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## **INTRODUCTION**

Appellees are under the misapprehension that they *must* own land down to the water of Lake Erie because some of their deeds say they own to the shore and some even say they own to the low water mark. No matter how tightly Appellees wrap their deeds in the mantle of private property rights, however, no deed can trump the law.

The law laid down at the founding of the country and followed faithfully by this court unequivocally establishes that the state was and is entrusted with the sovereign ownership of Lake Erie within the State of Ohio up to the ordinary high water mark for the common good. Upholding the law, therefore, does not deprive Appellees of the property rights they claim, because they never had them.

Appellees ignore, misconstrue, or mischaracterize the authorities, some dating to the 1800s. In support of their cause, the Appellees also enlist authorities that concern rivers or inland lakes, as well as other authorities that have no relevance to the Great Lakes or Ohio.

Appellants National Wildlife Federation and Ohio Environmental Council (“conservation appellants”) stand by their merit brief and will not repeat it here. They will confine this reply and response to those of Appellees’ arguments that merit one; they will not aggravate the Appellees’ imposition on the court by addressing either their more outlandish assertions or issues that are not before the court, such as the method for locating the ordinary high water mark.

## **STATEMENT OF FACTS**

Appellees Robert Merrill *et al.* (“Merrill”) lays out a history of Ohio’s settlement and legislation that inappropriately mixes facts, often unsubstantiated, and argument, including Merrill’s interpretation of the Fleming Act as enacted and amended. Class Plaintiffs-Appellees’ (“Merrill’s”) Merit Br. at 7-15. Merrill also catalogues different positions purportedly taken by

the executive branch of the government of the State of Ohio, including published opinions of the Attorney General, regarding the extent of Lake Erie and the reach of the public trust. *Id.* at 10-15. (Appellees L. Scot Duncan and Darla J. Duncan (collectively, “Duncan”) also rely on at least one Attorney General Opinion. Merit Brief of Intervening Plaintiffs-Appellees L. Scot Duncan and Darla J. Duncan (“Duncan’s Merit Br.”) at 12-13.) Even if accurate, Merrill’s catalogue is irrelevant because federal or state constitutional, statutory, and case law establish the boundary of Lake Erie, not the Ohio Department of Natural Resources, the Attorney General, or other agencies of the state government.

## **ARGUMENT**

### **Proposition of Law No. I:**

**The State of Ohio holds Lake Erie in trust for the public up to the line of the lake’s ordinary high water mark.**

- A. Upon admission into the Union, the State of Ohio received as a public trust title to Lake Erie, including the land submerged when the waters of the lake are at their ordinary high water mark, that is to say, the shore.**

In their merit brief, conservation appellants established that upon statehood Ohio received in trust the lands submerged by Lake Erie when its waters are at their ordinary high water mark. Further, Ohio has not only maintained its trusteeship, it is precluded from relinquishing it.

Appellees fail to address or distinguish the controlling decisions of the federal and state supreme courts that conservation appellants cited. Instead, they cite a host of other cases that are either inapposite, mischaracterized, or contrary to the propositions for which they are offered.

- 1. Federal law does not authorize Ohio to re-define the boundary of the public trust to exclude the shore of Lake Erie.**

- a. Merrill**

Merrill disputes the nature of the public trust and equal footing doctrines, which hold that upon admission each state received in trust the navigable waters within its boundaries up to the ordinary high water mark. Merrill claims that the two doctrines did not operate to transfer to Ohio a public trust over the lands up to the ordinary high water mark of Lake Erie, but rather that upon admission Ohio had the authority to define the boundary of the public trust.

Merrill has failed, however, to point to a single case holding that a state may define the boundary of the public trust in a Great Lake to exclude lands that are submerged when the waters of the lake are at the ordinary high water mark. In fact, no such case exists. To the contrary, the U.S. Supreme Court “made it clear that the trust [applicable to the Great Lakes] derives from federal law and is binding on all the states.” *Wilkinson, The Headwaters of the Public Trust* (1989), 19 *Envtl. L.* 425, 454; *Illinois Cent. R.R. Co. v. Illinois* (1892), 146 U.S. 387, 436-37, 13 S.Ct. 110, 36 L.Ed. 1018.

The cases Merrill relies on are either inapposite or belie its claim that states may define the extent of the public trust. For instance, Merrill’s reliance on *Shively v. Bowlby*, (1894), 152 U.S. 1, 41, 14 S.Ct. 548, 38 L.Ed. 331, is entirely misplaced. See Merrill’s Merit Br. at 18. As conservation appellants’ explained in their merit brief, the Court there held only that the states may determine the use of the lands below the ordinary high water mark, not that states may relinquish the public trust in those lands. Merit Brief of Appellants National Wildlife Federation and Ohio Environmental Council (“Conservation Appellants”) Merit Br. at 15-17.

*Barney v. Keokuk* (1876), 94 U.S. 324, 4 Otto 324, 24 L.Ed. 224, is inapposite. The Court did not authorize states to define the boundary of the public trust as something other than the ordinary high water mark, as Merrill contends. See Merrill’s Merit Br. at 18. Rather, it held that land created by depositing fill below the ordinary high water mark of the Mississippi River

remained subject to public rights, and that public use of the filled area was “absolutely necessary to the use of the river as a navigable water.” *Id.* at 342.

Speaking generally, the Court stated that the “correct rule” is that the beds and shores of the Great Lakes and other navigable waters below ordinary high water belong to the states in their sovereign capacity, and that the states are responsible for maintaining these waters for commerce and navigation. *Id.* at 337-38. The Court distinguished the “correct rule” from the rule that only tidal waters below ordinary high water belong to the sovereign, which had its source in English common law. *Id.* This was the context for the sentence Merrill quotes on page eighteen in its brief, which appears at the end of the following passage:

It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the *river*, or to sudden accretions produced by unusual floods, is a question which each State decides for itself. . . . The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters *above* tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the *riparian proprietor* rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

*Id.* at 338 (emphasis added).

Properly placed in the context of this passage, the last quoted sentence regarding state resignation of rights to the “riparian proprietor” refers to the resignation of rights in land raised *above* the ordinary high water mark of *rivers* formed as the result of artificial reclamation. It does not refer to any resignation of a state’s responsibilities as public trustee to protect commerce and navigation in lands below a river’s original ordinary high water mark. It certainly

does not refer to any resignation of a state's public trust responsibilities with respect to a Great Lake.

*Hardin v. Jordan* (1891), 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428, does not support Merrill's argument, either. It is inapposite because it concerned Wolf Lake, a small inland lake in Illinois, not one of the Great Lakes. The Court held that under the common law of Illinois the owner of land bordering an inland lake owns to the center of the lake. *Id.* at 386-87, 396, 401. The Court expressly stated that this rule did not apply to the Great Lakes. *Id.* at 385-86, 391, 396.

Rather, title to the shore and lands below the ordinary high water mark of the Great Lakes "inures to the state within which they are situated" and is "incidental to the sovereignty of the state . . . and held in trust for the public purposes of navigation and fishery." *Id.* at 381. The Court went on to say the same rule had been extended, "in some of the States, to *navigable rivers*," then added, as Merrill indicates, "but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised." *Id.* at 382 (emphasis added); see Merrill's Merit Br. at 18. This last phrase thus appears to refer to the states' varying approach to rivers. To conclude that it also applies to the Great Lakes is to ignore the Court's careful placement of the Great Lakes in a special class, distinct from other state water bodies. *Id.* at 391 ("Of course, these observations [that a grant of land bounded by an inland lake or a river includes the contiguous land covered by water] do *not* apply to our great navigable lakes, which are really inland seas, and to which all those reasons apply which apply to the sea itself.") (emphasis added). Such a conclusion would also be incorrect in light of the Court's later explanation that in *Hardin* it held that, although a state may convey its property

interest or *jus privatum* in lands below the ordinary high water mark, such a conveyance cannot interfere with the public trust or *jus publicum*. See *Shively*, 152 U.S. at 48-49.

Merrill also quotes from *Illinois Central Railroad Co. v. Chicago* (1900), 176 U.S. 646, 659, 20 S.Ct. 509, 44 L.Ed. 622. See Merrill's Merit Br. at 18. In that case, the Court noted that the Illinois Supreme Court, like the Court itself in *Illinois Central Railroad Company v. Illinois* ("*Illinois Central*"), *supra*, held that the state holds in trust, in its sovereign capacity, the title to the lands below the ordinary high water mark of Lake Michigan for the purposes of navigation and fishery, and that the state has no power to barter and sell those lands. 176 U.S. at 659, 660. Although the Court said this is a question of local law, it cited *Hardin* for this proposition. *Id.* As discussed above, the Court in *Shively* did not interpret *Hardin* to allow states to reduce the extent of the lands subject to the public trust.

