

**COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO EX REL	}	Court of Appeals No. 2008-L-008
ROBERT MERILL, TRUSTEE, et al.,	}	
	}	
Plaintiff-Appellee/Cross-Appellants,	}	Lake County Court of Common Pleas
and	}	
HOMER S. TAFT, Intervening Plaintiff-	}	No. 04-CV-001080
Appellee/Cross-Appellant	}	
and	}	
L. SCOT and DARLA J. DUNCAN	}	
Intervening Plaintiff-Appellees	}	
	}	
vs.	}	
	}	
STATE OF OHIO, DEPARTMENT	}	
OF NATURAL RESOURCES, et al.,	}	
	}	
Defendants-Appellants/Cross-	}	
Appellees	}	
	}	
and	}	
	}	
NATIONAL WILDLIFE FEDERATION,	}	
et al,	}	
	}	
Intervening Defendants-Appellants	}	

**ANSWER OF APPELLEES L. SCOT DUNCAN AND DARLA J. DUNCAN TO
BRIEF OF DEFENDANT-APPELLANT/CROSS-APPELLEE STATE OF OHIO**

Appellees L Scot and Darla J. Duncan (Hereafter, the Duncans) are in agreement with the Order by the Trial Court and pray that it is affirmed by the Appellate Court.

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II. STATEMENT OF THE CASE.

The Duncans concur with the State of Ohio’s summarized statement of the case.

III. STATEMENT OF FACTS.

The private lands adjacent to the Lake Erie public trust came into private ownership via two general paths. The easternmost 120 miles were part of the Connecticut Western Reserve and were either granted or deeded to private owners by Connecticut prior to Ohio’s statehood. The title history of the Western Reserve, including both the Firelands and the holdings of the Connecticut Land Company, was well detailed in a report to Congress by John Marshall during deliberations prior to the Congressional passage of the Quieting Act which authorized the president to quit-claim the United States’ interest in the soil of the Western Reserve in exchange for jurisdiction over the Western Reserve. T.d. 168, pp. 4-6, citing to *Connecticut Western Reserve*, American State Papers, Public Lands, Vol 1, p 83.

The lands adjacent to the Lake Erie public trust located west of the Western Reserve were initially public lands of the United States. These lands were surveyed and sold by the United States land offices under the Cadastral survey rules of the day. Ohio was the proving ground for the early development of the Public Land Survey System and the Cadastral survey rules in place early in the 19th century were significantly modified as the sale of public lands progressed westward.

Most early surveys and resurveys of littoral properties along Lake Erie used terms like “to Lake Erie” or “along the shore” to describe the boundary between the public and private

lands. One known exception being the initial survey of the Cedar Point peninsula which refers to “the whole sandbar or beach” when describing the peninsula itself where the Duncan’s property is located.

Since the first codification of the Lake Erie public trust, its has always been described with terms such as “lands under the waters” and “submerged lands.” There was never any reference to the Ordinary High Water Mark (OHWM), Ordinary Low Water Mark (OLWM), Low Water Mark(LWM), High Water Line(HWL), Low Water Datum(LWD) or any similar term describing a particular level or line at which the water contacts the dry land for some predefined portion of the time.

In the court below, the State and the National Wildlife Federation have advocated that the “Territory” extends to an elevation of 573.4 ft IGLD(1985). They also assert that this is the true location of the OHWM. The Ohio Lakefront Group has advocated that the “Territory” extends to the LWD which they say is equivalent to the OLWM. The LWD is located at 569.2 ft IGLD(1985). Intervening Plaintiffs Taft and Duncan advocated for the LWM in their trial court briefs. Their position was based on contemporaneously determined boundaries on the Ohio River, which, like Lake Erie, is part of the navigable water system referred to in the Northwest Territory Act of 1787. T.d.168, p.7.

The trial court considered the intent of the original sellers and buyers of the lands, the understanding of subsequent bona fide purchasers, and the cadastral surveying rules of the times. Under both federal and state law, any subsequent resurvey of a cadastral boundary must retrace the initial survey.

