

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO ex rel. ROBERT MERRILL,	:	
TRUSTEE, et al.	:	Case No. 2009-1806
	:	
Appellees and Cross-Appellees,	:	
	:	On Appeal from the Lake
	:	County Court of Appeals,
v.	:	Eleventh Appellate District
	:	
	:	Court of Appeals Case
STATE OF OHIO. DEPARTMENT OF	:	Nos. 2008-L-007, 2008-L-008
NATURAL RESOURCES, et al.	:	Consolidated
	:	
Appellants and Cross Appellees.	:	

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

Proposition of Law No. 1 2

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

Proposition of Law No. 2. 17

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

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

<i>Ace Equipment Sales, Inc.</i> (2005), 273 Conn. 217	15
<i>Brundage v. Knox</i> (1917), 279 Ill.450	8
<i>Cobb v. Lincoln Park Commrs.</i> (1903), 202 Ill. 437	8
<i>East Bay Sporting Club v. Miller</i> (1928), 118 Ohio St. 360	4, 13, 14
<i>East Harbor Sportsman’s Club v. Clemons</i> (1921), 15 Ohio App. 27	15
<i>Hogg v. Beerman</i> (1884), 44 Ohio St. 81.....	4, 15
<i>Illinois Central R Co. v. Illinois</i> (1892), 146 U.S. 387	8, 9
<i>In re Schmidt</i> (1986), 25 Ohio St.3d 331	17
<i>Knight v. U.S. Land Assn.</i> (1891), 142 U.S. 161.....	5
<i>Lockwood v. Wildman</i> (1844), 13 Ohio 430	4, 13, 14
<i>Lovejoy v. van Emmenes</i> (1979), 177 Conn. 287.....	1,
<i>Massachusetts v. New York</i> (1926), 271 U.S, 65	6, 7
<i>Niles v. Cedar Point Club</i> (1899), 175 U.S. 300	4, 12
<i>San Francisco v. Le Roy</i> (1891,) 138 U.S.656.....	3, 5
<i>Seaman v. Smith</i> (1824), 24 Ill. 560	7, 8, 9
<i>Sloan v. Beimiller</i> (1878), 34 Ohio St. 492.....	7, 8, 9
<i>State ex rel. Duffy v. East Fifty Fifth Lakeshore Corp.</i> (1940), 137 Ohio St. 8.....	11
<i>State ex rel. First New Shiloh Baptist Church v. Meagher</i> (1998), 1998-Ohio-192, 82 Ohio St.3d. 501.....	18
<i>State ex rel. Squire v. Cleveland</i> (1948), 150 Ohio St. 303	10, 11, 12
<i>State v. C&P Rd. Co.</i> (1961), 94 Ohio St. 61.....	9, 10, 11
<i>Town of Orange v. Resnick</i> (1920), 94 Conn. 573	15
<i>United States v. 461.42 Acres</i> (N.D. Ohio 1963), 222 F. Supp. 55	13
<i>Water Street Assoc. v. Ltd. Partnership v. Innopak Plastics Corp.</i> (1994), 230 Conn. 764.....	15

STATUTES

1 Ohio Laws Chap. XXIX (1803).....	4
10 Ohio Laws 163 (1812)	4, 5, 14
107 Ohio Laws 587 (1917)	11
GC S 3699-1.....	11
Northwest Territory Act of 1787	2, 5

OTHER AUTHORITIES

Auditor of State of Ohio, Ohio Lands Book (2002), available at http://www.auditor.-state.oh.us/publications/general/OhioLandsBook.pdf , last vsited Nov. 29, 2010.....	13, 17
---	--------

RULES

Civ.R. 24(A)..... 17, 18
Civ.R. 24(B)..... 18

INTRODUCTION

Rejecting any application of Ordinary High Water Mark (OHWM), Ohio has consistently for 200 years asserted ownership and control over “soil” or “lands” only when “submerged” or “subaqueous” and “beyond the natural shore line.” By plain meaning, historic practice and precedent, those terms describe the shore terminus and submerged lands at the low water mark of Lake Erie. Low water mark is also uniformly consistent with fresh water and Great Lakes boundary law as applied by Original States and the United States when Ohio became a State. Appellants’¹ attempts to create an intricate contrary fiction rely upon creative explanation and selectively edited, non-contextual discussion from various authorities. Appellants’ unsupported mis-interpretation of the “equal footing” doctrine and “public trust” do not even square with the decisions they cite. Those precedents do not inhibit rights of private land ownership of all lands not permanently submerged.

