitutes such interest groups for the litigants and for duly authorized public agencies and officers in resolving disputes of Ohio law and policy.

- a. Intervening Defendants-Appellants NWF/OEC do not meet the requirements of Civil Rule 24(A) which establishes the threshold for intervention as a matter of right.**

Cross-Appellant recognizes that on appeal, overcoming the presumption in favor of the trial court's determination on permissive intervention by showing "abuse of discretion" is difficult. While not conceding that these interest groups made a proper showing for permissive intervention under Civ. R. 24(B) as to the Plaintiffs' and Intervening Plaintiffs' Complaints, the plain language of Civ. R. 24(A) requires reversal of the holding of the court of appeals below that Intervening Defendants qualified for intervention "of right."

Four requirements must be met before intervention will be granted as of right under Civ.R. 24(A). The application must be timely. The intervenor must show an interest *relating to the property* or transaction which is the subject of the action, that the disposition may as a practical matter impair or impede the intervenor's ability to protect that interest and that that interest is not adequately represented by existing parties. Intervenors must satisfy each

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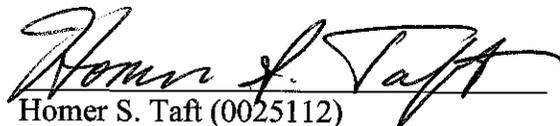
by non-profit, non-governmental organizations. NWF/OEC's claim does not share a common issue of law or fact with the main action. It is at best a claim dependent on the court's prior determination of the land ownership in dispute under the "main action".

Intervening Defendants-Appellants NWF/OEC assert the right to represent the interests of the public on behalf of Defendant-Respondent/ Appellant State of Ohio as Trustee for the "public trust" waters and lands of Lake Erie, without even a scintilla of evidence that the State is incapable of representing itself. *Cf., Youngstown Education Assn. v. Bd. of Education* (1973), 36 Ohio App.2d 35. Because there is only a single action, regarding the property boundary between the littoral owners' land and that held in trust by the State, permissive intervention under Civil Rule 24(B) is inappropriate.

### III. CONCLUSION

The court of appeals holding that the "natural shoreline" is defined as "water's edge" should be modified to "low water mark", the court of appeals decision affirming NWF/OEC's intervention should be reversed, and the court of appeals decision otherwise affirmed and remanded for further proceedings necessary in the trial court below.

Respectfully submitted



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IV. CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellee/Cross-Appellant Homer S. Taft was served by electronic mail upon the parties' counsel for all parties as follows:

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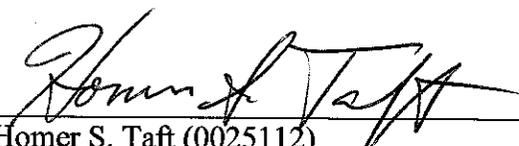
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**IN THE  
SUPREME COURT OF OHIO**

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

Appellees and Cross-Appellees

and

HOMER S. TAFT,

Appellee and Cross-Appellant,

and

L. SCOT DUNCAN and DARLA S. DUNCAN,

Appellees and Cross Appellees,

v.

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

Appellants and Cross Appellees,

and

STATE OF OHIO,

Appellants and Cross Appellees,

And

NATIONAL WILDLIFE FEDERATION, et al.,

Appellants and Cross Appellees.

Case No. 2009-1806

On Appeal from the Lake  
County Court of Appeals,  
Eleventh Appellate District

Court of Appeals  
Case No. 2008-L-007  
Case No. 2008-L-008  
Consolidated

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NOTICE OF APPEAL OF HOMER S. TAFT

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Darla J. Duncan

**Notice of Appeal of Appellee/Cross Appellant Homer S. Taft**

Appellee and Cross-Appellant Homer S. Taft hereby gives notice of cross-appeal to the Supreme Court of Ohio from the judgment of the Lake County Court of Appeals, Eleventh Appellate District, in Case No. 2008-L-007 and Case No. 2008-L-008, , entered on August 24, 2009.

This case raises a substantial constitutional question and is a case of public or great general interest.

  
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**Certificate of Service**

I hereby certify that copies of the foregoing Notice of Appeal of Homer S. Taft were served by first class U.S. Mail on this 16<sup>th</sup> day of October, 2009, upon all parties by serving their respective counsel addressed as follows:

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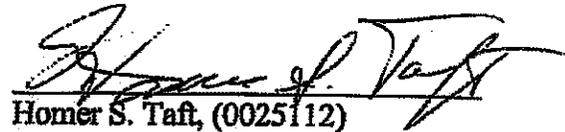
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FILED

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LYNNE L. MAZEIKA  
LAKE CO CLERK OF COURT

IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

OHIO STATE OF EX REL/ROBERT	)	CASE NO. 04CV001080
MERRILL/TRUSTEE et al	)	CASE NO. 04CV001081
	)	
Plaintiff(s)	)	JUDGE EUGENE A. LUCCI
	)	
vs.	)	<u>ORDER GRANTING MOTION</u>
	)	<u>TO INTERVENE BY NATIONAL</u>
OHIO STATE OF DEPARTMENT OF	)	<u>WILDLIFE FEDERATION AND</u>
NATURAL RESOURCES et al	)	<u>OHIO ENVIRONMENTAL</u>
	)	<u>COUNCIL, NUNC PRO TUNC</u>
Defendant(s)	)	

{¶1} On June 5, 2006, a motion to intervene was filed by the National Wildlife Federation and the Ohio Environmental Council in both Case No. 04CV001080 and Case No. 04CV001081.

{¶2} On June 12, 2006, the Ohio Lakefront Group plaintiffs-relators filed their brief in opposition in each case. Also on June 12, 2006, the Taft plaintiffs-relators filed their brief in opposition in each case.

{¶3} On June 19, 2006, the prospective intervenors filed their reply brief in each case.

{¶4} On August 30, 2006, the court conducted a telephonic conference call with counsel for all parties and counsel for the prospective intervenors.

{¶5} During the telephone conference on August 30, 2006, the court heard the arguments of the parties and of the prospective intervenors, and the court granted the motion to intervene in both Case No. 04CV001080 and Case No. 04CV001081.