The trial court concluded that the “water’s edge” is the best definition of the boundary of the “Territory” to harmonize the statutes, the case law, and the historic record. The trial court

declined to address the “correct” location of the OHWM since it was irrelevant to the boundary determination. Since the trial court bounded the “Territory” at the waters edge, it implicitly recognized that the public has no right to walk on the dry sand beach since it was outside of the “Territory” and was, therefore private property.

IV. ANSWER.

Summary of Answer

The State misinterprets more than 200 years of Federal and Ohio law. They fail to recognize that, in 1800, Congress authorized President John Adams to issue a patent to quit-claim the soil of the Western Reserve in trust for those who had previously been granted or had purchased portions of it from Connecticut under what is commonly known as the Quieting Act. Act of April 28, 1800, 6th Cong., Sess. I, Ch. 38, S. 56-57.

This history was extensively briefed by Intervening Plaintiffs Taft and Duncan. T.d. 168 at 5. A certified copy of the patent issued by President Adams is in the trial court record. T.d. 168, Exhibit 1. For the State of Ohio to now redefine the boundary of the Lake Erie public trust “territory” as they have attempted, would violate private contracts between subsequent purchasers formed more than 200 years ago. The United States Supreme Court first declared the unconstitutionality of such state actions violating previously formed contracts in *Fletcher v. Peck* (1810) 10 U.S. 87.

The requirements of any resurvey are clearly articulated in the Ohio Revised Code at RC 4733. Any Registered Surveyor in the State of Ohio would be in direct violation of Ohio law if he did not respect the initial surveys of these properties when the lands first transferred into private ownership. OAC 4733-37-01 and following.

In particular, OAC4733-37-05(C) reads in part as follows:

“4733-37-05 Plat of survey.

(A) The surveyor shall prepare a scale drawing of every individual survey, or drawings comprising all of the surveys when they are contiguous, in which the surveyor *retraces previously established property lines* or establishes new boundaries.

(C) The surveyor shall include the following details:

(1) A title such that the general location of the survey can be identified. The title shall include, but not be limited to: state, county, civil township or municipality, and *original land subdivision description*.

(7) A citation of pertinent documents and sources of data used as a basis for carrying out the work. The citation shall include, but not be limited to: current deeds as of the date of the survey, *prior deeds or other documents of record*, and available deeds of record for adjoining parcels along each boundary line of the survey. If the adjoining parcel is a recorded subdivision, only the subdivision name, recording information and lot numbers need to be shown.” (Emphasis added)

The decision of the trial court is fully supported by the law and the undisputed facts in the case. The trial court’s Order should be affirmed based on the irrefutable historic facts and the law of both the United States and the State of Ohio.

Each of the State of Ohio’s individual assignments of error and questions of law is answered separately below.

ANSWER TO THE STATE OF OHIO’S FIRST ASSIGNMENT OF ERROR

Answer to First Question of Law - The trial court was correct in holding that the public trust in Lake Erie is demarcated by the line where the water of the lake touches at any given time. This interpretation harmonizes the historical record, the case law, and the applicable statutes. (T.d. 183)

In their trial court briefs, the Duncans (briefing jointly with Taft) asserted that the historic Low Water Mark is the proper boundary of the public trust. We continue to believe that this is a proper interpretation of the historic record and the law. This position was supported by case law validating the use of the Low Water Mark (LWM) in establishing the riparian boundaries along the Ohio River. The Ohio River had been settled during the second half of the 18th century.

T.d. 168, p.9. In its trial court briefs, Plaintiff/Appellant OLG et al. advocated the use of the low water datum (LWD) as the boundary. Either of these positions yield the same practical result as the “water’s edge” holding of the lower court. When water levels are low, all three lines are essentially the same. When water levels are high, the public had the undisputed right to access all of the water and land which is actually submerged.

Because the LWM and LWD yield the same practical result, the Duncans accept the trial court’s “water’s edge” determination as proper. It represents a harmonizing approach which demonstrates judicial restraint and is entitled to deference by the appeals court.