*Borax Consolidated, Ltd. v. Los Angeles* (1935), 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9, does not help Merrill, either. In stating, "Rights and interests in the tideland, which is subject to the sovereignty of the state, are matters of local law," *id.* at 22, the Court was merely summarizing the statements it made earlier in *Barney* and *Hardin*, discussed above.

*Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Company* (1977), 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550, is inapposite because it concerns the effect of the equal footing doctrine *after* statehood, not the effect of the doctrine upon admission. The dispute in the case concerned the ownership of two distinct portions of land: one that had been within the bed of the Willamette River when Oregon was admitted into the Union and another that had become the main channel of the river after a major flood in 1909. 429 U.S. at 366-67. The Court held that the equal footing doctrine "did not operate *after* th[e] date [of admission] to determine what effect on titles the movement of [a] river might have." *Id.* at 371 (emphasis added).

However, the Court acknowledged that *upon admission*, under the equal footing doctrine, Oregon had acquired the same absolute title to the beds of navigable waters up to the ordinary high water mark that the original states had. *Id.* at 373-74 (citing *Pollard's Lessee v. Hagan* (1845), 44 U.S. 212, 230, 11 L.Ed. 565, 3 How. 212.), 375 (citing *Shively v. Bowlby*, 152 U.S. at 57-58). This absolute title was conferred “by the Constitution itself.” *Id.* at 374.

Finally, Merrill erroneously asserts that “recently, the U.S. Supreme Court held that ‘state law defines property interests, including property rights in navigable waters and the lands underneath them.’” Merrill’s Merit Br. at 19; see also Duncan’s Merit Br. at 5-6. Merrill’s quotation, which comes from *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2010), \_\_\_ U.S. \_\_\_, 130 S.Ct. 2592, 2597, is incomplete. The Court actually said, “*Generally speaking*, state law defines property interests, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998), including property rights in navigable waters and the lands underneath them, see *United States v. Cress*, 243 U.S. 316, 319-320, 37 S. Ct. 380, 61 L. Ed. 746 (1917); *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U.S. 349, 358-359, 18 S. Ct. 157, 42 L. Ed. 497 (1897).” *Id.* (emphasis added). Thus, the Court was only citing a general proposition, not disavowing the public trust doctrine.

This becomes even clearer upon examining the cases the Court cited. In *Cress*, the Court relied upon *Barney*, *Hardin*, and *Shively*. *Cress*, 243 U.S. at 319-20. As conservation appellants have shown, none of those cases empowered the states to shrink the lands subject to the public trust. In *St. Anthony Falls*, the Court said Minnesota’s title and jurisdiction over the navigable waters within its boundaries were the same as those of the original states, citing *Martin v. Waddell's Lessee* (1842), 41 U.S. 367, 407-08, 410, 418, 10 L.Ed. 997, 16 Pet. 367, which held

that lands below the ordinary high water mark of navigable waters belongs to the people in common. *St. Anthony Falls*, 168 U.S. at 359.

Contrary to Merrill's claim, the statement it quoted from *Stop the Beach* was not even the holding of the case. The holding of the case was that the State of Florida had not taken property rights in violation of the Fifth and Fourteenth Amendments when it enacted legislation authorizing the state to retain title to land it artificially fills below the mean high water mark. 130 S.Ct. at 2611-13.

As this discussion has shown, Merrill's argument that states may define the extent of the public trust is built upon passages plucked out of the context of the cases in which they appear and spun to support the result Merrill desires. The actual holdings and statements of the Court in those cases support, rather than undermine, the principle that the public trust in navigable waters extends up to the ordinary high water mark.

#### **b. Taft**

Appellee/Cross-Appellant Homer S. Taft ("Taft") takes issue both with the equal footing doctrine and the public trust doctrine, claiming – without adequately explaining why – conservation appellants have misconstrued *Shively*,<sup>1</sup> *Illinois Central*, and the Submerged Lands Act. Conservation appellants acknowledge that the Court in *Illinois Central* indicated that a state might convey "such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Illinois Central*, 146 U.S. at 452. However, that does not authorize any surrender of

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<sup>1</sup> Taft also claims, without any adequate explanation, that several cases cited in *Shively* actually support his position. Taft's Merit Br. at 31. However, he fails to address conservation appellants' demonstration that these cases only involve wharfing and access rights, like the littoral rights Ohio law recognizes, and that none of the cases authorizes a state to alter the scope of the public trust by granting absolute title to the lands below the ordinary high water mark. Conservation Appellants' Merit Br. at 16-17.

the state's trust responsibilities or the conveyance of title to the entire shore of Lake Erie into private ownership. Indeed, this court has held, "The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created." *State v. Cleveland & Pittsburgh Railroad Company* (1916), 94 Ohio St. 61, 80.

Taft claims that conservation appellants' interpretation of *Illinois Central* is undermined by *Appleby v. City of New York* (1926), 271 U.S. 364, 46 S.Ct. 569, 70 L.Ed. 992. *Appleby* actually reaffirms the presumption against the surrender of navigable waters to private parties. *Id.* at 383-84. Furthermore, the Court noted that public navigation would continue despite the grants of wharfing rights at issue in the case. *Id.* at 398.

Other cases Taft cites to support his argument that Ohio does not hold the shore of Lake Erie in trust are inapposite. A number of them concerned the boundaries between two states, not the equal footing or public trust doctrines. See *Ohio v. Kentucky* (1973), 410 U.S. 641, 93 S.Ct. 1178, 35 L.Ed.2d 560; *Vermont v. New Hampshire* (1933), 289 U.S. 593, 53 S.Ct. 708, 77 L.Ed. 1392; *Massachusetts v. New York* (1926), 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838; *Handly's Lessee v. Anthony* (1820), 18 U.S. 374, 5 L.Ed. 113, 5 Wheat. 374. One concerned the federal government's obligations when disposing of federal lands. See *Alabama v. Texas* (1954), 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689. Another concerned the federal government's ability to patent land *above* the "high water mark" of Lake Erie in Ohio. See *Niles v. Cedar Point Club* (1899), 175 U.S. 300, 20 S.Ct. 124, 44 L.Ed. 171. Cases concerning navigable rivers and inland

lakes, such as *Gavit v. Chambers* (1828), 3 Ohio 495, are subject to a different rule than is Lake Erie. *Pollock v. Cleveland Ship Building Company* (1895), 2 Ohio Dec. 151-52.<sup>2</sup>

Taft then launches into an argument that other states have rejected the ordinary high water mark in favor of the low water mark as the boundary of the Great Lakes. Even if Taft were correct, the long list of cases he strings together to support this argument do not alter Ohio's adoption of the ordinary high water mark as the boundary of Lake Erie subject to the public trust.

In fact, though, Taft is incorrect in claiming that other Great Lakes states have rejected the ordinary high water mark in favor of the low water mark as the boundary of the public trust in the Great Lakes. Illinois, Michigan, and Wisconsin all hold that the ordinary high water mark is the boundary. *Brundage v. Knox* (1917), 279 Ill. 450, 467, 472, 117 N.E. 123 (citing *Cobb v. Commrs. of Lincoln Park* (1903), 202 Ill. 427, 431, 67 N.E. 5; *Revell v. People* (1898), 177 Ill. 468, 478, 52 N.E. 1052); *Glass v. Goeckel* (2005), 473 Mich. 667, 687, 691, 703 N.W.2d 58; *R.W. Docks & Slips v. State of Wisconsin* (2001), 244 Wis.2d 497, 509, 628 N.W.2d 781; *State v. Trudeau* (1987), 139 Wis. 2d 91, 101, 408 N.W.2d 337. Indiana, Minnesota, New York, and Pennsylvania have also held or provided that the boundary of the public trust in navigable waters is the ordinary high water mark, not the low water mark. *State v. Korrer* (1914), 127 Minn. 60, 76, 148 N.W. 617 (land below ordinary high water mark is subject to "the right of the public to use the same for purpose of navigation or other public purpose"); *Marba Sea Bay Corporation v. Clinton Street Realty Corp.* (1936), 272 N.Y. 292, at paragraph two of the syllabus, 5 N.E.2d 824 ("A conveyance of land 'bounded southerly by the Atlantic Ocean' carries title no further than

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<sup>2</sup> Taft also engages in a lengthy and irrelevant analysis centering on the relationship between Roman and English law, geared toward supporting an assault on conservation appellants' exposition of the public trust doctrine.

high-water mark, and excludes the foreshore.”); *Freeland v. Pa. R. Co.* (1901), 197 Pa. 529, 539, 47 A. 745 (“[T]he absolute title of the riparian proprietor extends to high watermark only, and that between ordinary high and ordinary low watermark, his title to the soil is qualified, it being subject to the public rights of navigation over it, and of improvement of the stream as a highway.”); 312 Ind. Admin. Code 6-1-1(1)(b) (“In the absence of a contrary state boundary, the line of demarcation for a navigable waterway is the ordinary high water mark.”).