Appellants insist that Ohio has never resigned its ownership or control of *soil* or lands lying beyond or below OHWM and Appellants NWF/OEC claim that Ohio and the federal government are powerless to do so under federal law. In the former instance, Appellants continue to purposefully ignore the historical inconvenience that lakefront lands in Ohio were conveyed while part of another Original State or as territory of the United States before Ohio existed, except for limited lands in western Ottawa County along Lake Erie and Sandusky County along Sandusky Bay. They were not Ohio’s lands to resign. In the latter, Appellants NWF/OEC apparently expect that if they repeatedly misstate the law, this Court will accede to their incessant public trust mis-application. They consistently reject the plain meaning of the words used by various authorities, offering creative explanations why the Supreme Court of the

¹ Cross-Appellant will refer to State of Ohio and NWF/OEC collectively as Appellants or distinguish between Appellant State or Appellants NWF et al.

United States, Ohio General Assembly and this Court did not mean the words actually used. Appellants ignore the limitations placed on the equal footing doctrine provided in the Northwest Territory Act of 1787, the words of the Quieting Act and the associated federal and Connecticut grants which occurred a decade before Ohio's formation. No fair reading of the authorities supports their view, nor does either federal or Ohio law mandate or support the complete decoupling of Ohio's "public trust" territory from the issue of littoral owners' private title, an assertion at variance from the issues argued in the trial court, appellate court below or initially before this Court. No matter how many times they repeat their same fatally flawed arguments, those flaws remain.

ARGUMENT

Proposition of Law No. 1

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

The technically accurate and logically consistent Ohio rule for property boundary law along Lake Erie is at the low water mark. Ohio precedent firmly rejects "ordinary high water mark" (OHWM) as the landward boundary of the State's ownership of soil, much less an intentionally undefined and meaningless OHWM different than requested by Appellants below nor fixed by federal law at statehood, but moveable depending on how the State might choose to define it from time to time. Cross-Appellant recognizes that some prior declarations of this Court could be read consistent with either low water or a moving water's edge standard focused on land actually submerged. However, careful reading of those cases affirms low water mark.

Cross-Appellant reaffirms that no party contests that the actual waters of Lake Erie are always navigable waters subject to “public trust” rights of fishing and water passage or navigation. However, this action is about ownership and use of soil, not water. All parties, including Appellants at all levels below, contended that public ownership was co-terminus with public trust and extended to the same point. Indeed, the State did not even urge that de-coupling in its appeal to this Court or its principal Merit Brief. The Court should not entertain a new theory of the case merely because Appellants’ prior issues are fatally flawed.

Low water mark of seasonal level inland waters such as the Great Lakes was the recognized legal boundary utilized when these lands were actually conveyed and the most logical and appropriate policy. It provides a stable limit to a private upland owner’s enjoyment of the fruits of the soil, right to restore avulsions, and assured access to the water. The State urges erosion must be measured by lands becoming “permanently” submerged, Merit Brief of State at 40, which requires reference to low water mark as a starting point. Northern Original States followed “low water” rules on non-tidal, and often tidal, lands. Even in the remaining ocean-front states following “OHWM” tidelands ownership, exclusive private ownership and control extended to a point touched by the water every single day of the year. The low water mark of the Great Lakes is the only point that places Ohio property owners on an “equal footing“ assuring daily contact and access to the water and use of all economically viable land. “OHWM”, under any definition, would deny that contact virtually the entirety of every year, depriving owners of economically viable and useful property because of minimal or occasional water cover. Barely one year before the *Illinois Central* decision, its author, Justice Fields, speaking for the Supreme Court, observed the limits on shore potentially excludable from private ownership:

“The lands which passed to the state upon her admission to the Union were not those

which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation. To render lands tidelands which the state by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow, within every 24 hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which upland is applied.” *San Francisco v. Le Roy* (1891) 138 U.S.656, 671-72.