The trial court’s Order has the additional advantages of common sense and understandability. It does not require a strained interpretive reading of the Ohio statutes. On their face, the Ohio statutes clearly state that only submerged lands actually under water belong to the public. Clarity, in itself, is a virtue in a legal decision. A review of the authorities cited by all parties in their trial court briefs shows that a vast majority of the cases can be interpreted in many ways. Those cases have been extensively briefed by all parties.

No matter how many times one rereads the pertinent sections of R.C. 1506.10 and R.C. 1506.11 the term Ordinary High Water Mark does not appear. Nor does the term Low Water Mark. Instead, the statutes describe the “waters of Lake Erie” and the “land underlying the waters of Lake Erie.” This wording most easily leads to the interpretation held by the court and not that which is advocated by the State or NWF.

This Answer will intentionally be kept short of citations to the “classic cases” of shoreline law. Undoubtedly, these classic cases will be extensively briefed by the other parties from their individual perspectives. Instead, this answer will first review the historic information presented by Taft and Duncan in the trial court. It will then focus on the exhibits presented by

the State in the trial court and explain how those exhibits are in harmony with the trial court's decision.

The historic determination of Ohio's Lake Erie public trust boundary was thoroughly briefed by Intervening-Plaintiffs Taft and Duncan in the court below. T.d. 168, T.d. 172, and T.d. 179. The essence of the arguments presented by Taft and Duncan were well captured by the trial court and are included in its Order. T.d. 183 at 60-64.

At the beginning of the 19th century, Ohio was the proving ground for the Cadastral Survey system from which today's Federal Cadastral surveying principles eventually evolved. Because of Ohio's unique historical position as a proving ground, analyzing and understanding the historic record is critical. T.d. 168, p.7.

The Duncans are littoral property owners holding title to 70 feet of beachfront located on the Cedar Point peninsula in Sandusky, Ohio. T.d. 168, Exhibit 3, p.2. Their property first passed into private ownership in 1792 under the Firelands grant from Connecticut. The grant was made to compensate citizens who had lost property during the Revolutionary War. The grant was for 500,000 acres at the western end of the Connecticut Western Reserve. Initially, it was held by all of the "sufferers" as tenants in common. The Firelands Tract was bounded on the North by Lake Erie. It was not surveyed and subdivided until the Firelands Survey was authorized by the State of Ohio more than a decade later. OH Law, Ch. 20, April 15, 1803. Upon survey and division, the area where Duncan's property is located was described by the surveyors as the "Whole Sandbar or Beach." T.d. 168, Exhibit 3, Duncan Affidavit, Exhibit B,p.1, (page 102 of Sufferer's Record, bottom of page.) This description was subsequently accepted by the Ohio Legislature as an accurate and true description of the property as part of the Firelands Records. 10 O.L. 163, Feb 20, 1812.

The jurisdictional title to the entire Western Reserve and the title to the soil of the offshore area adjacent to the Duncan's property, to 42 degrees 2 minutes north latitude, was sold by Connecticut to a group of private investors who held it as tenants in common. Initially, they envisioned forming a state called New Connecticut since they held both jurisdictional title and title to the soil of the tract. Subsequently, reality triumphed and the Connecticut Land Company investors traded the jurisdictional title to the United States in exchange for any U.S. claim to title to the soil of that portion of the Western Reserve outside of the Firelands. This early history was contained in John Marshall's report to Congress in 1800 and was ably and accurately summarized by the trial court. See *Connecticut Western Reserve*, American State Papers, Public Lands, Vol 1, p 83. A certified copy of the deed from the United States to the State of Connecticut in trust for the Firelands and Connecticut Land Company purchasers was included in Taft and Duncan's Motion for Summary Judgment. T.d. 168, Exhibit 1.

The state acknowledges that Congress had the ability to make a pre-statehood grant of lands below the OHWM. *Montana v. United States* (1981), 450 U.S. 544, 551, 101 S.Ct. 1245, 67 L.Ed.2d 493. However, the State fails to recognize that such a transfer of the lands occurred under the Quietening Act and argues that it was not an appropriate consideration in the trial court's summary judgment. The wording of the Quietening Act is quite clear and, as an Act of Congress, is quite appropriate for consideration in a summary judgment.