Taft cites many of these cases to support his position, but he misconstrues them or places more weight on them than they can bear. For instance, in *Brundage* the Illinois Supreme Court did not establish the low water mark as the boundary of private lands adjoining Lake Michigan. It only held that a littoral owner acquired title to land along Lake Michigan formed by accretion,<sup>3</sup> and that to preserve his access to the water the boundary of his land was the edge of the lake “when free from disturbing causes.” *Id.* at 473. The court thus did not define the boundary as the low water mark, but rather followed its earlier decision in *Seaman v. Smith* (1860), 24 Ill. 521, 524-25, which defined “that line where the water usually stands when unaffected by any disturbing cause” as the “ordinary” or “usual high water mark.” *Id.* at 471-72. Moreover, the court adhered to its earlier rulings (1) that the state holds in trust the submerged lands of Lake Michigan, meaning the lands below the ordinary high water mark, and (2) that any title a private person might have below the ordinary high water mark is *jus privatum* and held subject to the public right or *jus publicum*. *Id.* at 467, 472 (citing *Cobb v. Commrs. of Lincoln Park* (1903), 202 Ill. 427, 431, 67 N.E. 5; *Revell v. People* (1898), 177 Ill. 468, 478, 52 N.E. 1052.)

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<sup>3</sup> Accretion is the “increase of real estate by the addition of portions of the soil, by gradual disposition through the operation of natural causes to that already in the possession of the owner.” *Lake Front-East Fifty-Fifth St. Corp. v. Cleveland* (1939), 21 Ohio Op. 1, 8, 7 Ohio Supp. 17 (citation omitted), *aff’d* 36 N.E.2d 196, appeal dismissed 139 Ohio St. 138, 38 N.E.2d 410, 22 O.O. 127.

Taft cites *Hilt v. Weber* (1930), 252 Mich. 198, 233 N.W. 159, to support his thesis, but the Michigan Supreme Court recently explained that its “concern in *Hilt* was the boundary of a littoral landowner’s *private* title, rather than the boundary of the public trust.” *Glass v. Goeckel* (2005), 473 Mich. 667, 689-90, 703 N.W.2d 58 (emphasis in original). In *Glass* itself, which involved Lake Huron but applied to all Michigan’s Great Lakes, the court deliberately did not rule on the extent of the private littoral title. *Id.* at 675 n.5. It did, however, rule that “although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property [the *jus privatum*] subject to the public trust [the *jus publicum*].” *Id.* at 679 (emphasis in original), and at 690 (“[L]ittoral property remains subject to the public trust.”), 694 (“[T]he private title of littoral landowners remains subject to the public trust beneath the ordinary high water mark.”). Furthermore, the Michigan Supreme Court held that the public trust extends to the ordinary high water mark of the Great Lakes. *Id.* at 687 , 691 (“[T]he ordinary high water mark . . . has meaning as applied to the Great Lakes and marks the boundary of land, even if not instantaneously submerged, included within the public trust.”).

Other cases Taft cited did not involve a Great Lake, did not concern the boundary of the public trust in a Great Lake, or were contradicted by the state supreme court. See *Mitchell v. St. Paul* (1948), 225 Minn. 390, 31 N.W.2d 46 (Lake Vadnais and Twin Lake); *Lamprey v. Metcalf* (1893), 52 Minn. 181, 191, 53 N.W. 1139 (unnamed inland lake; court did not rule whether public trust or private title runs to the low or high water mark); *Stewart v. Turney* (1923), 237 N.Y. 117, 121, 142 N.E.437 (Cayuga Lake); *City of Erie v. R.D. McAllister & Son* (1964), 416 Pa. 54, 59 & n.4, 204 A.2d 650 (contract dispute; court neither mentioned the low water mark nor addressed whether it is the boundary of private or public trust lands); *Jansky v. Two Rivers*

(1938), 227 Wis. 228, 230, 241-42, 278 N.W. 527 (apportionment of land accreted and relicted<sup>4</sup> from Lake Michigan; court neither mentioned the low water mark nor addressed whether it is the boundary of private or public trust lands); *Doemel v. Jantz* (1923), 180 Wis. 225, 227, 193 N.W. 393 (Lake Winnebago).

### c. Duncan

Duncan relies on a lengthy quote from *United States v. Gardner* (1997), 107 F.3d 1314 (9th Cir.), to support the vague assertion that the equal footing doctrine should not apply to Lake Erie because it does not apply to economic differences between states. Duncan's Merit Br. at 8. The quote, taken out of context, states that the "The Equal Footing Doctrine . . . applies to political rights and sovereignty, not to economic or physical characteristics of the states." *Id.* at 1319. Yet, it is the "political rights and sovereignty" that the State of Ohio received under the equal footing doctrine over the shore and lands beneath the navigable waters of Lake Erie that are at issue in this case, and which *Gardner* supports.<sup>5</sup> The court in *Gardner* confirmed that "New states . . . have the same 'rights, sovereignty, and jurisdiction' over the shores of and land beneath navigable waters as do the original states." *Id.* at 1318 (quoting *Pollard's Lessee v. Hagan* (1845), 44 U.S. 212, 230 11 L.Ed. 565).

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<sup>4</sup> The doctrine of reliction recognizes title to uplands exposed by permanent recession of a body of water.

<sup>5</sup> In *Gardner*, defendant ranch owner sought review of a District Court judgment granting an injunction preventing the ranch owner from grazing on federal land in Nevada. *Id.* at 1315-17. The Ninth Circuit affirmed the District Court, rejecting the Gardner's argument that the Equal Footing Doctrine required that all public lands within state boundaries revert to the state of Nevada upon admission. *Id.* at 1318-19. The court specified that the equal footing doctrine indicated that "New states . . . have the same 'rights, sovereignty, and jurisdiction' over the shores of and land beneath navigable waters as do the original states." *Id.* at 1318 (quoting *Pollard's Lessee v. Hagan* (1845), 44 U.S. 212, 230 11 L.Ed. 565). In contrast, it elaborated, in the language quoted in the Duncan brief, that the equal footing doctrine had not been extended to tracts of dry land. *Id.* at 1319.

**2. Western Reserve land grants did not convey any title to lands below the ordinary high water mark of Lake Erie.**

Taft and Duncan mistakenly assert that lands below the ordinary high water mark of Lake Erie adjacent to an area known collectively as the “Western Reserve” were not subject to the equal footing doctrine because they were conveyed to littoral owners before Ohio became a state. In 1792, a half million acres bounded on the north by the shore of Lake Erie were granted to people who had suffered losses during the Revolutionary War. *Hogg v. Beerman* (1884), 41 Ohio St. 81, 83.

However, this grant was not exempt from the equal footing doctrine, but was rather subject to the doctrine because the doctrine preceded the grant. The Northwest Ordinance of 1787 made the admission of any state in the territory that included Ohio subject to the equal footing doctrine, as follows:

There shall be formed in the said territory, not less than three nor more than five states; . . . and whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, *on an equal footing with the original States in all respects whatever* . . . .

Northwest Ordinance of 1787, art. V, *available at* [http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field\(DOCID+@lit\(bdsdcc224a1\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field(DOCID+@lit(bdsdcc224a1))) (last visited Nov. 7, 2010) (emphasis added).

More importantly, the Constitution itself, ratified in 1788, conferred to Ohio upon admission the absolute title to the bed of Lake Erie up to the ordinary high water mark by virtue of the equal footing doctrine. *Corvallis Sand & Gravel Company*, 429 U.S. at 374. Consequently, the pre-statehood Western Reserve land grant that followed was subject to the equal footing doctrine.

Taft and Duncan also claim that the federal Quieting Act and the resulting 1801 presidential quitclaim it authorized gave littoral owners title to land below the ordinary high water mark of Lake Erie. In evaluating this claim, the court should bear in mind that a pre-statehood conveyance of the lands underlying the navigable waters of Lake Erie would have been an exceptional event. The United States will only be held to have conveyed such lands to meet some international duty or public exigency, because control over lands beneath navigable waters “is so strongly identified with the sovereign power of government.” *Montana v. United States* (1981), 450 U.S. 544, 552, 101 S.Ct. 1245, 67 L.Ed.2d 493 (citations omitted). “A court . . . must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance ‘unless the intention was definitely declared or otherwise made plain,’ or was rendered ‘in clear and especial words,’ or “unless the claim confirmed in terms embraces the land under the waters of the stream.” *Id.* (citations omitted).