{¶6} Accordingly, the motion to intervene is granted, *nunc pro tunc*, as of August 30, 2006. Therefore, the National Wildlife Federation and the Ohio Environmental Council are hereby granted leave to intervene as defendants and counterclaimants, and to serve and file an answer and counterclaim to the complaint filed by the plaintiffs-relators in Case Nos. 04CV001080 and 04CV001081. Intervenor<sup>s</sup> shall serve and file their respective answers and counterclaims within 10 days of the date of this order.

{¶7} IT IS SO ORDERED.



EUGENE A. LUCCI, JUDGE

c: James F. Lang, Esq., Michael Mulcahy, Esq. and Henry G. Grendell, Esq.  
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Relators Pro Se in Case No. 04CV001081  
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Assistant Attorneys General for Defendants/Respondents in Case Nos.  
04CV001080 and 04CV001081  
Neil S. Kagan, Esq.  
Attorney for Intervenor National Wildlife Federation  
Peter A. Precario, Esq.  
Attorney for Intervenor Ohio Environmental Council

## **1803 Ohio Constitution, Pertinent Provisions**

### **Article II Of The Executive**

sec. 1. The supreme executive power of this State shall be vested in a Governor.

\*\*\*

### **SECRETARY OF STATE.**

sec 16. A secretary of State shall be appointed by a joint ballot of the Senate and House of Representatives, who shall continue in office three years, if he shall so long behave himself well. He shall keep a fair register of all the official acts and proceedings of the Governor; and shall, when required, lay the same, and all papers, minutes and vouchers relative thereto, before either branch of the Legislature, and shall perform such other duties as shall be assigned him by law.

\*\*\*

### **1803 Ohio Constitution, Article VI Of Civil Officers**

sec 2. The State Treasurer and Auditor shall be triennially appointed by a joint ballot of both Houses of the Legislature.

**1851 Ohio Constitution, Pertinent Provisions**

*Current through the November, 2009 Election*

**Article I. Bill of Rights**

**§ 19. Inviolability of private property**

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

\*\*\*\*

**Article III. Executive**

**§ 1. Executive department**

The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the General Assembly.

\*\*\*\*

**§ 5. Executive power vested in governor**

The supreme executive power of this state shall be vested in the governor.

\*\*\*\*

**Schedule**

**§ 1. Of prior laws**

All laws of this state, in force on the first day of September one thousand eight hundred and fifty-one, not inconsistent with this constitution, shall continue in force, until amended, or repealed.

~~...the sheriff shall, if necessary, employ a military force necessary to carry into effect the provisions of this act, or the act to which this is amendatory, he shall make a written requisition upon the officer of the militia highest in command, then in his county, who shall issue the necessary orders to insure a compliance with the requisition of such sheriff.~~

may require a military force if necessary.

Sec. 4. This act shall be in force from and after its passage.

ELIAS F. DRAKE,  
Speaker of the House of Representatives.  
SEABURY FORD,  
Speaker of the Senate.

February 16, 1846.

AN ACT

To create the office of Attorney General, and to prescribe his duties.

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

Mode of election and term of office.

Sec. 2. Before entering on the duties of his office, he shall take an oath to support the constitution of the United States, and of the state of Ohio, and faithfully discharge the duties of his office; and shall also give bond to the state of Ohio in the sum of five thousand dollars, with sureties, to be approved by the auditor and treasurer of state, conditioned for the faithful discharge of the duties of his office, and for the faithful and prompt payment to the treasurer of state, or to such other officer or person as may be entitled to the same, all moneys which may come to his hands.

Officer to take an oath and give bond.

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

In what cases he shall act.

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

Same.

Sec. 5. He shall, at the request of the governor, secretary, auditor, or treasurer of state, prosecute every person who shall be charged, by either of those officers, with the commission of

Same.

- an indictable offence, in violation of the laws which such officer is specially required to execute, or in relation to matters connected with his department.
- Same. Sec. 6. He shall cause to be prosecuted the official bonds of all delinquent officeholders in which the state may be interested.
- Same. Sec. 7. He shall give legal opinions to the governor, to the heads of the several departments of the state government, the board of public works, the canal fund commissioners, and to the legislature, or either branch thereof, when required thereto.
- Same. Sec. 8. Upon complaint made to him that any incorporated company, by any act or nonuser, has offended against the act relating to informations in the nature of quo warranto, or any other law which hereafter may be enacted therefor, it shall be the duty of the attorney general to inquire into the cause of complaint, and, if he find probable cause for it, he shall cause proceedings in quo warranto to be instituted and prosecuted against such incorporation.
- Same. Sec. 9. If he shall have knowledge that any incorporated company has so offended against such law, or whenever he shall be instructed by the supreme court, or by either branch of the legislature, to institute proceedings in quo warranto against any incorporated company, it shall be his duty to cause such proceedings to be instituted and prosecuted against such incorporated company.
- Same. Sec. 10. It shall be his duty to prosecute all assessors, and other officers connected with the revenue laws of the state, for all delinquencies and offences against such laws that come to his knowledge.
- Same. Sec. 11. It shall be his duty, whenever requested by the governor, secretary, treasurer, or auditor of state, to prepare proper drafts for contracts, obligations, and other instruments which may be wanted for the use of the state.
- Shall direct prosecuting attorneys. Sec. 12. It shall be the duty of the prosecuting attorney of the proper county, on the requirement of the attorney general, to institute suits and prosecutions directed by this act, and to assist the attorney general in preparing the same for trial, and in the prosecution thereof.
- To consult and advise with prosecuting attorneys. Sec. 13. It shall be the duty of the attorney general to consult with, and advise the prosecuting attorneys of the several counties, when requested by them, in all matters appertaining to the duties of their offices.
- Duties of prosecuting attorneys. Sec. 14. It shall be the duty of the several prosecuting attorneys, annually, on or before the fifteenth day of November, to report to the attorney general a particular statistical account of all crime in their respective counties, specifying the number of persons prosecuted, the crimes for which they were prosecuted, the results thereof, the punishment awarded therefor, and the costs thereof, specifying what portion, if any, of such costs have been, or probably will be collected of the offenders or their

sureties, and also what proportion of the offences prosecuted were occasioned by, or committed under the influence of intemperance.

Sec. 15. The attorney general shall keep, in proper books, to be provided for that purpose, at the expense of the state, a register of all actions and demands prosecuted by him in behalf of the state, and of all proceedings had in relation thereto, and shall deliver the same over to his successor.

Keep a register of actions, &c.