Ohio littoral law is strongly influenced by the conveyance of almost all Lake Erie shoreline prior to Ohio’s formation. Appellants argue that neither the federal government nor the Original State of Connecticut which controlled those lands had the right to alienate them except above the OHWM because the land should be held in trust for a future state. However, the lands were part of another State. That State conveyed the entirety of its soil lying within the territorial United States north of the 41st latitude, to a point well into Lake Erie, to the Connecticut Land Company and the “Firelands” company, respectively. While the State accurately describes the transfer of land to the Firelands as extending to Lake Erie, Connecticut then transferred all remaining lands, including the Bass Islands in the Lake, to the Connecticut Land Company by a description of all soil up to latitude 42 degrees 2 minutes. The federal quieting patent used the same description. The State incorrectly and belatedly complains that there is no record proof of this. However, actual evidence of lands being transferred was offered before the trial court, uncontested by Appellants, so that no material issue of fact existed. Further, the authenticated patent of the United States confirming those grants containing the description of *all soil* extending from latitude 41°N to latitude 42° 02’N was part of the record upon Summary Judgment, again undisputed by Appellants. T.d 168, Exhibit 1. Further, as has been demonstrated in prior Merit Briefs, there is a long line of cases of this Court and others and the General Assembly’s statutory confirmation recognizing those transfers. E.g., *Niles v. Cedar Point Club* (1899), 175 U.S. 300; *East Bay Sporting Club v. Miller* (1928), 118 Ohio St. 360; *Hogg v. Beerman* (1884), 44 Ohio St. 81; *Lockwood v. Wildman* (1844), 13 Ohio 430;. 1 Ohio

Laws Chap. XXIX (1803); 10 Ohio Laws 163 (1812). Claiming no evidence was offered, while untrue, does not offer dispute of unchallenged facts.

Appellants then argue that “equal footing” prohibits prior States or other sovereigns from disposing of lands beyond OHWM, and especially rely on the Northwest Territory Act of 1787.

However, Section 14, Article II of that Act explicitly provides:

“.....in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.” Northwest Ordinance, §14, Art. II.

Article IV also provides protection for prior grants and federal grants:

“The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.” Northwest Ordinance, §14, Art. IV.

Throughout the United States, grants made by previous sovereigns, including extensive grants by Mexico, France and Spain, have been honored by the states in which they are located. E.g., *San Francisco v. Le Roy* (1891) 138 U.S.656; *Knight v. U.S. Land Assn.* (1891) 142 U.S. 161 In Ohio, the two major grants made by Connecticut in its Western Reserve must be upheld under the terms of Articles II and IV where they preceded Ohio’s statehood by a decade. Virtually all private owners along Lake Erie claim from those grants. Ohio, whose early legislature and cases showed an intent to make Ohio law completely compatible with those grants, sensibly conformed its law in any de minimus remaining lands to the law applied by Original States to the Great Lakes, and indeed all freshwater navigable lakes. 10 Ohio Laws 163 (1812).

The State further belatedly suggests that if these lands transferred to low water or any point but OHWM, such transfers should be excluded from determination of the class issues, when virtually the entirety of Lake Erie’s shore is contained within these prior grants. The limited area not previously transferred is largely in public ownership, expressly excluded from

class issues below. The State posed no objection to class consideration of the issue below, arguing on other grounds.

Appellants also persist in inaccurately characterizing *Massachusetts v. New York* (1926), 271 U.S. 65, as merely a jurisdictional dispute between two States which did not raise private ownership or the issue of public rights in the “shore.” Their argument is particularly curious when both states rule all freshwater lakes are owned to the low water mark by private owners with no public rights of the “shore”, with Massachusetts extending that rule to ocean lands as well. Appellants’ explanation is firmly contradicted by the Supreme Court. The first sentence of the Court’s unanimous opinion states:

“This is an original suit in equity brought by the Commonwealth of Massachusetts against the State of New York, the City of Rochester in New York, **and certain corporations and individuals, to quiet title to land** located in the City of Rochester, **and to enjoin the city from taking it by eminent domain**, or, in the alternative, to have the amount of compensation for the taking determined by this Court.” *Id* at 80-81 (emphasis supplied)

Having commenced with recognition that the issue involves quieting title to private individuals and corporations who own these lands, the Court concludes:

“The “seashore” is that well defined area, **lying between high water mark and the low water mark**, of waters in which the tide daily ebbs and flows. The fact that, by the English common law and by the law of those states bounded by tidal waters, the public has rights in the seashore, and that grants extending only to the high water mark of such waters nevertheless give access to the sea, accounts for the rule, generally recognized and followed, that a grant whose boundaries extend to the “shore” or “along the shore” of the sea carries only to high water mark. [citations omitted] But the word “shore,” even in its application to tidal waters, is subject to construction by the terms of the deed and surrounding circumstances, and **may mean the water’s edge at low water mark.** [citations omitted]”