The Quieting Act and presidential quitclaim do not overcome the strong presumption against such conveyances. The trial court found that the Quieting Act passed federal claims “under metes and bounds descriptions that used terms such as ‘to Lake Erie,’ ‘traversing along the shore of Lake Erie,’ or ‘to the shore,’ or ‘including the whole beach.’” Order Granting Plaintiffs’ and Intervening Plaintiffs’ Motions for Partial Summary Judgment, In Part, Trial Docket (“Tr. Dkt.”) Entry 183, December 11, 2007, Appendix to Merit Brief of Defendant-Appellant-Cross-Appellee State of Ohio (“Ohio App.”) A-101, at ¶216. These terms do not express the required plain or definite declaration of an intent to convey any of the lands below the ordinary high water mark of Lake Erie. They make no reference at all to the lands under Lake Erie, but establish “Lake Erie” or “the shore” as the boundary of the conveyance. As the

U.S. Supreme Court has explained, the mention of a navigable water as the boundary of a conveyance does not convey title to lands below the high water mark.

Grants by congress of portions of the public lands within a territory to settlers thereon, though *bordering on or bounded by* navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state, when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States.

*Shively*, 152 U.S. at 13 (emphasis added).

Therefore, the Western Reserve land grant was subject to the equal footing doctrine, meaning that the waters of Lake Erie, including the lands below the ordinary high water mark, were held in reserve for the future State of Ohio, and passed to it upon admission. See *Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469, 473, 476, 479, 108 S.Ct. 791, 98 L.Ed.2d 877; *Barney*, 94 U.S. at 338; *Pollard's Lessee*, 44 U.S. at 228-30.

**B. Neither Ohio common law nor statutory law has recognized any boundary of the public trust in Lake Erie other than the ordinary high water mark.**

Appellees claim that this court and the legislature have recognized private titles in lands below the ordinary high water mark of Lake Erie and limited the scope of the public trust to the water's edge. Both claims are untenable.

As demonstrated above and in conservation appellants' merit brief, the relevant case law establishes that the boundary of the public trust is the ordinary high water mark. Much of the case law the Appellees use to support the theory that the low water mark is the correct standard is irrelevant or inapposite; often cited without explanation, much of it concerns riparian, not littoral rights, and many of the cases say nothing about Ohio, or the Great Lakes.

**1. Ohio common law**

**a. *Gavit v. Chambers***

Merrill begins its argument by citing *Gavit, supra*. In that case, the court held that the owner of land bounded by the Sandusky River, a navigable river, owned to the middle of the river. 3 Ohio at 498.

Merrill and Taft cite *Gavit* in an attempt to show that conservation appellants err by claiming that all navigable waters are impressed with a public trust. Merrill's Merit Br. at 20-21; Merit Brief of Appellee/Cross-Appellant Homer S. Taft ("Taft's") Merit Br. at 28. However, conservation appellants have never made such a claim. In Ohio, different rules are applicable to navigable rivers and Lake Erie because, like the U.S. Supreme Court, this court recognizes that a Great Lake is in a class all its own.

Specifically, the court expressly held that the rule recognizing the title of riparian owners below the ordinary high water mark of navigable rivers is *not* applicable to the owners of land bordering Lake Erie. *Sloan v. Biemiller* (1878), 34 Ohio St. 492, 512 ("The question before us is, whether the rule . . . laid down [in *Gavit v. Chambers*] . . . as applicable to navigable rivers, applies to the owners of land bounding on Lake Erie and Sandusky Bay. In our opinion, it clearly does not."). The court cited with approval authority holding that "'in this country our great navigable lakes are properly regarded as public property, and not susceptible of private property any more than the sea.'" *Id.* (internal citation omitted). As a result of this distinction, the federal law establishing the boundary of Lake Erie at the time of Ohio's admission as the ordinary high water mark does not necessitate the same rule with respect to the boundary of navigable rivers.

**b. *Sloan v. Biemiller***

Appelles argue that *Sloan* established some vague area lakeward of the ordinary high water mark as the boundary of the public trust. See Merrill's Merit Br. at 24-25. They base this

argument on a statement in *Seaman v. Smith* (1860), 24 Ill. 521. *Seaman* was the case this court drew upon in establishing the boundary of Lake Erie as the ordinary high water mark, which *Seaman* described with the phrase “that line where the water usually stands when unaffected by any disturbing cause.” *Seaman*, 24 Ill. at 525; see Conservation Appellants’ Merit Br. at 8.

Merrill says that this court quoted “from the *Seaman* opinion, which stated that the OHWM is the appropriate boundary for *tidal* bodies of water because the shore of such tidal bodies lacks value for cultivation or other private purposes.” Merrill’s Merit Br. at 25 (emphasis in the original). The quotation from *Seaman* appearing in *Sloan* actually stated in full that the ordinary high water mark, the boundary for tidal bodies of water, *also* applied to Lake Michigan.

The full quotation follows:

In the [*Seaman*] opinion it is said: ‘A grant giving the ocean or a bay as the boundary, by the common law, carries it down to *ordinary high-water mark*. *Costelyou v. Brundt*, 2 J. R. 357 . . . . *The principle, however, which requires that the usual high-water mark is the boundary on the sea, and not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water [Lake Michigan] has no appreciable tides. . . . The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes.*’

*Sloan*, 34 Ohio St. at 513 (emphasis added).<sup>6</sup>

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<sup>6</sup> Despite *Seaman*’s recognition of the ordinary high water mark as the boundary of Lake Michigan, Taft argues that the case and subsequent Illinois cases establish the low water mark as the boundary, citing *Brundage v. Knox* (1917), 279 Ill. 450, 117 N.E. 123. Taft’s Merit Br. at 19-20. In *Brundage*, however, the Illinois Supreme Court did not establish the low water mark as the boundary of private lands adjoining Lake Michigan. It only held that a littoral owner acquired title to land along Lake Michigan formed by accretion, and that to preserve his access to the water the boundary of his land was the edge of the lake “when free from disturbing causes.” *Id.* at 473. The court thus did not define the boundary as the low water mark, but rather followed its earlier decision in *Seaman*, which defined “that line where the water usually stands when unaffected by any disturbing cause” as the “ordinary” or “usual high water mark.” *Id.* at 473. Moreover, the court adhered to its earlier rulings (1) that the state holds in trust the submerged lands of Lake Michigan, meaning the lands below the ordinary high water mark, and (2) that any title a private person might have below the ordinary high water mark is *jus privatum* and held subject to the public right or *jus publicum*. *Id.* at 467, 472 (citing *Cobb v. Commrs. of Lincoln*

The court's quotation of this passage, in conjunction with its use of *Seaman's* phraseology, confirms that it selected the ordinary high water mark as the boundary of littoral owners bordering on Lake Erie. Once again, Merrill has selected only a portion of an opinion and used it to construct a flawed argument.

Whether or not other courts interpreted *Seaman* differently, as Merrill asserts on pages 26-27 of its brief, the only interpretation that matters is this court's, especially since that interpretation was correct. *Lembeck v. Nye* (1890), 47 Ohio St. 336, 353, 24 N.E. 686, which Merrill also cites, is inapposite because it concerned the boundary of a non-navigable inland lake. The court expressly stated that the rule recognizing private ownership to the middle of a navigable river "is otherwise in respect to calls in a deed bounding the lands conveyed by it to the waters of Lake Erie." *Id.* at 349.

Merrill makes one last claim about *Sloan*: that the court protected Sloan's private property right to exclude others from the area between the ordinary high water mark and the water's edge. Merrill's Merit Br. at 28; see also Duncan's Merit Br. at 24. However, the court did not recognize, much less protect, any right to *exclude* others from that area. First of all, since the court held that littoral owners do not own title below the ordinary high water mark, *Sloan* does not authorize littoral owners to exclude anyone from the lands below that boundary. See Conservation Appellants' Merit Br. at 23-25.

Secondly, the court held only that Sloan had reserved an exclusive right to *use* the shores for certain purposes. *Sloan*, 34 Ohio St. 492, at paragraph five of the syllabus ("The right reserved to the grantor is the exclusive right of landing on either shore to take sand, fish, or to carry to and from the shore seines and fishing tackle to be used in the

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*Park* (1903), 202 Ill. 427, 431, 67 N.E. 5; *Revell v. People* (1898), 177 Ill. 468, 478, 52 N.E. 1052.)

adjacent waters in direct connection with the shore.”). Even if the court meant by “shores” the lands below the ordinary high water mark, which is doubtful because that would contradict the court’s holding that the littoral owner’s title is bounded by the ordinary high water mark, Sloan never alleged and the court did not recognize any right to exclude others from entering on the shores for other purposes. *Id.* at 495 (“The prayer of the petition is ‘that the title of the plaintiff to . . . the *use* of the . . . shores for fishing purposes may be quieted.’”) (emphasis added). The court found no fault in Biemiller’s use of the shores as a place for his fishermen to live and for storing boats and fishing tackle. *Id.* at 516-17.