The metes and bounds description of the "tract of land known as the Western Reserve" extends far into Lake Erie, following the boundary of the initial grant to the Connecticut Colony from the King of England. It includes the islands in Lake Erie situated north of the Firelands. As John Marshall advised Congress, the Firelands grant extended to Lake Erie, but not beyond the shore. The survey of the Firelands, as authorized by the Ohio Legislature shortly after

statehood, refers to “the whole sandbar or beach” when describing the original Cedar Point parcel from which the Duncans’ parcel was later subdivided. T.d. 168, p.10, Exhibit 3B, (p.102 of Firelands Record, last line).

The State asserts that the trial court “listed pages of “facts” that the trial court found “relevant,” which were both disputed and improper for resolution on summary judgment.” (Citing SJ Order, T.d. 183, pp.13-24; 61-62.) The first section of the trial court’s Order to which the state objects, (pp. 13-24) is largely a restatement of history taken from the report by John Marshall to Congress made in 1800 and found in the records of Congress.

The second section of the trial court’s Order to which the State objects (pp.61-62) is a reference to a summary of early Ohio cases presented by Taft and Duncan as well as a reference to The Land Ordinance of 1785 and the Northwest Territory Act of 1787. While the trial court did not agree with our analysis of the significance of the Low Water Mark and case law drawn from contemporaneous Ohio River History, we are satisfied that the court properly harmonized our view of the historic case law with other approaches developed in subsequent cases and consolidated in the statutes over the past 200 years.

No doubt, part of the trial court’s objective in devoting 11 pages of its decision to the historical record was to establish that the record which the State had previously characterized as “Taft and Duncan’s Connecticut land grant theory” was a valid portrayal of the history of the Northwest Territory and the enablement of the birth of the State of Ohio by the owners of the Western Reserve and the Congress of the United States. We concur with the trial court’s reasoning on the importance of history. Indeed, it will be shown below that modern surveyors are required under Ohio law to examine and follow the exact history to which the State of Ohio now objects.

Based on the historical record, as well as the compatible modern interpretations, the trial court's restrained and harmonizing decision is entitled to judicial deference by the appeals court.

Answer to Second Question of Law - The trial court was correct to hold that the Ohio Department of Natural Resources erred in locating the boundary of the territory at 573.4 ft (IGLD1985). Even if, *arguendo*, the boundary were the OHWM, standards of science and law would dictate a lower elevation for the OHWM at the present time and would require that it be reevaluated annually rather than located at a fixed elevation.

As the trial court notes, even if the OHWM were the boundary of the territory, it would not be at 573.4 ft (IGLD1985). (T.d. 183 at 72) Understandably, the trial court exercised judicial restraint in declining to answer how the OHWM should be located. That decision is irrelevant for the determination of the boundary of the "Territory".

The State also fails to understand both the proper determination and the significance of the Ordinary High Water Mark (OHWM). The OHWM is a clearly defined term of Cadastral art. The State also misinterprets the significance and derivation of the elevation 573.4 ft. IGLD as applied to the reality of Lake Erie. During the summer, the waters of Lake Erie are typically more than a foot above the annual average elevation. As the result, the OHWM is, typically many feet lake-ward of the water's edge. T.d. 172, p.23, Exhibit 7.

As the result of their misconceptions, the State attempts to force fit inapplicable case law from western states that was developed long after the Cadastral boundaries in question were established. As a matter of law, the Ohio public trust boundaries must be established in accordance with the instructions from both Congress and the Ohio State Legislature in effect at the time of the first cadastral survey of the area.

The State of Ohio misunderstands which federal government entity has responsibility for the survey and resurvey of the boundaries of the public lands of the United States. This authority rests not with the Army Corps of Engineers, but with the Bureau of Land Management. The

standards used for public land surveys have changed significantly since the first surveys were authorized by Congress in 1785. Under Federal law, any resurvey of a public land boundary must follow the standards in effect at the time of the original survey. See <http://www.blm.gov/wo/st/en/prog/more/cadastralsurvey.html>. See also T.d. 168, p.6., T.d. 172, p.13.