“The application of that rule to conveyances of land bordering upon nontidal waters is supported by neither reason nor authority. The lack of clear definition, by natural landmarks, of the shore of nontidal waters would make its application impracticable. **It would deny to grantees all access to such waters except on the irregular and infrequent occasions of flood, since there are no public rights in the shores of nontidal waters and the abutting owner could not cross the shore to the water without trespass.** Such a result would contravene public policy and defeat the intention with which such conveyances are normally

made. New York has consistently refused to apply the rule to nontidal waters, holding that a conveyance "to the shore" or "along the shore" of such waters carries to the water's edge at low water (*Child v. Starr*, 4 Hill. 369, 375, 376; *Halsey v. McCormick*, 13 N.Y. 296; *Yates v. Van De Bogert*, 56 N.Y. 526; *Stewart v. Turney*, 237 N.Y. 117, 131), and the local rules for interpreting conveyances should be applied by this Court in the absence of an expression of a different purpose (*Hardin v. Jordan*, 140 U.S. 371, 384; *Oklahoma v. Texas*, 258 U.S. 574, 594; *Brewer-Elliott Oil Co. v. United States*, 260 U.S. 77, 88). **The same rule is, however, generally followed elsewhere. See *Castle v. Elder*, 57 Minn. 289; *Lamb v. Rickets*, 11 Ohio 311; *Daniels v. Cheshire R. Co.*, 20 N.H. 85; *Kanouse v. Slockbower*, 48 N.J.Eq. 42, 50; *Seaman v. Smith*, 24 Ill. 521; *Slauson v. Goodrich Transp. Co.*, 94 Wis. 642; *Burke v. Niles*, 13 New Bruns. 166; *Stover v. Lavoia*, 8 Ont. W.R. 398."**

"Upon neither of the theories advanced, therefore, does the Commonwealth of Massachusetts sustain its claim to the land in question." *Id.* at 92-93. (emphasis supplied)

The Court thus unanimously declared that there is no public right in the "shore" between high and low water on the Great Lakes and setting a littoral owner's boundary above the low water mark was unsupported by reason or authority. An interesting aspect of the case is the original 1788 Massachusetts grantees were Gorham and Phelps, central individuals in the 1795 transfer to the Connecticut Land Co., and subsequent survey and subdivision of that land.

While Appellants dismiss all of the "swamp land" cases dealing with private rights in the soil of lands covered by waters that inundate them when Lake Erie reaches OHWM, discussed below, they recognize that *Sloan v. Beimiller* (1878), 34 Ohio St. 492, is a central and controlling Ohio decision. However, Appellants continue their twisted reading of that case. Appellants selectively take words from one quoted Illinois case, alter them to a rule Illinois does not apply, then turn that new meaning into *Sloan's* holding. This Court relied on other, low water decisions and chose other words to describe its holding. Appellants' assertion that the decision adopts OHWM directly contradicts both the Court's holding and explanation.

Sloan relies on cases from several jurisdictions, including New York, Massachusetts and Vermont, that the "shore" to low water mark is privately owned, while not relying upon any case that employs OHWM. The only place the words "high water mark" appear are in one quotation

from *Seaman v. Smith* (1824), 24 Ill. 560, discussing the rule on the seacoast. However, even in *Seaman*, the Illinois Supreme Court did not adopt the “ordinary or usual high water mark” as its rule, but rather said that the *principle* behind the rule on oceans should be similarly applied by a rule crafted for the Great Lakes. That principle, it declared, was:

“But it should be at that line where the water usually stands when unaffected by any disturbing cause. **The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes.** And the line at which it usually stands unaffected by storms and other causes, represents the ordinary high water mark on the ocean, and the point between the highest and lowest water marks produced by the tides.” *Seaman* at 525.

Stating, perhaps mistakenly, that there was no seasonal variation in the Great Lakes (though typical Lake Michigan annual variation is less than Lake Erie and may not exceed 1 foot), the *Seaman* court selected a standard of where the water *usually* stands, explaining:

“These great bodies of water, having no currents, like rivers and other running streams, cannot present the same reasons why the boundary should be extended **beyond the water's edge, where it is ordinarily found ...**” (emphasis added) *Seaman* at 525.

At the very least, the “water’s edge” standard adopted in *Seaman* extends below OHWM to the water’s edge, and would always extend to low water if there is no seasonal variation.

Appellants incorrectly claim that other Illinois cases apply *Seaman* as ordinary high water or do not deal with the issue. Specifically, *Brundage v. Knox* (1917), 279 Ill.450, is said not to deal with the water mark, but it explicitly holds that accreted land is owned by the private landowner to the waters of Lake Michigan. Similarly, *Cobb v. Lincoln Park Commrs.* (1903), 202 Ill. 437, deals with lands actually permanently submerged *in front of* Cobb’s lands which extend to the water’s edge. 202 Ill. at 439. As shown in Cross-Appellant’s main brief, even *Illinois Central R Co. v. Illinois* (1892), 146 U.S. 387, results in filled submerged lands being confirmed in private ownership, just not the vast *additional* transfer contested there. Cross-

Appellant's Merit Brief at 29-30. *Illinois Central* also involves land that incorporated the parcel involved earlier in *Seaman*.