The court most definitely did not hold that the public trust does not extend to the ordinary high water mark, as Merrill claims. Merrill’s Merit Br. at 28. The court only addressed the title dispute between two private parties, Sloan and Biemiller, and their respective private rights in property above the ordinary high water mark of Lake Erie.

**c. *Lockwood v. Wildman***

Duncan characterizes *Lockwood v. Wildman* (1844), 13 Ohio 430, as the first littoral boundary case considered by this court. However, the opinion makes clear that the court was not addressing the boundary of Lake Erie or the rights of littoral property owners. Rather, the case concerned the partitioning of land between the township of Perkins and the southern shore of Sandusky Bay. *Id.* at 446.

**d. *Niles v. Cedar Point Club***

*Niles v. Cedar Point Club* (1899), 175 U.S. 300, 20 S.Ct. 124, 44 L.Ed. 171, did not involve the boundary of Lake Erie. Rather, it involved a dispute between two claimants to land, both recipients of federal patents. The Court affirmed the lower court’s finding that the land in

question was a marsh, neither part of Lake Erie nor a non-navigable inland water. *Id.* at 307-08. All the Court held was that although this marsh was not patented when it was inundated by water, it could have been patented then and could also have been patented to another party later.

**e. East Harbor Cases**

Appellees cite a number of Ohio cases involving navigable waters west of Sandusky Bay for the proposition that littoral owners along Lake Erie own the lands below the ordinary high water mark and may exclude others from those lands. However, the lands in these cases were not below the ordinary high water mark of Lake Erie, but marsh land above the ordinary high water mark. Despite Appellees' contentions, therefore, none of these "East Harbor" cases establish that private persons can own the title to the lands below the ordinary high water mark of Lake Erie.

**1) *Hogg v. Beerman***

*Hogg* involved a dispute over the ownership of "[l]and covered by the water of a navigable *land locked* bay, known as "East Harbor." 41 Ohio St. 81, at paragraph one of the syllabus, 81 (emphasis added). Thus, Merrill incorrectly states that East Harbor is part of Lake Erie. Merrill's Merit Br. at 29.

East Harbor was included in the 1792 grant to private individuals of a half million acres "described as bounded on the north by *the shore of Lake Erie*." *Hogg*, 41 Ohio St. at 83 (emphasis in original). The court held only that East Harbor, so described, "may be held by private ownership, subject to the public rights of navigation and of fishery." *Id.* at paragraph one of the syllabus. The court did not hold that property described simply as "bounded . . . by *the shore of Lake Erie*" extended below the ordinary high water mark. As a matter of law, a conveyance of property so described could not convey title to lands below the ordinary high

water mark. *Shively*, 152 U.S. at 13 (“[A] grant from the sovereign of land *bounded by the sea, or by any navigable tide water*, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.”) (emphasis added), 58 (“Grants by congress of portions of the public lands within a territory to settlers thereon, though *bordering on or bounded by navigable waters*, convey, of their own force, no title or right below high-water mark.”) (emphasis added).

## 2) *Bodi v. Winous Point Shooting Club*

In *Bodi*, the defendants claimed that they, as members of the public, had the right to navigate, fish, and hunt in marshy waters that they claimed were a continuation of Sandusky Bay, and therefore of Lake Erie. *Winous Point Shooting Club v. Bodi* (1895), 10 Ohio C.D. 544, 20 Ohio C.C. 637, 1895 Ohio Misc. LEXIS 451 at \*14, *aff'd in part and rev'd in part sub nom. Bodi v. Winous Point Shooting Club, supra*. The circuit court found that all the disputed waters actually lay west of Sandusky Bay. *Winous Point Shooting Club v. Bodi*, 1895 Ohio Misc. LEXIS 451 at \*12-13, \*16. It also held that the waters were not a continuation of Sandusky Bay, but waters of the Sandusky River and Mud Creek. *Id.* at \*16. The circuit court then recognized the title of the plaintiff, the Winous Point Shooting Club, to the waters and associated lands, marshes, shores, and islands, and enjoined the defendants from entering the waters to fish or hunt. *Id.* at \*17-19.

On review, this court did not find that the waters were part of Sandusky Bay, as Merrill implies. Merrill’s Merit Br. at 30. The sum total of the court’s opinion was that that the waters were not parts of the Sandusky River and Mud Creek, but “form part of a *public bay*.” *Bodi v. Winous Point Shooting Club* (1897), 57 Ohio St. 226, 233-34 (emphasis added). It left the rest of

the circuit court's findings intact, including the finding that all the waters involved were west, not a continuation of Sandusky Bay. In fact, the court described the area as a "land-locked bay." *Winous Point Shooting Club v. Bodi* (1897), 1 O.S.C.D. 691, 692, unreported. In a later case involving the same area, the Winous Point Shooting Club and the court identified this public bay as "Mud Creek Bay." *Winous Point Shooting Club v. Slaughterbeck* (1917), 96 Ohio St. 139, 145, 117 N.E. 162, 1917 Ohio LEXIS 211 at \*5, \*8. Thus, the court did not hold that the "public bay" was a part or continuation of Sandusky Bay. The court then held that the public had the right to navigate and fish in the navigable waters of the public bay. *Bodi v. Winous Point Shooting Club*, 57 Ohio St. at 234.

### 3) *East Bay Sportsman's Club v. Clemons*

In *East Bay Sportsman's Club v. Clemons* (1921), 15 Ohio App. 27, the dispute once again centered on the same East Harbor that was the subject of *Hogg* and *Bodi*. This time, the East Bay Sportsman's Club sought to enjoin the defendants from hunting on their land. *Id.* at 27-28. The Sixth Appellate District court acknowledged that this court had ruled in *Bodi* that the marshy waters were privately owned and that the public could not hunt there, but could navigate and fish in the navigable waters of the public bay. *Id.* at 29-30. Accordingly, the court of appeals held only, "The owner of land covered by the water of a navigable, *landlocked* bay or harbor, connected with Lake Erie, . . . has, as an incident of title, the exclusive right of hunting and shooting wild game and trapping wild animals on the premises, although the public have the right to navigate the waters and to fish therein." *Id.* at the syllabus. The court of appeals, like this court before it, therefore did not recognize the bay as part of Lake Erie.

### 4) *East Bay Sporting Club v. Miller*

Contrary to Taft's claim, echoed by Duncan, in *East Bay Sporting Club v. Miller* (1928), 118 Ohio St. 360, the court did not hold that the soil underlying a triangle of water in Sandusky Bay was privately owned. It held only that the water is a part of Sandusky Bay and therefore open to the public for navigation and fishing. *Id.* at paragraph one of the syllabus ("The public has a right of navigation and fishing in the waters of the open bays of Lake Erie, and such rights are not limited within such public bays to the particular portions thereof which are navigable in the legal sense, but such rights of fishing and navigation extend to any portions of such waters so long as they are a part of Lake Erie or its open bays. (*Winous Point Shooting Club v. Slaughterbeck*, 96 Ohio St., 139, 117 N. E., 162, L. R. A., 1918A, 1142, approved and followed.)), 365.

## 2. Ohio statutory law

Appellees argue that the General Assembly did not establish the ordinary high water mark of Lake Erie as the boundary of the public trust when it enacted the Fleming Act in 1917 or when it amended it in 1955. Instead, according to them, the General Assembly used the terms "natural shoreline" and "southerly shore" to mean that the public trust includes only the water in Lake Erie, the soil beneath the water, and the fish swimming in the water, not the lake's shores.

Appellees' arguments are not borne out by the backdrop for the enactment of the law.<sup>7</sup> In 1916, this court considered it well-settled that the ordinary high water mark is the boundary of Lake Erie. *Cleveland & P.R. Co.*, 94 Ohio St. at 68-69. In *Squire*, the court stated that the Fleming Act "does not change the concept of the declaration of the state's title as found in

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<sup>7</sup> The court should not that the term "water" does not appear anywhere in the Fleming Act, although Appellees partially base their argument on that term. The General Assembly used the term "waters," not "water." The two terms mean different things. "Waters" refer to a body of water defined by law; "water" refers to a liquid substance. The General Assembly's use of the former term, not the latter, should be presumed to be deliberate.

[*Cleveland & P.R. Co.*].” *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 337. These cases, in conjunction with the decisions of the United States Supreme Court, represent a body of common law consistently holding that Ohio received upon admission and retains the waters of Lake Erie up to the ordinary high water mark and holds them in trust for the public.

Conservation Appellants’ Merit Br. at 6-14.

In construing the Fleming Act, this court must be guided by its past decisions and those of the U.S. Supreme Court, not dictionary definitions as Merrill advocates. Merrill’s Merit Br. at 32-33. As this court has held:

Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.