Historically, it appears that ODNR's adoption of the Army Corps of Engineer's administrative OHWM of 573.4 ft IGLD(1985) was an attempt to simplify its permit procedure. Clearly, it was done without regard for history or property law. ODNR ignored that 573.4 ft is an international designation of the High Water Mark which is *seldom* exceeded. In contrast, the Ordinary High Water Mark is the annual *average* of all daily high water levels. See T.d. 172, p.23, Exhibit 7.

The Army Corps of Engineers' selection of a fixed 573.4 ft (IGLD1985) elevation as their internal administrative OHWM was intended for the Corp's internal administrative purposes only. It was never intended as a property boundary. The method and logic behind the determination was clearly explained in the Affidavit of John Konik. T.d. 175, Appendix B. The same document had previously been included by Taft and Duncan in their Motion for Summary Judgment. T.d. 168, Ex 4.

As will be discussed below, the use of the administrative OHWM determination by the Corps has been held to be unreasonable by the Federal courts even when it was used for its intended purpose.

The State cites to Bruce S. Flushman, *Water Boundaries*, (2002) for the proposition that the so-called "vegetation test" should be used for determining the OHWM on the Great Lakes. Assignment of Error, p.35. The State fails to note that Mr. Flushman points out that this is but

one of many possible tests. Flushman notes that each type of test has specific applications, advantages and disadvantages.

Mr. Flushman's book and a similar book, George M. Cole, *Water Boundaries*, (1997), are both excellent treatises on the general issue of locating the OHWM in various contexts. Flushman's book is focused on California where he practices law. Cole's book is focused on Florida where he is a Cadastral surveyor. Both books recognize that there is no single "right answer" to water boundary determinations and neither is focused on the "tideless ocean" conditions of the Great Lakes.

The Duncans agree with the State that the determination of the OHWM (for whatever application) in non-tidewater states should "be implemented to be as much as possible on all fours with that in tidal water states. The question, then, is how to best assure that the ordinary high water mark standard for non-tidal waters is equivalent to the "mean high tide line" standard used in ocean states." State's Assignment of Error at pp34-35.

The trial court found it unnecessary to address the proper OHWM determination method for Lake Erie since it had determined that the OHWM was irrelevant to locating the boundary of the "Territory." We also agree with the trial court on this point and fully understand why it refused to locate the OHWM. However, it remains an important boundary for various regulatory issues such as those derived from the Clean Water Act. While the State advocates using the vegetation test, we disagree.

Assuming *arguendo*, that the "Territory" does extend to the OHWM, its location can be established "on all fours" with the mean high water level in tidal waters. The same OHWM should be applicable to a wide range of regulatory applications. Conveniently, the State has

provided the necessary factual background for an “all fours” determination in its trial court filings. The appropriate analysis is described in the following paragraphs.

The starting point is the tidewater definition of the OHWM. The legally accepted methodology for determining the mean high water level in tidal waters is well established and was defined precisely in the *Borax* case:

In view of the definition of mean high tide, as given by the United States Coast and Geodetic Survey, that “Mean high water at any place is the average height of all the high waters at that place over a considerable period of time,” and the further observation that “from theoretical considerations of an astronomical character” there should be a “periodic variation in the rise of the water above sea level having a period of 18.6 years.”...in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, “an average of 18.6 years should be determined as near as possible.” *Borax Consolidated Ltd v. Los Angeles* 296 U.S. at 26-27.

From the guidance provided in *Borax*, the elements for the “all fours” determination of the OHWM on Lake Erie are found to be as follows:

- First, the OHWM must be based on an average of all daily high water values.
- Second, the OHWM should be averaged over a length of time equal to the “applicable periodic cycle.”
- Third, the OHWM should be updated with the passing of each periodic cycle.
- Fourth, the OHWM must be evaluated from location to location based on the average daily value at each location. A lake-wide value is not appropriate anymore than a single tide table could be applied to the entire Atlantic coast.

