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TABLE OF CONTENTS

TABLE OF CONTENTS..... 3

TABLE OF AUTHORITIES 4

THE INTEREST OF AMICUS CURIAE 5

ARGUMENT..... 5

I. Pursuant to Long-Standing Ohio Common Law, the State’s Public Trust
Interest in the Waters of Lake Erie Extends to the Water’s Edge, and the
Territory Between Water’s Edge and Ordinary High Water Mark is
Owned by the Littoral Owner. 5

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

page

Cases

California ex rel. State Lands Comm. v. United States (1982), 457 U.S. 273..... 7
Hogg v. Beerman (1884), 41 Ohio St. 81 7
State ex rel. Merrill v. Ohio Dep't of Natural Resources, 2009-Ohio-4256 8

Statutes

43 U.S.C.S. § 1301(a)(1) (1980) 7
43 U.S.C.S. § 1301(a)(3) (1980) 7
43 U.S.C.S. § 1311(a) (1995) 5
R.C. § 1506.10 5, 6
R.C. § 1506.11(A)..... 6

Other Authorities

1993 Ohio Op. Atty. Gen. No. 93-025..... 6, 7
2000 Ohio Op. Atty. Gen. No. 2000-047..... 5, 6, 7

THE INTEREST OF AMICUS CURIAE

I am a former Ohio Attorney General and former state senator for the 2nd district, which includes a substantial portion of the western shoreline of Lake Erie. During my tenure as Attorney General, I issued an opinion to the Lucas County Prosecuting Attorney addressing the authority of the State of Ohio to convey title to land within the territorial boundaries of Lake Erie. 2000 Ohio Op. Atty. Gen. No. 2000-047 (the “2000 Opinion”). This opinion necessarily required an examination of the state’s ownership of lands within the territorial boundaries of Lake Erie, the landward boundary of which is the natural shoreline. *See* R.C. § 1506.10. I have an interest in ensuring that the opinions issued by the Attorney General’s office are given due weight as persuasive authority in Ohio, and also in protecting the private property rights of Ohio’s citizens.

I joined an Amici Curiae brief supporting the State of Ohio’s Proposition of Law No. 1, but took no position in that brief on the State of Ohio’s Proposition of Law No. 2. This brief sets out my position on the State of Ohio’s Proposition of Law No. 2.

ARGUMENT

I. Pursuant to Long-Standing Ohio Common Law, the State’s Public Trust Interest in the Waters of Lake Erie Extends to the Water’s Edge, and the Territory Between Water’s Edge and Ordinary High Water Mark is Owned by the Littoral Owner.

An Attorney General opinion issued on December 29, 2000, examined the provisions of federal and Ohio law governing ownership of the lands within the territorial boundaries of Lake Erie. 2000 Ohio Op. Atty. Gen. No. 2000-047. My opinion cited the Submerged Lands Act, 43 U.S.C.S. § 1311(a) (1995), pursuant to which the United States relinquished any title or ownership of the lands beneath navigable waters “to the respective States *or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof*[.]” (emphasis

added). Under this federal law, “lands beneath navigable waters” was defined as meaning, *inter alia*, “all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union . . . up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction.” *Id.*

In this opinion, I stated that the State’s title to land under the waters of Lake Erie is dependent upon, in part, the “natural shoreline” as stated in R.C. § 1506.10. 2000 Ohio Op. Atty. Gen. No. 2000-047, at pp. 2-3. As explained in a 1993 Opinion authored by one of my predecessors, which I relied upon in my 2000 Opinion, the “natural shoreline” is the line marking the edge of a body of water and is in a constant state of change. 1993 Ohio Op. Atty. Gen. No. 93-025, at p. 5. By defining in R.C. § 1506.10 the boundary of the State’s trust interest in Lake Erie as the natural shoreline, Ohio “has asserted its ownership of the water of Lake Erie and the soil *beneath* the water. R.C. 1506.10 does not assert a claim by the state for ownership of the shore above the natural shoreline.” *Id.* (emphasis in original).¹ The public trust relates to use of Lake Erie’s waters, not its adjoining shore, as made clear in R.C. § 1506.10’s reference to “the public rights of navigation, water commerce, and fishery.”