*State ex. rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, at paragraph three of the syllabus, 90 N.E. 146, followed by *Bresnik v. Beulah Park Ltd. P’ship* (1993), 67 Ohio St. 3d 302, 304, 617 N.E.2d 1096; *see also* R.C. 1.49(D) (“If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters...[t]he common law or former statutory provisions, including laws upon the same or similar subjects.”).

The Fleming Act contains no language indicating a legislative intent to repeal the common law. On the contrary, “The passage of the Fleming Act in 1917 merely codified the existing law in this state with respect to a particular body of water, *i.e.*, Lake Erie.” *Thomas v. Sanders* (1978), 65 Ohio App.2d 5, 9, 413 N.E.2d 1224.

The statute’s very first sentence is key, because it confirms that the legislature intended to preserve the trust ownership it received upon admission. R.C. 1506.10 (“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 . . . *do now belong and have always, since the organization of the state of Ohio, belonged to the state* as proprietor in trust for the people of the state . . . .” (emphasis added).<sup>8</sup> The authorities are unanimous that under the equal footing doctrine Ohio received upon statehood the same title to the lands under the navigable waters within its boundaries that the original thirteen states received: the lands submerged when the navigable waters are at their ordinary high water mark. *See Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469, 473, 476, 479, 108 S.Ct. 791, 98 L.Ed.2d 877; *Pollard's Lessee v. Hagan* (1845), 44 U.S. 212, 228-29, 11 L.Ed. 565, 3 How. 212. All that follows the first sentence in R.C. 1506.10 therefore must be understood in that light, rather than interpreted to mean that Ohio’s public trust authority extends over anything less than all the lands below the ordinary high water mark of Lake Erie.

As Merrill notes, the court concluded its opinion in *Cleveland & P.R. Co.* by calling on the legislature to protect the rights of “shore owners.” 94 Ohio St. at 84. However, the court’s use of the term “shore owners” does not constitute an acknowledgment that littoral owners are exempt from the public trust in the lands below the ordinary high water mark. Such a holding would have been wholly inconsistent with the balance of the court’s opinion. *See Conservation Appellants’ Merit Br.* at 11. The suggestion that the court suddenly and summarily contradicted itself is untenable.

**C. The federal Submerged Lands Act recognized that the states received title and ownership of land below the ordinary high water mark of navigable waters, including Lake Erie.**

Conservation appellants demonstrated in their merit brief, they showed that the federal Submerged Lands Act recognized that the states received title and ownership of land below the

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<sup>8</sup> Formerly G.C. § 3699-a *et seq.* (1917), re-codified as R.C. 123.03 *et seq.* (1953), renumbered as R.C. 1506.10 and R.C. 1506.11 (1989).

ordinary high water mark of navigable waters, including Lake Erie. Conservation Appellants' Merit Br. at 19. They also showed that the court of appeals (1) erroneously concluded that the Act authorizes states to divest themselves of the public trust in submerged land and (2) misconstrued *California ex rel. State Lands Commission v. U.S.* (1982), 457 U.S. 273, 288, 102 S.Ct. 2432, 73 L.Ed.2d 1, to mean that state law governs the determination of ownership in the land under the Act. Conservation Appellants' Merit Br. at 19-21.

Appellees disagree with conservation appellants, but do not even attempt to identify any flaws in conservation appellants' interpretation of the Act or the case. Merrill does quote a fragment from a footnote that appears in *Corvallis Sand & Gravel Company*, but does not explain to what purpose. Merrill's Merit Br. at 36. In the footnote in question, the Court said that the Submerged Lands Act does not govern the ownership of river lands any more than the equal footing doctrine after a state's admission into the Union. 429 U.S. at 372 n.4. But the Court also said "the Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine." *Id.* Earlier in the opinion, the Court explained that the equal footing doctrine operated to confer upon states newly admitted into the Union ownership of the beds of navigable waters up to the ordinary high water mark. *Id.* at 373-75. Therefore, the Submerged Lands Act did not alter, but confirmed, the title Ohio received upon admission to ownership of Lake Erie up to the ordinary high water mark.

**Proposition of Law No. II:**

**The public trust includes the right of citizen passage along the shore of Lake Erie as a necessary incident to the use and enjoyment of Lake Erie for the traditional public trust purposes of navigation, commerce, and the fishery, and the more modern public trust purposes of recreation and aesthetic enjoyment.**

Contrary to Appellees' argument, Ohio's courts have never rejected the public's right to walk on the lands below the high water mark of Lake Erie. Nor have they held that littoral owners have a right to exclude the public from the shore.

Appellees rely principally on *Sloan* and *Bodi*. Both cases were silent about whether the public has the right to walk on the lands below the ordinary high water mark of Lake Erie under the public trust doctrine. *Sloan* held that littoral owners do not have title below the high water mark of Lake Erie, so it could not possibly be construed to support a right of littoral owners to exclude the public from the shore. The court did not protect or even recognize any right to *exclude* others; the only dispute was over the *uses* that Sloan retained by deed when he granted land that the court found extended only to the ordinary high water mark. In *Bodi*, the court said nothing about the public's right to walk on the shore below that boundary line.

None of the other cases Merrill cites recognize any right of littoral owners to exclude others from the shore of Lake Erie. As Merrill itself concedes, *Lessee of Blanchard v. Porter* (1841), 11 Ohio 138, involved the Ohio River, not Lake Erie.

The issue in *Miller v. Foos* (1980), 6th Dist. No. E-80-29, 1980 Ohio App. LEXIS 12470 at \*4, involved adverse possession of an *upland* road, not the public trust doctrine. The issue in this case is not whether the public has a right to gain access to the shore across privately owned uplands, but whether the public has a right to walk along the shore. In *Miller*, the court also said the public had no right to use a breakwall built by littoral owners. *Id.* at \*8-\*9. To the extent this represents a holding confirming the right of littoral owners to wharf out, it is consistent with the ruling of this court; to the extent it authorizes littoral owners to exclude the public from walking along the shore, it is not. See *Cleveland & P. R. Co.*, 94 Ohio St. at 79 (“[T]he littoral

owner, for the purposes of navigation, should be held to have the right to wharf out to the line of navigability . . . provided he does not interfere with public rights.”).

In *State v. Cleveland-Pittsburg Ry. Co.* (1914), 21 Ohio C.A. 1, 19, 1914 Ohio Misc. LEXIS 163, the court of appeals stated that a littoral owner has the right to prevent the public from entering his property from the water, but this statement does not identify the boundary between a littoral owner’s property and Lake Erie. As conservation appellants noted earlier, the Ohio Supreme Court in the appeal of that case accepted as settled that the state, not littoral owners, owns the lands below the ordinary high water mark, and holds them in trust for the public. *Cleveland & P. R. Co.*, 94 Ohio St. at 68, 72.

In *Cleveland v. Cleveland C.C. & St. L. R.* (1909), 19 Ohio Dec. 372, 376, the issue was whether the city or the railroad possessed Bath Street. In approaching the issue, the court noted, “The lots along Lake street butted on the lake, so that the only place that access to the lake was had was at the confluence of the Cuyahoga river with the lake, along this little sandy strip of land called Bath street.” *Id.* (emphasis added). This was merely an observation that the public could not gain access to Lake Erie from Lake Street by crossing the lots abutting the lake. It was not a ruling on the right of the public to walk along the lands below the ordinary high water mark of Lake Erie.

Finally, *Massachusetts v. New York* (1926), 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838, is inapposite because it involved a land dispute between two states. The inquiry was confined to the question of the location of the physical boundary of a grant of land adjacent to the shoreline of Lake Ontario, and did not involve a question of the public trust, the right of the public to use the shore, or the right of littoral owners to exclude the public from the shore.

In sum, none of the cases Merrill cites hold that littoral owners have the right to exclude the public from the shores of Lake Erie below its ordinary high water mark.

**Response to Taft's Proposition of Law No. I:**

**Taft's claim that the low water mark is the boundary of the State of Ohio's public trust interest in the waters of Lake Erie is baseless.**

Taft's proposition that the low water mark is the boundary of the State of Ohio's public trust interest in Lake Erie utterly lacks foundation. He has failed to muster a single Ohio case that supports this unheard-of proposition, including *Sloan*, the East Harbor cases, and *Niles*. See text, *supra*, at 17-24. *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 12, 17 O.O. 301, 27 N.E.2d 485, determined only that an upland owner may gain title to new land formed by accretion. His claim that other states have held that the low water mark is the boundary of the public trust in the Great Lakes is incorrect. See text, *supra*, at 10-12.