This Court also subsequently confirmed, after discussing *Illinois Central*, that Illinois utilized a common law rule of ownership to the "water's edge", not OHWM. *State v. C&P Rd. Co.* (1961), 94 Ohio St. 61, 73.

More telling than Appellants' mis-explanation of the reference to *Seaman*, this Court in *Sloan* began its examination of the law of freshwater lakes with an explicit quote from New York holding the low water mark to be the proper boundary, then approvingly cites a lengthy string of cases from Vermont, New Hampshire, New York and Massachusetts supporting a **low water mark** terminus of private lands, then examines *Seaman*. The Court ultimately concludes that the entire "shore", which it previously quoted as being between high and low water marks, was privately owned.

Incredibly, contrary to the Court's opinion, Appellants claim that *Sloan* did not settle any rights to the shore below OHWM, only above it, where the shore does not exist. The Court found that Beimiller did not violate Sloan's reservation of rights *because* Beimiller actually owned the shore, thereby allowing him to have his men live on and traverse the shore, but that he was prevented from "landing" upon the "shore", using it or taking sand from it for purposes reserved by Sloan. The Court concluded the evidence did not support improper use of the "shore" by Beimiller in applying its conclusion that the "shore" was privately held. *Sloan's* explicit holding was that Beimiller, the grantee, owned the rights to all use of the shore (to the exclusion of the grantor and all others) except for the reservations contained in the grant. When reading the full facts of the case and the full decision of the Court, together with its own holding

in Syllabus 5, ownership of the entire shore between high water and low water cannot be seriously contested.

Appellants urge *State v. C & P Rd. Co.*, supra, as the next key development, followed by the Fleming Act. In doing so they studiously ignore the 1910 General Assembly statute, GC §3699-1, which plainly views only that which is permanently “submerged” or made lands on formerly submerged lands as the territory of the State. This enactment is only compatible with a low water mark standard equating “submerged land” with land titled to the State.

State v. C&P Rd. and *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, relied on by Appellants, are also most consistent with this “low water mark” standard at the “natural shore line”, properly defined as the low water terminus of the “shore”. Contrary to Appellants’ cumbersome explanations, neither decision adopts a standard *at* OHWM, instead with stunning consistency referring to “subaqueous land” of the territory that lies under the waters of Lake Erie or “submerged” as previously stated by the General Assembly.

In *C&P Rd.*, the Court repeatedly uses the phrases “subaqueous land beyond the high-water mark of navigable waters” and land “under water”. Appellants claim that the Court could only mean “high water mark” as the terminus. The phrase actually employed by this Court has a contrary meaning which rejects the boundary or “natural shoreline” being located at or above OHWM, but rather at a point *beyond* or below it.

Not dissimilarly, *State ex rel. Squire v. Cleveland* finds any fill not meaningful unless beyond the “shoreline” into Lake Erie “shallow waters”. *Id* at Syllabus 5, 340. The term “artificial shoreline” appearing in quotation in the State’s discussion of *Squire*, State’s Third Merit Brief at 32, does not appear anywhere in the opinion, much less in juxtaposition to “natural shoreline”. Repeatedly, *Squire* stated that the public lands were “subaqueous” or permanently

covered by water, and that the artificial or “made” lands were those filled into the “shallow waters” of the Lake. *Id.* at 317, 318, 319, 320, 321, 322, 324, 325, 326, 327, 328, 330, 331, 331, 332, 337, 339, 340. The Court even distinguished “subaqueous” land from “marginal” lands between high and low water that might have public rights on tidal lands, but did not extend public control of “marginal” lands to Lake Erie. *Id.* at 332. Both *C&P Rd.* and *Squire* rather speak of lands that are actually covered by water submerged *below* the OHWM and *beyond* the shore.² Both deal with private rights and title to “made” land filled into the waters, and the right to compensation for their taking except exclusively for purposes of water navigation and fishery.