Sec. 16. He shall, annually, on or before the fifteenth day of December, report to the general assembly all the official business done by him during the preceding year, together with a succinct tabular statement of the statistics of crimes in the several counties, required to be returned to him by the prosecuting attorneys.

Report to the legislature.

Sec. 17. He shall be entitled to receive, for his services, an annual salary of seven hundred and thirty dollars, to be paid in quarterly installments, computing time from the date of his actual qualification according to this act, and three and a half per centum on all sums of money collected by him in his official capacity: Provided, that the aggregate amount of compensation of the said attorney general shall not average, for the time which has expired of his term of office, more than thirteen hundred dollars annually. The account of the said attorney general for postage, arising from his official correspondence, shall be audited and allowed by the auditor of state, and be paid out of the state treasury.

Amount of salary, and how paid.

Sec. 18. Proceedings instituted by the attorney general against incorporated companies, may be prosecuted in the supreme court of Franklin county, notwithstanding the company or its officers may be situated in another county.

When proceedings may be instituted against incorporated companies.

Sec. 19. Suits authorized by this act may be brought, in the court of common pleas of Franklin county, against persons or companies owing debts to the state, in whatsoever county they, or any of them, may reside, when the attorney general shall state, under his hand, that he believes there is more than five hundred dollars due.

In what cases suits may be brought in Franklin county common pleas.

Sec. 20. In all causes arising under the two preceding sections, writs may be sent and returned, by mail, to and from any county in the state, and shall be served by the sheriff of such county, who shall be allowed the same mileage and other fees he would have been entitled to, had the writs been issued and made returnable in the county in which he resides.

ELIAS F. DRAKE,

*Speaker of the House of Representatives.*

SEABURY FORD,

*Speaker of the Senate.*

February 16, 1846.

## AN ACT

Further prescribing the duties of the Auditor of State.

~~Sec. 1. Be it enacted by the General Assembly of the State of Ohio, That the Auditor of State is hereby required to take immediate steps to secure to the State of Ohio, the title to all lands heretofore granted, or that may hereafter be granted to this state, by various acts of Congress, for the completion of the Ohio, Miami, and Wabash and Erie Canals, or for other purposes.~~

Sec. 2. That the said Auditor of State is further required, if it become necessary, to use such means as he may deem advisable, to obtain further legislation by Congress, to vest in the State of Ohio all or any of said lands, together with such other lands as this State may have sold, and to which said state has not hitherto secured a valid title; Provided, that no money or other compensation shall be paid, either directly or indirectly, by said Auditor, to any person, for securing such title, or procuring such further legislation.

JAMES C. JOHNSON,

Speaker of the House of Representatives.

WILLIAM MEDILL,

President of the Senate.

May 1, 1852.

## AN ACT

To prescribe the duties of the Attorney General.

Sec. 1. Be it enacted by the General Assembly of the State of Ohio, That each Attorney General elect, before entering upon the performance of his duties, shall take an oath or affirmation, before the supreme court, or some judge thereof, to support the constitution of the United States, and the constitu-

tion of the State of Ohio, and faithfully to discharge the duties of his office; and shall also give bond to the state of Ohio, in the sum of five thousand dollars, with two or more sureties, to be approved by the Governor for the time being, conditioned that he will faithfully discharge his duties as aforesaid, and truly pay into the treasury of state, all public moneys which may come into his hands.

Oath and bond to be filed with Secretary of State.

SEC. 2. That a certificate or the oath or affirmation so taken, shall be filed, together with the bond, in the office of the Secretary of State, and a record of the same shall be made and kept in the said secretary's office.

Attorney General shall appear for the State in Supreme Court.

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

Also in other courts.

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

Shall prosecute indictments.

SEC. 5. That he shall, upon the written request of the Governor, prosecute any person who may be charged with any indictable offence whatever.

Also delinquent officers.

SEC. 6. That he shall cause to be prosecuted, the official bonds of all delinquent officers, in which the state may be interested, when the same are directed to be put in suit.

Same.

SEC. 7. That he shall cause to be prosecuted, all assessors and other officers connected with the revenue laws of this state, for all such delinquences and offences against those laws as may come to his knowledge.

In Franklin county, or the county where the offence was committed.

SEC. 8. That he may prosecute any action or suit at law, or in equity, authorized by the last two sections, in the court of common pleas of Franklin county, or in the court of common pleas of the county in which the defendant, or any one or more of the defendants, may reside or be found.

On complaint against incorporated companies, by quo warranto, &c.

SEC. 9. That upon complaint made to him, that any incorporated company has offended against the laws of the state, misused its corporate authority, or any of its franchises or privileges, assumed franchises or privileges not granted to it, or surrendered, abandoned or forfeited its corporate authority, or any of its franchises or privileges, he shall enquire into the complaint, and, if he should find probable cause for so doing, cause proceedings, in the nature of quo warranto or writ of scire facias, to be instituted against it.

From personal knowledge, the same.

SEC. 10. That if it shall come to his knowledge otherwise, that any incorporated company has offended against the laws of the state, misused its corporate authority, or any of its franchises or privileges, assumed franchises or privileges not conferred, or surrendered, abandoned or forfeited its corporate authority, or any of its franchises or privileges, he shall cause

proceedings in the nature of quo warranto or writ of scire facias, to be instituted against it.

SEC. 11. That he shall likewise cause such proceedings to be instituted, and diligently prosecute the same, whenever directed so to do by the Governor, the Supreme Court, or either house of the General Assembly.

Also, when directed by Governor, Supreme Court, &c.

SEC. 12. That whenever any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise or privilege, within this state, or any office in any corporation created by the authority of this state, or whenever any such public or corporate officer shall have done or suffered any act, which, by law, may work a forfeiture of his term of office, or whenever any person or number of persons shall act or assume to act as a corporation, within this state, without being legally authorized so to do, or shall exercise or assume to exercise any franchise or authority not warranted by law, within this state, the Attorney General may, upon complaint made to him, or upon his own motion, cause proceedings, in the nature of quo warranto, to be instituted, and the same diligently prosecuted to judgment; Provided, however, that he may refuse to institute proceedings, as aforesaid, except when directed by the Governor, the Supreme Court, or either house of the General Assembly, unless some responsible freeholder of the state will become relator in the cause, and liable for the cost thereof; but whenever the Governor, the Supreme Court, or either house of the General Assembly, may direct any such proceedings to be instituted, he shall cause the same to be commenced, and diligently prosecuted, upon his own relation.

