

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

STATE ex rel. ROBERT MERRILL,  
TRUSTEE, et al.,  
Plaintiffs-Appellees,  
Cross-Appellants,

Case No. 2009-1806

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

HOMER S. TAFT,

Intervening Plaintiff-Appellee/  
Cross-Appellant,

Court of Appeals  
Case Nos. 2008-L-007, 2008-L-2008

L. SCOT DUNCAN, et al.,

Intervening Plaintiffs-Appellees,

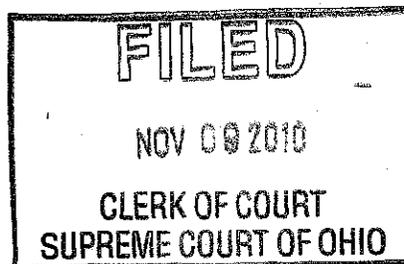
Ohio Supreme Court Case  
Nos. 2008-L-007, 2008-L-008  
Consolidated

v.

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

Defendants.

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



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

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

RICHARD CORDRAY (0038034)  
Attorney General of Ohio

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

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

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

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

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

Intervening Plaintiff-Appellee-  
Cross-Appellant, Pro Se

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

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

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

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

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

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

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

## TABLE OF CONTENTS

TABLE OF CONTENTS	4
TABLE OF AUTHORITIES	5
ARGUMENT	6
I. <u>Amicus Pacific Legal Foundation Misapplies the U.S. Supreme Court’s <i>Stop the Beach Renourishment</i> Decision to this Case.</u>	
II. <u>Amicus Betty Montgomery Misapplies Ohio Revised Code Section 1506.10 and the Submerged Lands Act and Ignores Ohio Case Law to Reach the Conclusion that the Public Trust Boundary is the “Natural Shoreline.”</u>	
CONCLUSION	10
PROOF OF SERVICE	12

## TABLE OF AUTHORITIES

### Cases

<i>Seaman v. Smith</i> (Ill. 1860), 24 Ill. 521	7
<i>Sloan v. Biemiller</i> (1878), 34 Ohio St. 492	7
<i>Stop the Beach Renourishment v. Fl. Dept. of Env. Prot.</i> (2010), 130 S. Ct. 2592	6
<i>Webb's Famous Pharmacies, Inc. v. Beckwith</i> (1980), 449 U.S. 155	7

## ARGUMENT

### I. Amicus Pacific Legal Foundation Misapplies the U.S. Supreme Court's *Stop the Beach Renourishment* Decision to this Case.

Amicus, the Pacific Legal Foundation, presented the argument that this court would cause a Fifth Amendment taking as applied to the states through the Fourteenth Amendment if it were to maintain the boundary of the public trust in Ohio at the ordinary high water mark. This is a misapplication of the United States Supreme Court's holding in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2010), 130 S. Ct. 2592. They correctly identified the Supreme Court's holding that a "judicial redefinition of the background principles of a state's property law would raise federal constitutional problems." Brief of Amicus-Pacific Legal Foundation at 5, *State ex rel. Merrill v. State of Ohio*, No. 2009-1806. However, the Supreme Court's holding did not establish any new rules quantifying when a taking exists. They simply clarified that when a court's ruling strips an owner of an established property right, a judicial taking has occurred just as it would have as a result of similar actions by the executive or legislative branches of government. *Stop the Beach Renourishment*, 130 S.Ct. at 2602. Contrary to Amicus Pacific Legal Foundation's conclusions, in the case before this court the appellants do not argue for a holding that would result in a taking, as the established property law of the state of Ohio places the boundary of the public trust property at the ordinary high water mark.

The U.S. Supreme Court acknowledges that generally state law defines the property rights within the state's borders. *Stop the Beach Renourishment*, 130 S.Ct. at 2597. In this case, it is within the context of the Ohio's property law that the takings analysis must be applied. The primary question in *Stop the Beach Renourishment* to determine if there was a taking was whether or not a court's ruling recharacterized property that had been privately held, as public

property. If this is found to be the case, then a taking has occurred and the private property owners must be compensated by the state for the loss of their property rights. *Webb's Famous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155, 163-165. In *Stop the Beach Renourishment*, the Supreme Court held that since the Florida Supreme Court's holding was within the established property law of the state, the newly enforced limitations on the private landowner's property were not violations of the Fifth and Fourteenth Amendments, so no taking had occurred. *Stop the Beach Renourishment*, 130 S.Ct. at 2613. Therefore, as long as a court stays within the current limits of the state's property law and does not deprive a landowner of an established property right, they will not create a taking that would require compensation by the state.