Like the oceans, Lake Erie and the other Great Lakes experience daily fluctuations in levels with one or more daily high levels. These daily fluctuations vary from location to location along the shoreline. Unlike the ocean coasts, where predictive “tide tables” are developed to aid mariners and fishermen, there is no equivalent predictive “level table” available for Lake Erie or

the other Great Lakes. The number of high water events in a given day at any given point on the shore is a function of the weather fronts passing through the area. While monthly, or even weekly, predictions of water levels on Lake Erie are impossible, the daily historic record is readily available through NOAA observations at

<http://glakesonline.nos.noaa.gov/geographic.html>.

Since the basic cycle of daily levels on Lake Erie is the annual one, the appropriate period for evaluating the OHWM is 365 days, not the 18.6 years used for the ocean coasts and other tidal waters. While there are very small gravitational variations on the Great Lakes, the majority of the variation is weather driven and follows an annual cycle, not the 18.6 year lunar cycle which controls in tidal areas. T.d. 175 Appendix A

Water levels on Lake Erie are highest in late spring and lowest in early winter. An examination of the State's data at T.d. 175 Appendix A, which has 140 years of data, shows that the year to year variations are essentially random.

Since the annual cycle is non repetitive, the appropriate cycle of reevaluation for an "all fours" equivalent to the mean high tide level on the oceans is annual. While it has been common practice to use much longer historical record periods, the use of such periods is inappropriate since they are unrelated to the controlling cycle as required by *Borax*.

Recently, much has been said about the affects of global warming on lake level trends. Studies have also been undertaken about the effects of river bottom erosion on the relative levels of the individual Great Lakes. In recent years, Lake Huron water levels have declined relative to Lake Erie levels. See State's MSJ, T.d. 166, Appendix H. All of these long term trendline factors argue against using very long term historic data for setting the OHWM. Thus, for compatibility with *Borax*, the daily high levels must be averaged over the duration of the

“periodic variation” and the most appropriate period is 365 days and an annual reevaluation of local determinations is required.

The actual OHWM at each point along the shore would be an issue of fact for the courts to decide. For points at an official IGLD gauge station, actual levels differences from the gauge elevation would be used to relate the OHWM to the IGLD datum. For intermediate points, the elevation would be interpolated following the interpolation methods outlined in the IGLD handbooks. T.d. 175 Appendices D and E.

The above discussion is offered *arguendo* since the trial court avoided it as a matter of judicial restraint. From the data the State presented in T.d. 175, Appendix A, the four square OHWM for 2002 (the last year of their record) was about 571.3 ft IGLD(1985). Appendix A also shows that the OHWM has been as low as 568.5 feet IGLD(1985) in past years. These values, of course, represent lake-wide average values and not actual local values which might vary substantially with climatic anomalies.

The difference between the Army Corps OHWM and the “four square” OHWM is readily explainable from the Army Corps documentation included in the T.d. 175, Appendix B. The key portion of this documentation, a memo dated December 16, 1974, was also included by Taft and Duncan in their MSJ. That memo clearly states that the reason for the selection of the Army Corps OHWM of 572.8 IGLD1955 was “for uniformity and to avoid confusion”. Subsequently, 572.8 IGLD(1955) was converted to 573.4 feet IGLD(1985) as the result of the datum offset required to convert from one IGLD(1955) to IGLD(1985) as explained in the T.d. 175 Appendix E. As explained in the documentation, the change did not move the OHWM relative to any physical location on the shore.

The State misinterprets the significance of the International Great Lakes Datum. The concept is well explained in the State's T.d. 175, Appendices D and E. The IGLD methodology, as clearly explained in T.d. 175, Appendices D and E, is a methodology the scientific community used to develop a uniform reference datum for standardizing gauging points throughout the Great Lakes relative to a single reference point (or datum) located on the St. Lawrence River. The 1955 IGLD study rationalized many disparate datum systems which had, until then, plagued mariners as they traveled from one area to another on the Great Lakes. T.d. 175, Appendix D. The 1985 IGLD study upgraded the gauging technology and made adjustments for small shifts in the earth's surface due to glacial rebound. As is clear from Appendices D and E, neither the 1955 nor the 1985 IGLD study had anything to do with determining the Ordinary High Water Mark of Lake Erie or any other Great Lake. Nothing in either the Appendix D document or the Appendix E document even mentions the Ordinary High Water Mark. T.d. 175, Appendices D and E.