As further explained in the 1993 Opinion provided to Frances S. Buchholzer, who was then the Director of the Ohio Department of Natural Resources:

By enacting 43 U.S.C.S. § 1311, the United States relinquished any title or ownership of the lands beneath navigable waters which it held and vested such title and ownership in the states or the persons who were on June 5, 1950 entitled thereto under the law of

¹ Likewise, R.C. § 1506.11(A) defines the public trust “territory” as “the waters and the lands *presently underlying* the waters of Lake Erie and the lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the international boundary line with Canada.” (emphasis added). Thus, lands not presently underlying the waters of Lake Erie are not burdened by the state’s public trust interest.

the respective states in which the land is located, and the respective grantees, lessees or successors in interest thereof. The phrase “under the law of the respective states in which the land is located” means “that state law determines the proper beneficiary of the grant land under [43 U.S.C.S. § 1311].” *California ex rel. State Lands Comm. v. United States*, 457 U.S. 273, 288 (1982).

Pursuant to Ohio law, the state holds title to land under the water of Lake Erie within the boundaries of the state and to all land beyond the natural shoreline that was previously covered by the waters of Lake Erie and is now covered by artificial fill. *R.C. 1506.10*; *State ex rel. Squire v. Cleveland*. Accordingly, the state is the beneficiary of the grant pursuant to 43 U.S.C.S. § 1311 of “lands beneath navigable waters,” 43 U.S.C.S. § 1301(a)(1) (1980), that lie beneath the water of Lake Erie and “all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters,” 43 U.S.C.S. § 1301(a)(3) (1980). The land that lies above the natural shoreline of Lake Erie belongs to the littoral owner. Therefore, the littoral owner is the beneficiary of the grant pursuant to 43 U.S.C.S. § 1311 (1980) of land above the natural shoreline up to the ordinary high water mark.

1993 Ohio Op. Atty. Gen. No. 93-025, at pp. 6-7.

The Submerged Lands Act does not assign all lands on nontidal waters beneath ordinary high water mark to the respective states. Instead, it makes clear that title and ownership to these nontidal lands is in either the state *or* in private hands as determined by state law. In Ohio, because the state’s interest in Lake Erie does not extend landward of the natural shoreline, the lands above the natural shoreline up to the ordinary high water mark are not held in trust by the state.² Of course, this includes the hundreds of properties owned in fee simple by the state or its

² I observed in my 2000 Opinion that, prior to 1803, the United States conveyed to private owners title to parcels within the territorial boundaries of Lake Erie, which the Ohio Supreme Court recognized as valid in *Hogg v. Beerman* (1884), 41 Ohio St. 81. 2000 Ohio Op. Atty. Gen. No. 2000-047, at p. 3 fn.3. Thus, under Ohio law, it is possible for lands lakeward of the natural shoreline to be privately owned. It follows then that the court of appeals properly reversed the trial court’s reforming of all littoral property owners’ deeds to provide that no ownership extended beyond water’s edge. See *State ex rel. Merrill v. Ohio Dep’t of Natural Resources*, 2009-Ohio-4256, ¶ 103.

political subdivisions, many but not all of which are opened to the public to promote public access to Lake Erie.

The Eleventh District Court of Appeals held that the natural shoreline is the “actual water’s edge” – the line where the water contacts the land between the high and low water mark. *State ex rel. Merrill v. Ohio Dep’t of Natural Resources*, 2009-Ohio-4256, ¶ 127. As a result, “the waters, and the lands under the waters of Lake Erie, when submerged under such waters, are subject to the public trust, while the littoral owner holds title to the natural shoreline.” *Id.* This aspect of the appellate court’s decision is consistent with both the 2000 Opinion and the 1993 Opinion discussed above and should be affirmed by this Court.

Respectfully submitted,

Betty Montgomery By Christy M. Wald per court
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CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Amicus Curiae was served by regular U.S. Mail, postage pre-paid, on this 20th day of September, 2010, upon the following counsel of record:

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