The Fleming Act similarly supports a low water mark standard. It requires two elements for land to be included in the “territory”. The soil must be “beneath” (later amended to “underlying”) the waters of Lake Erie. Further, the Act explicitly declares that public or private littoral owners *encroach* upon the territory when they make artificial improvements by fill “beyond the natural shore line”. Section 2 of the Act amends and clarifies GC S3699-1 previously referred to permitting leases and grants :

“over and on any **submerged** or artificially filled land or lands made by accretion resulting from artificial encroachments, title to which is in the state of Ohio, with the territory **covered or formerly covered by the waters of Lake Erie in front of littoral land ...**” 107 Ohio Laws 587 (1917) (emphasis supplied)

Appellants studiously avoid *State ex rel. Duffy v. East Fifty Fifth Lakeshore Corp.* (1940), 137 Ohio St. 8. In *Duffy*, this Court recognized littoral owners’ rights to fill accretions, even artificial accretions if not created by the owner, in order to prevent re-inundation or loss, so

²*Squire*’s holding on artificial fill is consistent with what appears to be agreement among the parties --unpermitted artificially made lands beyond the shoreline do not prejudice the “public trust”. As the statute’s provides, “artificial encroachments by ... littoral owners, which interfere with the free flow of commerce in navigable channels, ... beyond the natural shoreline of said waters, not expressly authorized by the general assembly ... 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.” R.C, §1506.10.

long as no substantial portion of the fill was into the waters of the Lake. When read in light of the facts in that case, including that the fill was performed during a period of lowest water levels, the decision of the Court in *Duffy* is a further affirmation that littoral lands extend to the water's edge at low water mark. *Squire* similarly dealt with a shoreline during years of low water levels.

Appellants also misapply the holding of *Niles v. Cedar Point Club* (1899), 175 U.S. 300, involving lands in Ohio denied to the State under the Swamp Lands Act in 1852 and patented by the United States to private ownership. Appellants rely on the appellate court ruling in an effort to explain away any granting of lands below OHWM. However, to the extent that their interpretation would have any credence, it conflicts with the Supreme Court's determination of the issue. The U.S. Supreme Court unanimously characterized the "flag marsh" as being sometimes inundated by the waters of Lake Erie or overflow of adjoining waterways, but not "permanently submerged." Since the lands were not permanently underwater, and therefore below the low water mark, the Court held that the United States could properly sell those lands and did so by its patents. The Court observed that the Land Office surveyed and sold lands to the "shore" of Lake Erie, including near shore islands lakeward of the flag marshes with inlets between them that allowed the waters of the Lake to flow.

"It is impossible to hold that the lower courts erred in the conclusion that this marsh was not to be regarded as land **continuously submerged**, either under Lake Erie, a navigable lake, and in that case belonging to the State of Ohio, *Pollard v. Hagan*, 3 How. 212; *Weber v. Harbor Commissioners*, 18 Wall. 57; *McCready v. Virginia*, 94 U.S. 391, or under a pond or other similar body of non-navigable inland waters, and therefore generally the property of riparian owners. It was called a marsh by Rice, the first surveyor, is so styled on the plat, and the conditions as disclosed by the agreed statement indicate that it was a body of low swampy land, partly boggy and partly dry, **sometimes subject to inundations from Lake Erie** or the overflow of the adjacent streams, but **not permanently covered with water.**" *Id* at 307-308. (emphasis supplied)

In conclusion, while the U.S. Supreme Court affirmed the decision of the federal appeals court, it employed a very different reasoning.

“With respect to the contention that the character of this marsh, as it was found to have been, shows that it should have passed to the State of Ohio under the Swamp Land Act, it is enough to say that the State of Ohio applied for it as such, that the application was denied, that this denial was made in 1852, that the land was never patented to the State, and without such patent no fee ever passed, *Michigan Land and Lumber Co. v. Rust*, 168 U.S. 589, that subsequently the land department treated it as land subject to its control, as public land of the United States, had it surveyed, sold and patented. Whatever claims the State of Ohio may have cannot be litigated in this suit. The legal title passed by the patent to the appellee's grantors, and that title is certainly good as against a stranger with no equities.” *Id* at 308-309.

Thus, the Court confirmed the decision of the United States, as owner of the lands, to sell the land for their highest use as hunting and fowling grounds, and not submit them to Ohio. Contrary to the unproven and unsupported statement of Appellant State, the swamp lands received by Ohio were generally not shorelands, but inland lands that Ohio did receive in the Great Black Swamp under the Swamp Lands Act for diking, draining and cultivation. Auditor of State of Ohio, *Ohio Lands Book* (2002), at 65, available at <http://www.auditor.state.oh.us/-publications/general/OhioLandsBook.pdf>, last visited Nov. 29, 2010.

While the State briefly addresses *United States v. 461.42 Acres* (N.D. Ohio 1963), 222 F. Supp. 55, in conceding that the private owner has the right to restore lands lost to avulsion, the case also stands for the premise that marsh lands not continuously submerged can be privately owned and are not a part of the public trust even when below the ordinary high water mark. While the dike constructed on the beach protecting the drained marshlands in *United States v. 461.42 Acres* was lost to avulsion, the subsequent inundation of the patented lands behind the dike were lost solely to submergence by the Lake's waters, not avulsion.