Prosecution of usurpers, &c.

SEC. 13. That he may prosecute any information, writ, relation, or other proceeding authorized by the last four sections, in the supreme court of the state, the district court of Franklin county, or the district court of any county wherein such company may have a place of business, or such officer or officers, person or persons, reside or may be found.

In what courts.

SEC. 14. That it shall be his duty to cause proper suits to be instituted, at law and in chancery, to enforce the performance of trusts for charitable and educational purposes, and restrain the abuse thereof, whenever, upon the complaint of others, or from his own knowledge, he may deem that to be advisable, or whenever by the Governor, the Supreme Court, or either house of the General Assembly, he may be directed so to do; which said suits may be brought in his own name, upon behalf of the state, or the beneficiaries of the trust, in the court of common pleas of Franklin county, or in the court of common pleas of any county wherein the trust property may be situated or invested, and which suit shall not abate nor discontinue by any change of the officer, but shall be prosecuted to final judgment, mandate, or decree, as if no such change

Prosecution, to enforce charitable or educational trusts, &c.

had occurred; Provided, however, that the Attorney General may refuse to institute proceedings as aforesaid, except when directed by the Governor, the Supreme Court, or either house of the General Assembly, unless some responsible freeholder of the state will become relator in the cause, and liable for the costs thereof; but whenever the Governor, the Supreme Court, or either House of the General Assembly, may direct any such suit, he shall cause the same to be commenced, and diligently prosecuted, without any other relation.

Legal advice to  
Executive offi-  
cers, &c.

Sec. 15. That he shall, when required, give legal advice to the Governor, the Secretary of State, the Auditor of State, the Treasurer of State, the Board of Public Works, the Commissioners of the Sinking Fund, the Warden and Directors of the Penitentiary, and the Superintendent and Directors of the Benevolent Institutions of the state, in all matters relating to their official business.

Also, General  
Assembly.

Sec. 16. That he shall also give his written opinion upon any question of law, to either house of the General Assembly, when required.

Also, Prosecut-  
ing Attorneys.

Sec. 17. That he shall advise the Prosecuting Attorneys of the several counties, when requested by them, in all matters appertaining to the duties of their offices.

Shall prepare  
forms of con-  
tracts, &c.

Sec. 18. That he shall prepare suitable forms of contracts, obligations, and other like instruments of writing, for the use of the state officers, when requested by the Governor, Secretary, Auditor or Treasurer of State.

In what coun-  
ties suits at law  
shall be proce-  
dured.

Sec. 19. That he may prosecute any suit, information, or other suit, either at law or in equity, in behalf of the state, or in which the state may be interested; (other than prosecution by indictment,) in the courts of appropriate jurisdiction in Franklin county, or in the courts of appropriate jurisdiction in any other county in which the defendant, or any one or more of the defendants, may reside or be found; Provided, however, that no merely civil suit at law, or in equity, other than is authorized by the eighth section, shall be commenced in Franklin county, unless the defendant, or one or more of the defendants, shall therein reside or be found; except the Attorney General shall certify on the writ, that he believes the amount in controversy to exceed five hundred dollars.

Writs by mail,  
and fees.

Sec. 20. That in all cases brought under the provisions of this act, the writ or writs may be sent to the sheriff of any county by mail, and returned by him in like manner, for which the sheriff shall be allowed the same mileage and fees as if the writ or writs had issued out of the court of common pleas or district court in his own county, and been returnable thereto.

Suits against  
non resident  
defendants, to  
be advertised,  
&c.

Sec. 21. That upon all information or other proceedings specified in the ninth, tenth, and eleventh sections, if the writ or writs, mesne process be returned, not found by the sheriff of the county in which the company is authorized by law to have

its place of business, the clerk of the court in which such information or other proceedings may have been filed, shall make out a notice of the filing and substance thereof, and cause the same to be published for six consecutive weeks, in some newspaper printed in the county in which such company is authorized as aforesaid, to have its place of business; or if no newspaper be therein printed, in some newspaper printed in the city of Columbus; and an affidavit of such publication, together with a copy of the said notice, shall be filed in the office of the clerk aforesaid; and if the company so made defendant, should fail to answer or plead to any such information or other proceeding, within thirty days from the filing of the affidavit and copy aforesaid, judgment shall be given upon the default, in like manner as if the writ or writs had been duly served and returned.

Sec. 22. That upon all appeals, writs of error, certiorari, <sup>No security re-</sup>supersedeas, procedendo, replevin, ne exeat, injunction, attach- <sup>quired on ap-</sup>ment, mandamus, or prohibition, taken or sued out by the At- <sup>peals, &c.</sup>torney General upon behalf of the state, or upon behalf of any other officer thereof, no security shall be required.

Sec. 23. That nothing in this act shall be construed to pre- <sup>When and</sup>vent either party to any cause brought under its provisions, <sup>where deposi-</sup>from taking the depositions of such witnesses as reside out of <sup>tions may be</sup>the county in which the cause may be pending, or intend to <sup>taken.</sup>leave the county before the time of trial, or are unable to at-  
tend the trial in person.

Sec. 24. That the attorney general shall keep an office in <sup>Attorney Gene-</sup>the city of Columbus, to be provided and furnished at the state's <sup>ral's office in</sup>expense, and the account for postage upon his official corres- <sup>Columbus.</sup>pondence, shall be audited and allowed by the auditor of state, and paid out of any funds in the state treasury, not otherwise appropriated.

Sec. 25. That he shall keep, in suitable books, to be provi- <sup>Shall keep re-</sup>ded for that purpose, at the state's expense, a register of all <sup>gisters, &c.</sup>actions, demands, complaints, writs, informations, and other suits prosecuted or defended by him officially, together with all the proceedings had in respect thereof, and also a register of all written official opinions given by him, which said books he shall deliver to his successor at the expiration of his term.

Sec. 26. That he shall, in the report required of him, by <sup>Abstract of sta-</sup>article third, section twentieth, of the constitution, submit an <sup>tics of crime:</sup>abstract of the statistics of crime returned to him by the prosecuting attorneys of the several counties, with a general statement of the business under his immediate charge.