Taft attempts to show by reference to R.C. 721.04 (which covers municipal use of Lake Erie) and R.C. 1506.10 that the term "territory" includes only those lands that are permanently covered by the water in Lake Erie. Neither of these statutes expresses such a limitation, however, but rather speak of the territory as including the lands beneath the "waters" of Lake Erie. This phrase, like the rest of R.C. 1506.10, is a codification of the common law articulated in the decisions of the United States Supreme Court and this court. As conservation appellants have shown, these courts held that the waters of Lake Erie extend to the high water mark, making the lands submerged when the lake is at its ordinary high water mark part of the public trust.

Taft bases his claim primarily on a case that did not even involve the public trust. In *Massachusetts v. New York* (1926), 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838, the State of Massachusetts claimed that it acquired title to certain upland and adjacent shoreland along Lake

Ontario in the State of New York by treaty, and that it retained title to the shore, meaning the land lying between the ordinary high and low water marks, after Massachusetts later granted the adjacent upland bounded by the “shore” of the lake to private parties. *Id.* at 271 U.S. at 91-92.

The Court explicitly stated that the dispute did not involve an attempted conveyance of a state’s interest as trustee for the public, but the conveyance of a state’s proprietary interest. *Massachusetts v. New York*, 271 U.S. at 91-92 (“We are not dealing here with the disposition of the *jus publicum*, but with land held by Massachusetts in private ownership and granted by it to private persons.”). Thus, the Court’s ruling that Massachusetts conveyed to private parties *title* to the low water mark of Lake Ontario was not a ruling that the *public trust* extends only to the low water mark. The Court expressly held that *jus publicum* was not at issue in the case.

The distinction between a state’s public and private personas with respect to its trusteeship of the navigable waters of the Great Lakes is a distinction that Taft does not grasp. In a Great Lake state’s capacity as sovereign, it holds the navigable waters of a Great Lake and the lands beneath such waters in trust for the public, so the people may use them for purposes including navigation, commerce, and fishing, unobstructed by private persons; this is the state’s *jus publicum* interest. *Illinois Central R. Co. v. Illinois* (1892), 146 U.S. 387, 436-37, 452, 13 S.Ct. 110, 36 L.Ed. 1018; *Shively*, 152 U.S. at 48-49; *State v. Cleveland & P. R. Co.* (1916), 94 Ohio St. 61, 77, 113 N.E. 677 (Lake Erie); 2000 Ohio Atty.Gen.Ops. No. 2000-047, at 4 (Lake Erie). In a Great Lake state’s capacity as proprietor, it holds title to the navigable waters of a Great Lake and the lands beneath such waters; this is the state’s *jus privatum* interest. *Illinois Central*, 146 U.S. at 452; *Shively*, 152 U.S. at 48-49; 2000 Ohio Atty.Gen.Ops. No. 2000-047, at 4 (Lake Erie).

Although a Great Lake state may recognize private property rights or grant its *jus privatum* title in the lands beneath the navigable waters of a Great Lake after statehood under certain limited circumstances, it cannot dispose of its *jus publicum* interest in such lands under any circumstances. *Illinois Central*, 146 U.S. at 452-54; *Shively*, 152 U.S. at 48-49; *State v. Cleveland & P. R. Co.*, 94 Ohio St. at 80 (Lake Erie); 2000 Ohio Atty.Gen.Ops. No. 2000-047, at 4 (Lake Erie). A disposition of the *jus privatum* in the lands beneath navigable waters of a Great Lake therefore has no effect on the state's remaining dominant *jus publicum* in such lakelands. *Id.* at 5.

Thus, even were Taft correct that the courts in some Great Lakes states have established the low water mark as the boundary of private title (*jus privatum*) adjoining a Great Lake, conservation appellants have shown that the courts did not also re-establish the boundary of the public trust down to the low water mark in the process. To do so would be to unlawfully abdicate the states' *jus publicum* to all lakelands from the ordinary high water mark down to the low water mark.

For these reasons, Taft's claim that the low water mark is the boundary of the public trust in Lake Erie within Ohio's territorial boundaries is contrary to all authorities and completely devoid of merit.

### **Response to Taft's Proposition of Law No. II:**

**The trial court did not abuse its discretion in granting intervention to conservation appellants.**

#### **A. Standard of Review**

The court reviews a trial court's ruling on a motion for intervention for abuse of discretion. *Myers v. Basobas* (1998), 129 Ohio App.3d 692, 696-97, 718 N.E.2d 1001; *Peterman v. Vill. of Pataskala* (1997), 122 Ohio App.3d 758, 761, 702 N.E.2d 965; *Fairview Gen. Hosp. v.*

*Fletcher* (1990), 69 Ohio App.3d 827, 836, 591 N.E.2d 1312. “Abuse of discretion connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *Peterman*, 122 Ohio App.3d at 761 (citing *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140, 1141-1142). In applying the “abuse of discretion” standard, the court should presume that the trial court was correct, rather than substitute its judgment for the trial court’s judgment. *State ex rel. Strategic Capital Investors, Ltd. v. McCarthy* (1998), 126 Ohio App.3d 237, 247, 710 N.E.2d 290.

**B. The trial court’s grant of intervention as a matter of right<sup>9</sup> was not an abuse of discretion.**

Taft erroneously asserts that the trial court abused its discretion by finding that conservation appellants established one of the elements necessary for intervention. Taft cites an opinion by the U.S. Court of Appeals for the Seventh Circuit regarding the elements and showing necessary to obtain intervention of right under Federal Rule of Civil Procedure 24(a)(2). Merit Brief of Appellee/Cross-Appellant Homer S. Taft (“Taft’s Merit Br.”) at 48-49. Whatever might be required by the federal rule in federal court as interpreted by the federal courts is

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<sup>9</sup>In the order granting summary judgment, the trial court indicated that it granted intervention of right. Specifically, the trial court referenced conservation appellants’ showing that the State of Ohio cannot adequately represent their interests. Order Granting Plaintiffs’ and Intervening Plaintiffs’ Motions for Partial Summary Judgment, In Part, Trial Docket Entry 183, December 11, 2007, Appendix to Merit Brief of Defendant-Appellant-Cross-Appellee State of Ohio A-45 n. 5. The adequacy of representation is only relevant to a motion to intervene as of right. Ohio Civ. R. 24(A)(2). The trial court’s order granting intervention was not entirely clear that the order granted intervention of right. Order Granting Motion to Intervene by National Wildlife Federation and Ohio Environmental Council, *Nunc Pro Tunc*, Trial Docket Entry 148, January 10, 2007, Appendix to Merit Brief of Appellee/Cross-Appellant Homer S. Taft 5-6. Regardless, the trial court authorized conservation appellants to intervene as defendants and counterclaimants. *Id.* at 2.

irrelevant in this case, which was brought in state court and is subject to the Ohio Rules of Procedure.

In Ohio, a party must establish four elements to intervene as a matter of right: “(1) the intervenor must claim an interest relating to the property or transaction that is the subject of the action; (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest; (3) the intervenor must demonstrate that his or her interest is not adequately represented by the existing parties; and (4) the motion to intervene must be timely.” *Peterman*, 122 Ohio App.3d at 761 (citing *Fairview*, 69 Ohio App.3d 827, 831, 591 N.E.2d 1312); accord Ohio Civ. R. 24(A)(2).<sup>10</sup>

Taft charges that conservation appellants failed to “demonstrate” an interest. This charge reveals a misunderstanding of the nature of the first element necessary for obtaining intervention of right.

The rule does not require a party seeking intervention to “demonstrate” an interest, only to “claim” one. Ohio Civ. R. 24(A)(2). Conservation appellants did not have to prove, and the trial court did not have to conclusively determine, that conservation appellants in fact have an interest. *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 354, 29 OBR 479, 505 N.E.2d 1010 (“While the [applicant's] claim may be shown to be without merit . . . it is not required that the interest be proven or conclusively determined before the motion [to intervene] is granted.”).

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<sup>10</sup>Ohio Civ. R. 24(A)(2) provides, “Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.”

Taft argues that conservation appellants did not satisfy the standard because they have no “interest in the real estate boundary in question.” See Taft Br. at 49. If Taft means that conservation appellants do not own, or assert any ownership of, the land along Lake Erie, such ownership is not a prerequisite to intervention. For instance, Ohio courts have recognized intervention of right where the disposition of the land at issue might affect the use of land owned by contiguous or neighboring landowners. *Peterman*, 122 Ohio App.3d at 761 (holding that contiguous and nearby neighboring landowners have interest relating to the property which was the subject of litigation); *Creter v. Council of City of Westlake* (1985), 8th Dist. No. 49848, 1985 Ohio App. LEXIS 6764 (same: contiguous owner); see also *State ex rel. Sneary v. Miller* (1993), 86 Ohio App.3d 684, 689, 621N.E.2d 785.