Similar in nature to the Black Swamp cases were the cases of Sandusky Bay including *Lockwood v. Wildman, supra*, and *East Bay Sporting Club v. Miller, supra*. NWF/OEC attempts to characterize *Lockwood* as a partitioning of land without littoral significance. However, the

facts considered in the case by this Court recognized the existence of extensive flag marshes at the East end of the partition area. The consideration of private or public ownership of these partially inundated marshes clearly played a part in the Court's decision. Since the *Sloan* Court also referred to the maps at 13 Ohio 430 which were an integral part of the *Lockwood* case, they were considered important to the entire initial survey of the Firelands as authorized by the Ohio legislature. This survey was subsequently approved by the Ohio Legislature and serves as a basis for all subsequent land divisions in the Firelands. 10 Ohio Laws 163 (1812). The exhibits found at 13 Ohio 430 clearly shows the flag marshes involved in *Lockwood* as well as **the open water** and marshes east of the Huron/Perkins township line. The Huron/Perkins township line is the line agreed upon between the Firelands Company and The Connecticut Land Company as the "boundary between the land and the waters of the bay" The Flag marshes shown on 13 Ohio 430 and open water areas east of the Huron/Perkins line were also central to *East Bay Sporting Club v. Miller* (1928), 118 Ohio St. 360.

In its analysis of *East Bay Sporting Club*, NWF/OEC claims that this Court "did not hold that the soil underlying a triangle of water in Sandusky Bay was privately owned". NWF/OEC simply misread the case which states that the Sporting Club owned the soil under the waters east of the Huron/Perkins township line but that the waters were open to the public for fishing because they were contiguous to the open waters of Sandusky Bay. However, this Court reversed the lower court's decision that the waters through the flag marsh were open to the public:

"The validity of the title of plaintiff in error to the property described in the petition up to the west line of Huron township is conceded. While the ownership of this property up to the west line of Huron township is recognized in both *Teasel v. West Huron Sporting Club* and *Stroud v. West Huron Sporting Club*, supra, neither of said cases denies the right of fishing or navigation in the waters of the bay lying east of such line. This right of private ownership in land covered by the waters of a navigable landlocked bay or harbor,

connected with Lake Erie, subject to the public rights of navigation and fishery, provided the owner derives his title from express grant made or sanctioned by the United States, is recognized in *Hogg v. Beerman*, 41 Ohio St. 81, 52 Am. Rep., 71, so that, if it be conceded that the plaintiff in error is the owner of the land under the water of Sandusky Bay up to the west line of Huron township, under this rule announced in the *Beerman* case the rights of the public and the defendants in error of fishing are preserved, in so far as such waters form a part of Sandusky Bay.” *Id* at 373.

Appellants NWF/OEC also misstate the citation and holding of *East Harbor Sportsman’s Club v. Clemons* (1921), 15 Ohio App. 27, quoting a syllabus not prepared by the court but by a publishing company. The case deals with East Harbor, not the East Bay of Sandusky Bay, and holds that hunting on the waters over the privately owned submerged lands is prohibited, as had been previously affirmed as to the same lands by this Court.

The State argues that Connecticut follows OHWM. However, that is limited only to tidal lands. Yet even on tidal lands, Connecticut employs a more generous rule than other OHWM states because of the substantial tidal flats along Long Island Sound, permitting, inter alia, the adjoining landowner to improve the area between ordinary high and low water and own and exclusively control it to the low water mark. *Town of Orange v. Resnick* (1920), 94 Conn. 573, 579-580. Connecticut also considered only tidal waters to be “navigable”, but in non-tidal waters from impoundment of streams, Connecticut followed “common law” non-tidal rules that held the adjoining owners controlled the soil and even the right to fish, boat or bathe over it. E.g., *Ace Equipment Sales, Inc.*, (2005), 273 Conn. 217.

The State’s reliance on *Water Street Assoc. v. Ltd. Partnership v. Innopak Plastics Corp.* (1994), 230 Conn. 764; and *Lovejoy v. van Emmenes* (1979), 177 Conn. 287 is misplaced. *Water Street* deals with division of riparian rights between two owners in the waters of a tidal bay. More telling, *Lovejoy* not only does not “hold” that the State owns all lands below OHWM, but

deals with the right of a littoral owner to wharf into the waters of Long Island Sound well beyond low water mark over a *submerged* Oyster Lot *owned* by the plaintiffs under Connecticut law.