Sec. 27. That the act to create the office of attorney gen- <sup>Acts repealed:</sup>eral and to prescribe his duties, passed the sixteenth day of February, in the year eighteen hundred and forty-six, and the acts amendatory thereof, passed the twenty-fourth day of February, in the year eighteen hundred and forty-eight, and the

nineteenth day of March, in the year eighteen hundred and forty-nine, be, and the same are repealed.

JAMES C. JOHNSON,  
*Speaker of the House of Representatives.*

WILLIAM MEDILL,  
*President of the Senate.*

May 1, 1852.

AN ACT

To provide for the adjustment and settlement of the affairs of incorporated associations and companies.

**SEC. 1.** *Be it enacted by the General Assembly of the State of Ohio,* That no suit, action, judgment, order or decree, to which any incorporated association or company of this state may be a party, either plaintiff or defendant, shall abate, be discontinued or dismissed, by reason of the expiration of the charter of such association or company, but that all such suits, actions, judgments, orders or decrees, shall proceed to final judgment, execution, satisfaction or settlement, in the corporate name of such association or company.

No action to abate, &c., by reason of dissolution of corporation.

**SEC. 2.** That the board of directors for the time being, or other officers having the control and management of any incorporated association or company in this state, are hereby authorized to appoint three trustees to adjust and settle the affairs of such association or company; and the trustees so appointed, shall be authorized to use the corporate name of their association or company, for such period as may be necessary for the adjustment and settlement of its affairs, by suit or otherwise.

Boards of directors may appoint trustees, &c.

**SEC. 3.** The trustees appointed under this act, shall report annually to the stockholders of their association or company, a full and succinct statement of its affairs.

Trustees to report annually.

**SEC. 4.** A majority of the stockholders, in interest, of any such association or company, may remove, and shall have authority to appoint a trustee to fill a vacancy occasioned by death, resignation or removal.

Trustees may be removed.

## AN ACT

To supplement section 3699 of the General Code relating to leasing municipal property.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That section 3699 of the General Code be supplemented by a section to be known as section 3699-1 as follows:

Municipal  
leases.

Sec. 3699-1. All municipal corporations shall have power to construct, maintain, use and lease, or grant the right to construct, maintain and use, any pier, dock, wharf or landing for use by passenger or freight carriers, with buildings and appurtenances necessary to such use, on any land belonging to the corporation, and on and over any made or submerged land, whose title is in the corporation or the state of Ohio, in front of land belonging to the corporation. All municipal corporations shall also have power to construct, maintain, use and lease, or grant the right to construct, maintain and use, on and over any land belonging to the corporation and such made or submerged land, any steam, electric or street railroad tracks and appurtenances, necessary for the use of any pier, dock, wharf or landing as aforesaid. Such lease or grant may be made by the passage of an ordinance fixing its terms and conditions and by the acceptance thereof by the lessee or grantee. Land belonging to the corporation shall be construed to include also any land heretofore or hereafter appropriated or held by the corporation for streets, parks or other public purpose; but this section shall not be construed to authorize the taking of reversionary or other property rights without such compensation and proceedings as are authorized by law.

Terms, fixed  
by ordinance.

GRANVILLE W. MOONEY,  
*Speaker of the House of Representatives.*

FRANCIS W. TREADWAY,  
*President of the Senate.*

Passed May 10, 1910.  
Approved May 17, 1910.

JUDSON HARMON,  
*Governor.*  
169.

[Amended House Bill No. 255.]

## AN ACT

Declaring the rights of the state in the waters of Lake Erie, and the soil under such waters and granting power to municipal corporations to use, lease and control such territory within their corporate limits, and amending and supplementing sections 3699-1 of the General Code.

*Be it enacted by the General Assembly of the State of Ohio:*

Sec. 3699-a.

SECTION 1. 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.

Declaration of state's rights to waters of Lake Erie and soil under same.

SECTION 2. That section 3699-1 of the General Code be amended and supplemented by the enactment of supplemental sections to be known as sections 3699-2, 3699-3, 3699-4, 3699-5, 3699-6, 3699-7, 3699-8 and 3699-9 of the General Code, to read as follows:

Sec. 3699-1.

Sec. 3699-1. All municipal corporations within the corporate limits of which there is or may hereafter be included part of the shore of the waters of Lake Erie shall have the power, in aid of navigation and water commerce, to construct, maintain, use and operate, or lease the right to construct, maintain, use and operate, piers, docks, wharves and connecting ways, places, tracks and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the corporation held under title permitting such use and also over and on any submerged or artificially filled land or lands made by accretion resulting from artificial encroachments, title to which is in the state of Ohio, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of said corporation whether said littoral land is privately owned or

Municipalities authorized to use, lease and control waters and soil of Lake Erie, within corporate limits, extending two miles out from natural shore.

Powers, duties  
and limitations.

not. Any such municipal corporation shall also have power and authority to by ordinance subject to superior federal legislation, establish harbor lines and other regulations for said territory and to prohibit the placing, maintaining or causing or permitting to be placed therein any unlawful encroachments on said territory. The territory to which the powers hereby granted shall apply shall be limited to that within the existing or future corporate limits of the corporation and extending into Lake Erie to the distance of two miles from the natural shore line; and for all purposes of government and exercise of said powers the corporate limits of any such corporation shall be held to extend out, in, over and under said water and land made or that may be made within said territory. These provisions, however, shall not have the effect of limiting the now existing boundaries of any municipal corporation and in case where two municipal corporations have upland territory fronting on said waters and there should be a conflict on account of the curve of the shore line or otherwise as to said two mile boundary the boundaries of each corporation shall be a line midway between the shore line of each and not exceeding two miles from the shore line of either. Provided, however, that all powers hereby granted shall be exercised subject to the powers of the United States government and the public rights of navigation and fishery in any such territory and all mineral rights or other natural resources existing in the soil or waters in said territory, whether now covered by water or not, are reserved to the state of Ohio and its citizens.

Sec. 3699-2.

Limitations of  
rights of munic-  
ipality respect-  
ing front im-  
proved by private  
owner.

Sec. 3699-2. When any part of the territory mentioned in Sec. 3699-1, title to which is in the state of Ohio, is in front of privately owned upland and has been filled in or improved by said private upland owner or his predecessor in title to said upland, then a municipal corporation shall not have the power to take possession of or lease such part of the public domain so filled or improved, without the consent of said upland owner, until said municipal corporation has complied with the laws governing the appropriation of private property for municipal purposes, except that in any such proceeding to appropriate there shall be no compensation allowed to the upland owner for the site of such fill or improvements.