In any event, the subject of this case is not some run-of-the-mill real estate boundary dispute, but the extent of the public trust, and therefore the extent of public rights, in Lake Erie in the State of Ohio. This is plain from Merrill’s amended complaint, which sought a declaratory judgment regarding the propriety of the ordinary high water mark of Lake Erie as the boundary of the public trust. First Amended Complaint, Tr. Dkt. 22, July 2, 2004, Supplement to Merit Brief of Defendant-Appellant-Cross-Appellee State of Ohio (“Ohio Supp.”) S-12-14, 15. It is also plain from the first question of law certified by the trial court, which concerns the proper interpretation of R.C. 1506.10, which describes the extent of the “waters of Lake Erie” belonging to the State as trustee for the people. Order Certifying Class Action, Tr. Dkt. 123, June 9, 2006, Ohio App. A-118.

In moving for intervention, conservation appellants claimed an interest in the lands under the navigable waters of Lake Erie, meaning the lands below the ordinary high water mark of the lake, as beneficiaries of the public trust. Answer and Counterclaim of National Wildlife

Federation and Ohio Environmental Council to Plaintiffs-Relators' First Amended Complaint ("NWF/OEC Answer"), attached to and tendered with Motion to Intervene, Tr. Dkt. 121, June 5, 2006, Supplement to Merit Brief of Appellee/Cross-Appellant Homer S. Taft ("Taft Supp.") 30-31; Motion to Intervene, Tr. Dkt. 121, June 5, 2006, at 9; Reply to Opposition to Motion to Intervene, Tr. Dkt. 130, June 19, 2006, at 4. They claimed that they have the right to use the shore by virtue of the public trust for recreation and aesthetic enjoyment, and that they have an interest in preserving that right so they may continue to use the property for those purposes, as they have in the past. NWF/OEC Answer, Taft Supp. 30-31, 36-37; Motion to Intervene, Tr. Dkt. 121, June 5, 2006, at 9; Reply to Opposition to Motion to Intervene, Tr. Dkt. 130, June 19, 2006, at 4.

Conservation appellants also made their interest clear in their proposed counterclaim. They claimed that their members use and enjoy the Lake Erie shore and that "[a] ruling that the Lake Erie shore is not owned and held in trust by the State of Ohio, but rather belongs to private individuals who own upland property, would extinguish their members' right to use and enjoy the shore." NWF/OEC Answer, Taft Supp. 30-31. They sought intervention because a ruling that Ohio's Lake Erie shore is not held by the State of Ohio as proprietor in trust for the people of the state, but rather is the exclusive private property of the individuals who own the upland property bordering it, would extinguish the longstanding public rights of members of NWF and OEC to use and enjoy the shore for recreational and aesthetic purposes. Motion to Intervene, Tr. Dkt. 121, June 5, 2006, at 10; *see Merrill v. Ohio*, 11th Dist. Nos. 2008-L-007, 2008-L-008, 2009-Ohio-4256, at ¶114, Ohio App. A-33.

In short, the interest conservation appellants claimed is direct, substantial, and legally protectable. Their claim of that interest was sufficient. *Blackburn*, 29 Ohio App.3d at 354.

“Ohio case law has established that the right to intervene must be liberally construed.” *Peterman*, 122 Ohio App. 3d at 761 (citing *Blackburn*, 29 Ohio App. 3d at 353). So construed, conservation appellants were entitled to intervention as of right, and the trial court did not abuse its discretion in granting it.

**C. Even if the trial court’s grant of intervention was permissive, the trial court did not abuse its discretion.**

Taft also incorrectly argues that the trial court abused its discretion if the intervention it granted was permissive. Taft claims that conservation appellants failed to raise a claim or defense that has a question of law or fact in common with Merrill’s claim, which he purports to be nothing more than a boundary dispute. Taft’s Merit Br. at 49-50. Taft relies on *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 328-29, 574 N.E.2d 1055, which is completely inapposite. Permissive intervention may be granted by the court “when an applicant’s claim or defense and the main action have a question of law or fact in common,” as found by the trial court with regard to NWF’s claim, *or* “when a statute of this state confers a conditional right to intervene.” Ohio Civ. R. 24(B). *Ridenour* considered a set of grandparents in an adoption seeking intervention based on the statutory rationale, not commonality. *Id.* The court found permissive intervention improper, not because of a lack of commonality (an issue irrelevant to that case), but because no statute conferred either a conditional or an unconditional right to intervene. *Id.*; Ohio Civ. R. 24(B).

Far from a simple boundary dispute, the relief Merrill sought in this matter included a declaratory judgment that “[t]he interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include any non-submerged lands.” Complaint T.d. 22, p. 9. Conservation appellants, of course, claimed that the land below the ordinary high water mark of Lake Erie *is* held by the State in trust for the public, even when that land is not covered

by water. Consequently, conservation appellants' claim or defenses necessarily had questions of law and fact in common with Merrill's claims. Accordingly, the trial court did not abuse its discretion in granting intervention.

Taft next argues that Conservation appellants, which are both non-profit corporations, may not intervene on behalf of their members, including Ms. Chordas. Taft's Merit Br. at 49. However, the law is to the contrary. A non-profit corporation has standing to sue on behalf of its members "when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ohio Acad. of Nursing Homes, Inc. v. Barry* (1987), 37 Ohio App. 3d 46, 47, 523 N.E.2d 523. A person has standing to sue in her own right when she has suffered a concrete and particularized, actual or imminent injury in fact to a legally protected interest, one which is fairly traceable to the defendant's actions, and which likely would be redressed by a favorable decision. *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, 840 N.E.2d 1101, at ¶10.

Taft concedes that Ms. Chordas has "an unquestioned right" to intervene herself. Taft's Merit Br. at 49. Therefore, nothing prevents conservation appellants from intervening on her behalf, as well as on behalf of their other members with standing to sue in their own right.

In the trial court, conservation appellants introduced affidavits from Ms. Chordas and other of their members demonstrating that they have standing to sue in their own right. Motion to Intervene, Tr. Dkt. 121, June 5, 2006, at Exhibits 5-7. These members have personally walked and intend to continue to walk along the Lake Erie shore adjacent to upland property owned by private individuals. *Id.* While walking along the Lake Erie shore, these members engage in picnicking, exercise, birdwatching, or shell-collecting, enjoy the natural beauty of the lake and

quiet contemplation, or use the shore to gain access to the waters of Lake Erie for canoeing, fishing, swimming, or other recreational pursuits. *Id.* These members are concerned that Merrill's success in this lawsuit would cut off their personal use and enjoyment of the Lake Erie shore and its natural resources. *Id.*

The affidavits establish imminent, concrete, and individualized injuries which are directly traceable to Merrill's initiation of this lawsuit. These injuries would be redressed by a judgment rejecting Merrill's claims of private ownership of the Lake Erie shore, and declaring that the State of Ohio owns and holds Lake Erie, including the shore, in trust for the public. In addition, the interests of the members in using the shore for recreation and aesthetic enjoyment are germane to conservation appellants' purposes, which are to conserve and protect natural resources for the use and aesthetic enjoyment of their members. Motion to Intervene, Tr. Dkt. 121, June 5, 2006, at Exhibits 3-4. Neither the intervention sought nor the relief requested requires the participation of individual members of conservation appellants in the lawsuit. Under the standing doctrine prevailing in Ohio, then, the trial court did not abuse its discretion in granting intervention.

Finally, Taft complains that the trial court abused its discretion because conservation appellants produced no evidence that the State is incapable of representing itself. Taft's Merit Br. at 49. In seeking permissive intervention, conservation appellants never contended that the State is incapable of representing itself, nor is permissive intervention dependent upon a showing to that effect. See Ohio Civ. R. 24(B).

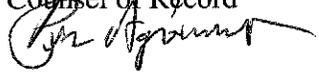
## **CONCLUSION**

For the foregoing reasons, and those that appear in conservation appellants' merit brief, the court should reverse the court of appeals on both propositions of law raised by the

conservation appellants. Specifically, the court should hold that the State of Ohio holds Lake Erie in trust for the public up to the line of the lake's ordinary high water mark. The court should also hold that the public trust includes the right of citizen passage along the shore of Lake Erie as a necessary incident to the use and enjoyment of Lake Erie for the traditional public trust purposes of navigation, commerce, and the fishery, and the more modern public trust purposes of recreation and aesthetic enjoyment.

In addition, the court should reject both propositions of law raised by Taft.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I certify that a copy of this Reply and Response Brief of Appellants National Wildlife Federation and Ohio Environmental Council was sent by e-mail to the following counsel of record and parties not represented by counsel on November 9, 2010:

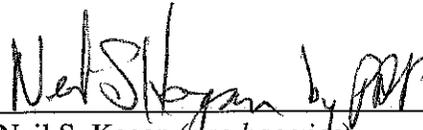
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