Other than its Western Reserve, Connecticut had no large non-tidal lakes. However, Connecticut decisional law applied “public trust” claims only to tidal waters, and even there placed considerable restriction on them to low water and beyond. Connecticut precedent suggests it would follow low water mark or beyond in its Western Reserve. By actual survey, deed, and practice, it followed the law of its sister Original States with Great Lakes lands and transferred all littoral lands to the low water mark.

As publications of the State of Ohio memorialize (e.g., Auditor of State of Ohio, Ohio Lands Book (2002), at 23-28), the history of Connecticut’s Western Reserve is summarized as:

When ceding its western lands to the United States in 1786, Connecticut “reserved” a tract, commonly called the Western Reserve which was described by a metes and bounds survey as extending westerly from the western boundary of Pennsylvania to a line 120 miles westward and extending in a south to north direction from 41 degrees of north latitude to 42 degrees 2 minutes of north latitude.

In 1792, Connecticut granted the westernmost 500,000 acres of its Reserve, bounded northerly “on the shore of Lake Erie.”

In 1795, the balance of the tract known as the Western Reserve was sold to a group of investors who took title to the soil as tenants in common. Initially, this group apparently intended to form a state of New Connecticut. This plan was subsequently abandoned.

In 1800, Congress passed the Quietening Act authorizing the President to issue a patent for the soil on the tract known as the Western Reserve to the Governor of Connecticut in trust for its grantees. In exchange, jurisdictional title was passed to the United States.

Where considerable care was expended to quantify, describe and alienate all soil along Lake Erie, Cross Appellant urges this Court to protect the chain of title proved by those deeds and surveys and fully supported by this Court, the U.S. Supreme Court, and a majority of Original and Great Lakes States to the low water mark of Lake Erie.

Proposition of Law No. 2

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

Appellants NWF and OEC urge that the trial court’s and appellate court’s “discretion” in approving intervention “of right” should not be disturbed except upon showing an abuse of discretion. However, the underlying requirement is that the mandatory provisions of the rule must be met, and they are not. The attempted intervention “of right” of these Intervening Defendants/Appellants does not offer any compliance with the Rule, and is improper. While not truly a matter of “discretion”, a failure of the court below to require compliance with mandatory provisions of the Rules would certainly constitute abuse of discretion.

Appellants attempt to show they fall within the Rule by claiming they need not “demonstrate” any interest in the property subject to a property dispute, but rather need only “claim” same. While Cross-Appellant has plainly used “demonstrate” in the sense of showing any such claim, the pleadings submitted by Intervening Defendants in the trial court, or even their Motion for Summary Judgment, never assert any claim whatsoever by Intervening Defendants in the property under dispute. Rather, their “claims” are virtually exact mimics of the facts and claims for relief of the State of Ohio, and assert rights on behalf of the State of Ohio already a party below, not themselves.

Civ.R. 24(A) requires that a party seeking intervention claim a “legally protectable” interest in the property that is subject of the (plaintiffs’) action. *In re Schmidt* (1986), 25 Ohio St.3d 331. Intervening Defendants/Appellants assert no interest *of theirs* at all, but only support

the rights of existing defendants.. Rather, the interest claimed must be that of the applicant in the property, and the property is that which is raised in the Plaintiffs' action. Nor does the Rule contemplate allowing organizations to represent the supposed third party personal claims of their individual members not possessed by the Defendants themselves, though they also did not "claim" any unique interest or claim of their members except general public rights possessed by the State of Ohio. Such "claims" do not entitle Intervening Defendants/Appellants to intervene as a matter of right under Civ.R. 24(A).

Intervening Defendants-Appellants complain that Cross-Appellant relies on federal decisions as well as the Civil Rule and decisions of Ohio Courts. However, this Court has held that Civ. R. 24(A) is intentionally patterned on the federal rule. *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 1998-Ohio-192, 82 Ohio St.3d. 501.

Similarly, Intervening Defendants/Appellants fail to show the assertion of any legally protectable claim or interest in Plaintiffs' "main action", which is the preliminary jurisdictional requirement permitting consideration of a permissive intervention under Civ.R. 24(B).

Respectfully submitted



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CERTIFICATE OF SERVICE

I certify that a copy of this Reply (Fourth) Merit Brief of Appellee/Cross-Appellant
Homer S. Taft was served on December 15th, 2010 by electronic mail upon the parties' counsel

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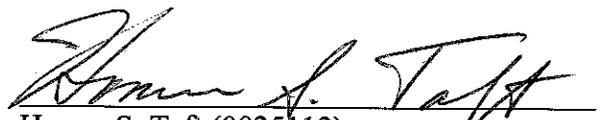
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