Furthermore, contrary to the State's claim, the 1973 administrative determination of the Army Corps OHWM was not updated in 1985 or at anytime since. The 0.6 foot adjustment made in the OHWM when IGLD1985 replaced IGLD1955 was a simple vertical translation of the datum itself. That is how the Corps was able to integrate the historic levels record back to 1860 which the State presents as its Appendix A. T.d. 175, Appendix A.

Taft and Duncan are not the only ones to dispute the scientific validity of the Army Corps' OHWM. The court in *U.S. v. Marion L. Kincaid Trust* (2006) 463 F.Supp.2d 680 found that the methodology used was not even sufficiently scientific even for administrative purposes.

The Kincaid court opined in some detail and clearly rejected the scientific validity of the Army Corps OHWM determination which underlies the States second question of law.

There is no evidence in this case that the plaintiff conducted any investigation to determine the location of the OHWM on the Kincaids' property. Rather, the attorney for the government readily acknowledged that she relied on an "administrative OHWM," which the Corps set at "581.5 feet IGLD in 1985." Pl.'s Resp. to Defs.' Supp. Br. Ex. 1, Halliday Aff. at ¶ 12. There are no federal regulations that establish, authorize, or condone the establishment of an "administrative" ordinary high water mark. The Michigan legislature has established an OHWM figure for Lake Huron (of which Saginaw Bay is a part) of 579.8 feet IGLD based on the 1955 survey for certain regulatory purposes, *see* Mich. Comp. Laws § 324.32502; but the Michigan courts reject that delineation for the purpose of determining the rights, privileges, obligations, and responsibilities of shoreline landowners. *Glass*, 473 Mich. at 682-85, 703 N.W.2d at 66-69. However, the concept of an administrative OHWM finds no support in federal law. Moreover, it appears that the Corps has chosen the highest level reached by Lake Huron in decades as its selection of an "ordinary" high water mark. That choice violates the traditional notion of the concept of an *ordinary* high water mark, which was intended to account for the day-to-day fluctuations of the levels of oceans, and later lakes and rivers, if not due to tides then as a result of wind and weather. Moreover, the selection of an extraordinarily high lake level as the administrative OHWM alone defies the plain meaning of the term "ordinary." *See* Oxford English Dictionary (2004) (defining the word as "[b]elonging to the regular or usual order or course of things; having a place in a fixed or regulated sequence; occurring in the course of regular custom or practice; normal; customary; usual"). The historic maximum lake level cannot constitute an "ordinary" high water mark as that term is defined by the cases and regulations or the common-sense meaning of the term's constituent words. Based on the language of the regulations and the case law, it appears that land on which non-aquatic vegetation grows is above the OHWM. The Court finds, therefore, that reliance by the government on an administrative OHWM was unreasonable. *U.S. v. Marion L. Kincaid Trust* (2006) 463 F.Supp.2d 680

Once again, these issues were thoroughly addressed by the trial court.

Answer To Third Question Of Law - The Trial Court Was Correct To Hold That The Public Has No Right To Walk Above The Water's Edge Since That Is The Landward Limit Of The Territory. (T.d. 183)

The State cites *Glass v. Goeckel* for the proposition that the public has the right to walk the beach anywhere below the OHWM. Brief of Defendants-Appellants at 20 citing to *Glass v. Goeckel* (2005), 473 Mich. 667, 703 N.W.2d 58. Taft and Duncan briefed the trial court on why *Glass* was, in part, wrongly decided. T.d. 172. p.10. The trial court agreed with Taft and Duncan. T.d. 183, p.67, at ¶236.

The State fails to note that *Glass v. Goeckel* clearly affirms that the littoral owner holds title to the low water mark, making it stand against the State’s position on the First Question of Law. Unfortunately, after the *Glass* court properly held that littoral owners can have title to the low water mark, and that title should rely on the deeds, the majority in *Glass v Goeckel* then came to its bizarre holding that the public has the right to walk the privately held lands up to the line of vegetation.