Sec. 3699-3.

Execution of  
leases; pro-  
cedure.

Sec. 3699-3. Any lease by a municipal corporation, made under the provision of section 3699-1, for a term of three years or more, shall be made by the passage of an ordinance describing the premises leased and locating by metes and bounds the then existing natural shore line or the last natural shore line, if artificially changed, and fixing the terms and conditions of the lease, and the acceptance thereof in writing by the lessee. But the same shall have no validity unless a true copy of such ordinance and said acceptance certified as correct by the clerk of the council of said municipality is recorded in the office of the recorder of the county where the premises are located.

- Sec. 3699-4. Sec. 3699-4. Before a municipal corporation makes a lease for a term of three years or more of any territory mentioned in section 3699-1, title to which is in the state of Ohio, said municipal corporation shall, by resolution of its council, cause public notice to be given in the same manner that the ordinances of said council are published, that on a day named in said notice bids will be received by the clerk of the council for the leasing of the premises, to be described in said notice. Said notice shall specify whether any rental shall be required or name a fixed rental to all bidders or may leave the amount of rental a matter of competition between bidders and shall require all bidders to specify the use they propose to make of the premises described in the notice. Said bids shall be opened only at a regular session of said council and a lease shall be given to the bidder whose offer, in the discretion of the council, is the best considering the amount of rental offered, if made competitive, as well as whose use of the premises under the lease will best advance the water commerce of the port. Publication of notice before leasing; bids.
- Sec. 3699-5. Sec. 3699-5. The council of any municipal corporation may, when not otherwise prescribed by the charter law of the corporation, provide by ordinance for the manner and by what executive officials the ordinances and laws governing the administration of the territory described in section 3699-1 shall be administered and for the management of said territory and improvements placed thereon. Control and management of territory.
- Sec. 3699-6. Sec. 3699-6. All rentals or charges made or collected by a municipal corporation for the use of any part of the territory described in section 3699-1, title to which is in the state of Ohio, or for improvements thereon, shall be used only to maintain, improve or add to improvements in aid of navigation and water commerce. Application of rentals.
- Sec. 3699-7. Sec. 3699-7. Nothing contained in section 3699-1 to section 3699-6, all inclusive, shall be held to have a retroactive effect to validate or add to the effect of any previous act of a municipal corporation concerning such or like territory or public rights, nor shall the provisions of said sections have any effect, except as expressly provided in this act, to give any littoral or riparian owner any rights in any territory covered or formerly covered by the waters of Lake Erie or the other navigable waters of the state. Law shall have no retroactive effect.
- Sec. 3699-8. Sec. 3699-8. All right, title and interest of the state of Ohio in and to all submerged and filled lands in the harbor of the city of Cleveland, described in section 3, section 4, section 5, section 7 and section 9 in an ordinance of the city of Cleveland, designated Ordinance No. 37904-A, passed September 13th, 1915, which authorized the mayor of the city of Cleveland to enter into a contract with certain railroad companies for the purpose of securing a union passenger station for the city of Cleveland, together with all other submerged and filled lands within a tract which is bounded westerly by the east bank of Cuyahoga river as it now runs and the east government pier, northerly by the government harbor line as it is now or may hereafter be established, and All state rights to certain submerged and filled lands, excepted from provisions of this act.

easterly by a line extended northerly and at right angles or normal to the natural shore line of Lake Erie from a point, on said natural shore line, one hundred and fifty (150) feet easterly from the easterly line of East 26th street or said easterly line produced northerly, is excepted from the provisions of sections 3699-1 to 3699-7, inclusive, of this act. Nothing herein shall prevent the general assembly from conveying the right, title and interest of the state in any lands described in any agreement now made between a municipality and any railroad company or companies for the purpose of securing railroad terminals and stations, and which land may be a part of the lands described in section one hereof; in any such event the conveyance shall be made in conformity with the provisions of such agreement.

Sec. 3699-9.

Section or part held unconstitutional shall not affect other sections or parts.

Sec. 3699-9. Should any of sections 3699-1 to 3699-8, inclusive, or any provision of said sections be decided by the courts to be unconstitutional or invalid the same shall not affect the validity of said sections as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

SECTION 3. That original section 3699-1 of the General Code be, and the same is hereby repealed.

H. J. HOPPLE,

*Speaker of the House of Representatives.*

EARL D. BLOOM,

*President of the Senate.*

The sectional numbers on the margin hereof are designated as provided by law.

JOSEPH MCGHEE,  
*Attorney General.*

Passed March 20, 1917.

Approved March 30, 1917.

JAMES M. COX,  
*Governor.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the 2nd day of April, A. D. 1917. 148G.

[House Bill No. 144.]

### AN ACT

~~Repealing sections 9007-1 and 9007-2 of the General Code, and providing for the well-being of their employees.~~

*Be it enacted by the General Assembly of the State of Ohio:*

Sec. 9007-1.

Seats for conductor and motorman.

SECTION 1. That it shall be unlawful to operate in Ohio any electric, street or interurban railroad car unless it be provided at all times during operation with seats for the motorman and conductor.

Sec. 9007-2.

Penalty for failure to provide seats.

SECTION 2. A violation of section 1 hereof shall constitute a violation thereof by the president, general manager, general superintendent, or other officer in charge of same.

(Amended Senate Bill No. 87)

## AN ACT

To amend section 3699-a of the General Code designating the department of Public Works as the state agency to care, protect and enforce state's rights pertaining to Lake Erie.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That section 3699-a of the General Code be amended to read as follows:

**Declaration of state's rights to waters of Lake Erie and soil under same; department of public works designated as state agency in charge.**

Sec. 3699-a. 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.

*The department of Public Works of Ohio, acting by and through the superintendent of Public Works, is hereby designated as the state agency in all matters pertaining to the care, protection and enforcement of the state's rights designated herein.*

**Repeal.**

SECTION 2. That existing section 3699-a of the General Code be and the same is hereby repealed.

JACKSON E. BETTS,  
*Speaker of the House of Representatives.*

GEORGE D. NYE,  
*President of the Senate.*

Passed April 16, 1945.

Approved April 25, 1945.

FRANK J. LAUSCHE,  
*Governor.*

The sectional number herein is in conformity to the General Code.