In the case at bar, the appellants are merely asserting the existence of the public trust up to the ordinary high water mark, as is well established in the case history. Appellants, the Ohio Environmental Council and National Wildlife Federation, discuss at length in their first merit brief the case history and statutory scheme establishing the ordinary high water mark as the boundary between private upland property and public trust lands in Ohio. First Merit Brief of Appellants-National Wildlife Federation and Ohio Environmental Council at 6-12, *State ex rel. Merrill v. State of Ohio*, No. 2009-1806. The history starts with *Sloan v. Biemiller* (1878), 34 Ohio St. 492, citing an Illinois Supreme Court case, *Seaman v. Smith* (Ill. 1860), 24 Ill. 521, which held that "the ordinary high water mark as indicated by the usual rise of the tide" is the boundary of the public trust lands. In *Sloan*, the court further held that the boundary of Lake Erie is "the line at which the water usually stands when free from disturbing causes" rather than the lowest or highest points at which the water may stand at any given time. *Sloan* at syllabus P4. Appellants proceed with an in-depth explanation of the continued interpretation of the public trust boundary at the ordinary high water mark by the courts and legislature in Ohio, which for

brevity's sake will not be repeated here. First Merit Brief of Appellants-NWF and OEC 6-12. Based on this in-depth analysis compiled by appellants National Wildlife Federation and Ohio Environmental Council, it is clear that the upland owners in this case will not be deprived of any recognized property right by this Court's reestablishing the boundary of the public trust at the ordinary high water mark. By reestablishing the boundary of the public trust as the ordinary high water mark, this Court would simply be applying well-established state property law; the upland owners would not be denied a property interest because the interest that they assert has never existed in Ohio law. Therefore, there could not be a judicial taking as described in the ruling of the U.S. Supreme Court in *Stop the Beach Renourishment* and the arguments made by Pacific Legal Foundation on this point are without merit.

**II. Amicus Betty Montgomery Misapplies Ohio Revised Code Section 1506.10 and the Submerged Lands Act and Ignores Ohio Case Law to Reach the Conclusion that the Public Trust Boundary is the "Natural Shoreline."**

Amicus Betty Montgomery cites Revised Code Section 1506.10 as support for her proposition that the state's public trust interest only extends to the waters' edge. However, Ms. Montgomery misapplies this code section. The portion of the statute that she cites has no relevance to the question of where the public trust ends. The portion of Revised Code Section 1506.10 that discusses the "natural shoreline" only provides that littoral property owners may build beyond the natural shoreline (i.e. "landward" of the shoreline) without violating the public trust:

Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the **natural shoreline** of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 1506.11 of the Revised Code, shall not be

considered as having prejudiced the rights of the public in such domain. (Emphasis added).

Moreover, R.C. 1506.10 does not define the precise location of the public trust lands; the Ohio Supreme has consistently defined this aspect of Ohio property law. As explained by appellants National Wildlife Federation and Ohio Environmental Council and others, well-established Ohio case law defines the location of the public trust. See Brief of Appellants NWF and OEC at 8 (“The [Ohio Supreme Court] regarded [the public trust boundary] as the ordinary high water mark, drawing on the opinion in *Seaman v. Smith*” (1860), 24 Ill. 521. *Sloan*, 34 Ohio St. at 512-13). First, we point out that Attorney General opinions are at best persuasive authority and are not binding on this court. *General Dynamics Land Sys., Inc. v. Tracy* (1998), 83 Ohio St.3d 500. The fact that Ms. Montgomery’s erroneous interpretation of R.C. 1506.10 can be read into an Attorney General Opinion in 1993 and 2000 does not make that opinion persuasive today, and it should be disregarded by this Court. This Court need only to recognize and hold its own precedent in *Sloan v. Beimiller*. In *Sloan*, this Court held that the ownership extends only to “the line at which the water usually stands when free from disturbing causes,” not to the middle of the lake and bay. *Sloan v. Biemiller* (1878), 34 Ohio St. 492 at paragraph four of the syllabus, 511-12.

Next, Ms. Montgomery attempts to use the federal Submerged Lands Act, 43 U.S.C.S. Section 1311(a) (1995) (“SLA”) to argue that the natural shoreline constitutes the public trust boundary. However, the SLA does not provide any persuasive authority for this proposition. The SLA, while it relinquishes title to lands previously held by the United States, is not relevant to the question in this case. The SLA only relinquishes those public trust rights held by the federal government at the time of its enactment. At the time the SLA was originally enacted in

1953, *Sloan* was controlling law in the state of Ohio. *Sloan* held that the ordinary high water mark is the public trust boundary under Ohio law. Thus, the SLA has no bearing on the question before this Court because the state of Ohio already owned title to land up to the ordinary high water mark.

Ms. Montgomery's brief attempts to use an erroneous interpretation of R.C. 1506.10 fashioned to an erroneous interpretation of the SLA to make an argument that the public trust boundary is the natural shoreline, not the ordinary high water mark. Her entire brief should be disregarded by this Court.

### CONCLUSION

The case history in Ohio dating back to 1878 in *Sloan v. Biemiller* shows that the established property law of state, as summarized by appellants in their merit briefs, has drawn the boundary of the public trust lands at the ordinary high water mark, not at the natural shore as argued by amici Pacific Legal Foundation and Betty Montgomery. Maintaining that boundary as the appellants request would not be considered a judicial taking since no established property right would be taken from any private landowners. Therefore, a judicial takings analysis is not relevant in this case. For the foregoing reasons, and those previously argued by these amici and the appellants in their briefs, amici respectfully request that this court overturn the decision of the lower court and reestablish the boundary of the public trust lands at the ordinary high water mark, consistent with well-established state law.

Respectfully submitted,



---

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

## CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief of Amicus Curiae was served by Regular U.S.

Mail on this 9th day of November, 2010, on the following counsel:

RICHARD CORDRAY (0038034)  
Attorney General of Ohio

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

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

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

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

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

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

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

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

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

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

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

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

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