In discussing it’s Third Question of Law, the State wants the Ohio courts to reject the first undisputed part of the holding in *Glass v. Goeckel* while adopting the wrongly decided second part. Such a proposition is even more bizarre than the *Glass* holding itself.

The following excerpts are from the majority opinion in *Glass*:

“The concepts behind the term “ordinary high water mark” have remained constant since the state first entered the Union up to the present: boundaries on water are dynamic and water levels in the Great Lakes fluctuate. In light of this, the aforementioned factors will serve to identify the ordinary high water mark, but the precise location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact.” *Id.* at 30.

“We must conclude with two caveats. By no means does our public trust doctrine permit *every* use of the trust lands and waters. Rather, this doctrine protects only limited public rights, and it does not create an unlimited public right to access private land below the ordinary high water mark. See *Ryan v Brown*, 18 Mich 196, 209 (1869). The public trust doctrine cannot serve to justify trespass on private property. Finally, any exercise of these traditional public rights remains subject to criminal or civil regulation by the Legislature.” *Id.* at 36.

“We conclude that plaintiff, as a member of the public, may walk the shores of the Great Lakes below the ordinary high water mark. Under longstanding common-law principles, defendants hold private title to their littoral property according to the terms of their deed and subject to the public trust.” *Id.* at 44.

Two members of the *Glass* court issued separate concurring and dissenting opinions. The first, issued by Justice Young was the less critical of the majority opinion.

“However, I join Justice Markman’s opinion with respect to the other issues presented by this appeal. Like Justice Markman, I believe the majority errs by recognizing a right that we have never before recognized—the right to “walk” the private beaches of our Great

Lakes- and by granting public access to private shore land up to an ill-defined and utterly chimerical “ordinary high water mark” as described in the majority opinion.” Id. at 46.

Justice Markman, the second concurring and dissenting judge was far less kind to the analysis and decision of the majority.

“However admirable the majority’s effort, I remain convinced that the “ordinary high water mark” concept on which the majority relies applies only to tidal waters, with their regularly recurring high and low tides.³ The only “water mark” that one can find on the Great Lakes is the water’s edge—viz., the wet portion of the shore over which the lake is presently ebbing and flowing. I believe it is only in this area of wet shoreline that the public may walk.” Id. at 47.

“One of the few things that is clear about the majority’s opinion is that it will lead inevitably to more litigation-- more litigation in an area of the law that, mercifully, has been largely free from such litigation for the past century and a half in our state. In the place of the reasonable harmony that has developed between the public and littoral property owners, there will be litigation. In the place of open beaches, there almost certainly will be a proliferation of fences erected by property owners determined to protect their now uncertain rights.” Id. at 54.

Answer to State of Ohio’s Second Assignment of Error - The trial court was within its authority to consider the historical record and its decision is entitled to judicial deference.

The historic “facts” to which the State apparently objects were not invented by the trial court. These facts were presented to the Congress of the United States by John Marshall more than 200 years ago and are a part of the Congressional record.

The “facts” which Taft and Duncan presented to the trial court below regarding water levels, the IGLD determination and significance, and the methodology by which the Army Corps determined its administrative OHWM, were subsequently reintroduced to the court by the State in their Brief in Opposition as Appendices A, B, C, D, E and F. T.d. 175, Appendices.

The State asserts that it should have been “provided an opportunity for the parties to brief and present proper, authenticated evidence for summary judgment.” Assignment of error, p.48. However, since the State had already reintroduced the exact same evidence as presented by Taft

and Duncan, it is unclear why the State feels entitled to yet another opportunity to refute their own evidence.

V. CONCLUSION.

For all of the reasons outlined above, as well as those previously presented in the courts below, Appellees L. Scot and Darla J. Duncan pray that this court affirm the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing Memorandum on all parties on this 12th day of May, 2008, by mailing copies to their counsel of record addressed as follows:

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Absent a court-order so directing, Intervening Plaintiff-Appellee does not serve copies on counsel of interested non-parties City of Cleveland, Northeast Ohio Regional Sewer District or others, as they are neither parties to the case below nor to this Appeal.

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