HUGH S. JENKINS,  
*Attorney General.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the  
25th day of April, A. D. 1945.

EDWARD J. HUMMEL,  
*Secretary of State.*

File No. 29.

(Amended Senate Bill No. 71)

AN ACT

~~To authorize the sale of certain real property situated in the city of  
Akron, Ohio.~~

*Be it enacted by the General Assembly of the State of Ohio:*

**Conveyance of certain real property in Akron, Summit county, Ohio,  
authorized; procedure; description.**

SECTION 1. That the Governor be and he hereby is authorized and empowered in the name of the State of Ohio to sell and convey to the highest and best bidder, by receiving sealed bids therefor, after at least 30 days' notice in a newspaper of general circulation in the City of Akron, Summit County, Ohio, and for not less than seven hundred and fifty dollars (\$750.00) all the right, title and interest of the State in and to a certain parcel of real estate in the City of Akron, Summit County, Ohio, heretofore acquired by the State as a site for an armory. Said real estate being more particularly described as being part of the original lot No. 71, Ely tract No. 5; said premises being bounded as follows: Beginning at a stone in Hickory Street at the intersection of the premises of Carl Bahr south 33° East 196.62 feet to a stone in said street; thence south 55° west 231.5 feet; thence west by north along the boundary line of the P. A. and W. R. R. 288 feet to the premises of Carl Bahr; thence north 61° 15' east 375.5 feet to the place of beginning, containing 1.445 acres of land. Being the same premises conveyed to the state of Ohio, by the Peoples Savings and Trust Company, of Akron, Ohio, by deed dated September 27, 1922, and recorded in deed book 920, page 222, of the Summit County, Ohio, deed records.

~~Filed in the office of the Secretary of State at Columbus, Ohio, on the  
1st day of July, A. D. 1955.~~

~~TED W. BROWN,  
Secretary of State.~~

~~File No. 187~~

~~Effective September 27, 1955.~~

(Amended Substitute Senate Bill No. 187)

### AN ACT

To enact section 123.031 and to amend sections 123.03, 721.04, 721.05, and 721.11, and to repeal sections 721.06 and 721.07 of the Revised Code, for the purpose of encouraging and providing for the private development of lakefront lands and the development, utilization, and conservation of said territory for the uses to which it may be adapted, and to protect the rights of the state and to delegate certain powers to municipal corporations, port authorities, counties and the director of public works.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION I. That sections 123.03, 721.04, 721.05, and 721.11 be amended and section 123.031 of the Revised Code be enacted to read as follows:

#### **State's rights to waters of Lake Erie.**

Sec. 123.03. 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 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 it may be adapted, subject to the powers of the United States government, \*\*\* to the public rights of navigation, water commerce and fishery, and further subject \*\*\* 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 shore line of said waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 123.031 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 public works 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 public works in any matter pertaining to the care, protection and enforcement of the state's rights in said territory shall be deemed a rule or adjudication within the meaning of sections 119.01 to 119.13, inclusive, of the Revised Code.*

**Leasing of lakefront land for private improvement.**

Sec. 123.031. (A) "Territory", as used in this section, means the waters and the lands presently underlying the waters of Lake Erie and lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shore line and the harbor line or the line of commercial navigation where no harbor line has been established.

(B) Whenever the state, acting through the governor upon the recommendation of the director of public works, shall, upon application of any owner of uplands fronting on Lake Erie, and after notice as hereinafter provided, determine that any part of the territory as defined in section 123.031 of the Revised Code, in front of said uplands can be developed and improved or the waters thereof used as specified in said 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 said owner, subject to the powers of the United States government, and without prejudice to the littoral rights of said upland owner, provided the legislative authority of the municipal corporation within which any such part of the territory is located if such 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, shall have enacted an ordinance or resolution finding and determining that such part of the territory, described by metes and bounds, 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 said application comply with regulation of permissible land use under a waterfront plan of the local authority.

(C) Upon the filing of the application of such upland owner in the office of the director of public works in Columbus, Ohio, such director shall hold a public hearing thereon and cause written notice of such filing to be given any municipal corporation, county, or port authority, as the case may be, in which such part of the territory is located and also public notice of such filing by advertisement in a newspaper of general circulation within the locality where such part of the territory is located, once a week for four consecutive weeks prior to the date of the initial hearing. All hearings shall be before the director of public works and shall be open to the public and a record shall be made of the proceeding. Parties thereto

shall be entitled to be heard, to be represented by counsel, and to have process to compel the attendance of witnesses. The findings and order of the director of public works shall be in writing. All costs of the hearings, including publication costs, shall be paid by the applicant.

In the event the director of public works finds that a lease may properly be entered into with the applicant he shall recommend to the governor the terms and conditions of such lease, and shall determine the consideration to be paid by the applicant, which consideration shall exclude the value of the upland owner's littoral rights and improvements made or paid for by the upland owner or his predecessors in title. Such lease may be for such periods of time, whether limited or perpetual, as the director of public works shall recommend. The rentals received under the terms of such a lease shall be paid into the city, county, or port authority making the finding herein provided for.

If the governor concurs in the findings of the director of public works, and approves the terms and conditions of said lease agreement, he shall issue a certificate to that effect and deliver the same to the auditor of state for the drafting of the lease agreement. All leases made hereunder shall be executed in the manner provided by section 5301.13 of the Revised Code and shall contain, in addition to the provisions required herein, a reservation to the state of all mineral rights as required by section 155.01 of the Revised Code, except that the removal of such minerals shall be conducted in such manner as not to damage any improvements placed by the littoral owner or lessee on such leased lands. No lease of the lands herein defined shall express or imply any control of fisheries or aquatic wildlife now vested in the division of wildlife of the department of natural resources.

(D) Upland owners who have, prior to the effective date of section 123.031 of the Revised Code, erected, developed or maintained structures, facilities, buildings or improvements or made use of waters in the part of the territory in front of such uplands shall be granted a lease by the state, acting through the governor, as set forth in this section, upon the presentation of a certification by the chief executive of a municipality, resolution of the board of county commissioners, or by a resolution of the board of directors of the port authority establishing that such structures, facilities, buildings, improvements or uses do not constitute an unlawful encroachment on navigation and water commerce. Such lease, upon its issuance, shall specifically enumerate the structure facilities, buildings, improvements, or uses so included.

(E) Upland owners having secured a lease pursuant to section 123.031 of the Revised Code shall be 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 provisions of such lease or the littoral rights of such upland owner, and such leasehold and the littoral rights of the upland owner, pursuant to the procedure provided in sections 719.01 to 719.21, inclusive, of the Revised Code. Such 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 upland owner under this sec-

tion or by prior acts of the general assembly or grants from the United States. The failure of any owner of uplands to apply for or obtain a lease under this section shall not prejudice any right said upland owner may have to compensation for a taking of littoral rights and improvements made in the exercise thereof.

(F) In the event any taxes or assessments are levied or assessed upon the property which is the subject of a lease pursuant to section 123.031 of the Revised Code, such taxes or assessments shall be and become the obligation of the lessee having secured a lease pursuant to this section.

#### **Use and control of waters and soil of Lake Erie.**

Sec. 721.04. Any municipal corporations within the limits of which there is included a part of the shore of the waters of Lake Erie may, in aid of navigation and water commerce, construct, maintain, use, and operate, \*\*\* piers, docks, wharves, and connecting ways, places, tracks, and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the municipal corporation held under title permitting such use, and also over and on any submerged or artificially filled land made by accretion resulting from artificial encroachments, title to which is in the state, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of such municipal corporation, whether such littoral land is privately owned or not.

Any such municipal corporation may, by ordinance, subject to federal legislation, establish harbor lines and other regulations for such territory and prohibit the placing, maintaining, or causing or permitting to be placed therein any unlawful encroachments on such territory.

The territory to which this section applies is limited to that within the limits of the municipal corporation and extending into Lake Erie to the distance of two miles from the natural shore line. For all purposes of government and exercise of such powers the limits of any such municipal corporation shall be held to extend out, in, over, and under such water and land made or that may be made within such territory. This section does not limit the now existing boundaries of any municipal corporation. Where two municipal corporations have upland territory fronting on such waters, and there is a conflict because of the curve of the shore line or otherwise as to such two mile boundary, the boundaries of each such municipal corporation \*\*\* *may be determined by agreement between the municipal corporations concerned.*

All powers granted by this section shall be exercised subject to the powers of the United States government and the public rights of navigation and fishery in any such territory. All mineral rights or other natural resources existing in the soil or waters in such territory, whether now covered by water or not, are reserved to the state.

#### **Acquisition of privately improved lakefront area.**

Sec. 721.05. When any part of the territory mentioned in section 721.04 of the Revised Code is in front of privately owned upland and has

been filled in or improved by the owner or his predecessor in title to such upland, a municipal corporation shall not take possession \*\*\* such part of the public domain so filled or improved, without the consent of such upland owner, until the municipal corporation has complied with sections 719.01 to 719.21, inclusive, of the Revised Code. In any such proceeding to appropriate there shall be no compensation allowed to the upland owner for the site of such fill or improvements.

**Waterfront development; assessments on improvements.**

Sec. 721.11. Any municipal corporation having jurisdiction over any part of the territory mentioned in section 721.04 of the Revised Code, whether in front of privately owned upland or otherwise, as provided in such section, may, in aid of navigation and water commerce, adopt plans for the development of such water front, construct bulkheads at such locations as it approves between the shore line and the harbor line as fixed by the United States government, make fills with earth or other suitable materials out to such bulkheads, and construct public highways on the filled portions \*\*\*.

*Leases made pursuant to section 123.031 of the Revised Code shall be subject to the right of the municipal corporation to maintain a highway, a marginal railroad, and other agreed reasonable means of access to the waters of Lake Erie in conformity with the water front plan of such municipality, in aid of navigation and water commerce, provided that an adequate means of access to said waters must be provided to the lessees.*

\*\*\*

Such municipal corporations may assess, in any one of the three methods authorized by section 727.01 of the Revised Code, against the littoral land and other specially benefited property, such part or all of the cost of constructing such bulkheads, filling, highway, and other improvements, in aid of navigation and water commerce, as are agreed upon by the owners of such littoral lands and the legislative authority of such municipal corporation. Such municipal corporation may issue bonds in anticipation of the collection of such assessments and use the proceeds thereof in paying the cost of constructing such improvements of the water front.

\*\*\*

**Repeal.**

SECTION 2. That existing sections 123.03, 721.04, 721.05, 721.06, 721.07 and 721.11 of the Revised Code are hereby repealed.

ROGER CLOUD,  
*Speaker of the House of Representatives.*

JOHN W. BROWN,  
*President of the Senate.*

Passed June 23, 1955.

I return to you herewith Amended Substitute Senate Bill No. 187 without my signature and with my veto. July 11, 1955.

FRANK J. LAUSCHÉ,  
*Governor.*

IN THE SENATE:

Passed notwithstanding the objections of the Governor, July 13, 1955.  
Yeas—27; Nays—4.

JOHN W. BROWN,  
*President of the Senate.*

IN THE HOUSE OF REPRESENTATIVES:

Passed notwithstanding the objections of the Governor, July 13, 1955.  
Yeas—95; Nays—21.

KLINE L. ROBERTS,  
*Speaker Pro Tem of the House of Representatives.*

The sectional numbers herein are in conformity with the Revised Code.

OHIO LEGISLATIVE SERVICE COMMISSION  
JOHN A. SKIPPON, *Director*

Filed in the office of the Secretary of State at Columbus, Ohio on the 14th day of July, A. D. 1955.

TED W. BROWN,  
*Secretary of State.*

File No. 319.

Effective October 13, 1955.

(Amended Substitute Senate Bill No. 193).

AN ACT

~~To amend sections 4582.01, 4582.02, 4582.03, 4582.04, 4582.05, 4582.06, 4582.07, 4582.08, 4582.09, 4582.10, 4582.11, 4582.12, 4582.13, 4582.14, 4582.15, and 4582.16 of the Revised Code providing statutory authority for the creation of port authorities by political subdivisions, and to declare an emergency.~~

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That sections 4582.01, 4582.02, 4582.03, 4582.04, 4582.05, 4582.06, 4582.07, 4582.08, 4582.09, 4582.10, 4582.11, 4582.12, 4582.13, 4582.14, 4582.15, and 4582.16 of the Revised Code be enacted to read as follows:

**Definitions.**

Sec. 4582.01. As used in sections 4582.02 to 4582.16 of the Revised Code: