

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

STATE OF OHIO EX REL.,)	
ROBERT MERRILL, TRUSTEE, et al.,)	Case No. 04-CV-001080
)	
Plaintiffs-Relators and Named)	Judge Eugene A. Lucci
Class Representatives)	
)	
and)	
)	
HOMER S. TAFT, et al.,)	
)	
Intervening Plaintiffs-Relators,)	
Pro Se,)	
)	
v.)	
)	
STATE OF OHIO, DEPARTMENT)	
OF NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents and)	
Counterclaimants)	
)	
and)	
)	
NATIONAL WILDLIFE FEDERATION,)	
et al.,)	
)	
Intervening Defendants and)	
Counterclaimants.)	

**MOTION OF DEFENDANTS-RESPONDENTS FOR SUMMARY JUDGMENT
AND BRIEF IN SUPPORT**

Defendants-Respondents the State of Ohio, Department of Natural Resources, Sean Logan, Director, Ohio Department of Natural Resources, and the State of Ohio (hereinafter collectively “the State of Ohio” or “the State”), by and through counsel, Attorney General Marc Dann, hereby move this Court for an Order granting summary judgment to the State pursuant to Rule 56(B) and (C) of the Ohio Rules of Civil Procedure because there is no genuine issue of material fact and the State is entitled to judgment as a matter of law.

The reasons and support for this request are more fully set forth in the accompanying Brief in Support which is incorporated into this motion as if fully set forth herein.

Respectfully submitted,

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**BRIEF IN SUPPORT
OF
DEFENDANTS'-RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

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The State of Ohio

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II. QUESTIONS OF LAW

Pursuant to the Court's Order Certifying Class Action on Count One of the First Amended Complaint in this action on June 9, 2006, the Court found that the following questions of law are common to the class:

- (A) What constitutes the furthest landward boundary of the “territory” as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms “southerly shore” in R.C. 1506.10, “waters of Lake Erie” in R.C. 1506.10, “lands presently underlying the waters of Lake Erie” in R.C. 1506.11, “lands formerly underlying the waters of Lake Erie and now artificially filled” in R.C. 1506.11, and “natural shoreline” in RC. 1506.10 and 1506.11.
- (B) If the furthest landward boundary of the “territory” is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such “territory” as proprietor in trust for the people of the State.
- (C) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the “territory.”

This Brief in Support of Defendants-Respondents’ Motion for Summary Judgment answers each of these questions of law, in the order in which they were presented by the Court in its Class Certification Order.

III. SUMMARY OF ARGUMENT

A. THE FURTHEST LANDWARD BOUNDARY OF THE “TERRITORY”

The “territory,” consisting of the navigable waters of Lake Erie within Ohio’s territorial boundaries, the lands beneath those waters, and their contents, was vested in the State of Ohio pursuant to the Equal Footing Doctrine of the U.S. Constitution, upon the admission of Ohio into the Union in 1803. The landward terminus of the “territory” is a question of federal law; the well established answer to which is the Ordinary High Water Mark.

No grant by the United States of upland bordering Lake Erie in the State of Ohio extended lakeward of the Ordinary High Water Mark of Lake Erie, regardless of whether that federal grant was made before or after Ohio’s admission to the Union. No recipient of such a federal grant, nor their subsequent grantees, could, by any words of deed, convey land previously withheld by the United States or previously vested in the State of Ohio.

Since statehood, the State of Ohio has held Ohio’s citizens’ rights and title to Lake Erie as proprietor in trust. Ohio has never granted any title interest in the “territory” (the lands lakeward of the Ordinary High Water Mark of Lake Erie in the State of Ohio) to the upland owners that border it, and has in fact been forbidden from abdicating that title to private persons for private uses. Ohio courts have never recognized that upland owners bordering the “territory” have any title interest in the “territory.”

B. HOW THE LANDWARD BOUNDARY MAY BE LOCATED

The definition and measure of the Ordinary High Water Mark of Lake Erie was set at statehood by federal law. The Ordinary High Water Mark of Lake Erie is an elevation line, which is located currently at 573.4 International Great Lakes Datum 1985. At any moment in time, the water of Lake Erie may be above or below that line upon the shore. The location of that line is further subject to state common law doctrines that govern the ambulatory nature of the boundary (submergence, reliction, erosion, and accretion) and to those exceptions when the boundary does not move (avulsion and artificial fill), which as to any given site is a factual matter to be determined. The State of Ohio, through its Department of Natural Resources, has granted leases for lands below the Ordinary High Water Mark of Lake Erie for improvement and development pursuant to R.C. 1506.11. Those decisions are reasonable and entitled to administrative deference.

C. RESPECTIVE RIGHTS IN THE “TERRITORY”

The rights and responsibilities of the United States, the State of Ohio, the public, and the upland owners that border Lake Erie have been long defined in federal and state law. The hierarchy of those rights is as follows: (1) The United States holds supreme rights to the “territory” by virtue of the navigational servitude, an easement for the purposes of regulating navigation and commerce among the several states, that it reserved for itself at Ohio’s statehood, as well as regulatory jurisdiction under the Commerce Clause of the U.S. Constitution; (2) The State of Ohio holds title to the lands, waters, and contents of the “territory” as proprietor in trust for the people of the state; (3) The public has certain recognized rights of use in the “territory,” and the upland owners bordering Lake Erie have both those public rights of use, as well as the recognized littoral rights of use, in the “territory.” Public rights include navigation, commerce, fishery, and recreation. Littoral rights include wharfing for purposes of navigation, access to navigable waters, and reasonable use of those waters. Both public rights and littoral rights are held subject to regulation and control by the state and federal governments.

IV. LAW AND ARGUMENT

Careful understanding of the boundary between the lands beneath the navigable waters of Lake Erie, title to which is held in trust by the State of Ohio, and the upland property which borders those public trust lands, is essential to this case. Equally important to the resolution of this case is the re-confirmation of the respective public and private rights that exist within the “territory” itself and the hierarchy of those rights.

A. AS A MATTER OF LAW, THE FURTHEST LANDWARD BOUNDARY OF THE “TERRITORY” AS THAT TERM APPEARS IN R.C. 1506.10 AND 1506.11, IS THE ORDINARY HIGH WATER MARK, AND THE STATE OF OHIO HOLDS TITLE TO ALL SUCH “TERRITORY” AS PROPRIETOR IN TRUST FOR THE PEOPLE OF THE STATE.

Lands underlying navigable waters have, since the inception of western civilization, “been considered an essential attribute of sovereignty.” This is the principle which underlies the public trust doctrine. *Idaho v. Coeur d’Alene Tribe* (1997), 521 U.S. 261, 283 - 284.

“The principle arises from ancient doctrines.”¹ Id. In this nation it is held that:

When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Shively v. Bowlby (1894), 152 U.S. 1, 16. In this nation, for the first time in all of history, the sovereignty to which lands beneath navigable waters are considered an essential attribute, is in the people. While their servant, the State, is merely the trustee.

1. The landward boundary of the “lands beneath navigable waters” of Lake Erie granted to the State of Ohio at statehood is a question of federal law.

- a. Pursuant to the holdings of the United States Supreme Court under the Equal Footing Doctrine, and as reaffirmed by the United States Congress in the Submerged Lands Act, the states were granted title in trust to all lands below the Ordinary High Water Mark of non-tidal navigable bodies of water within their territorial boundaries upon their admission to the Union.**

“The issue before us is not what rights the State has accorded private [land] owners in lands which the State holds as sovereign; but, rather, how far the State’s sovereign right extends under the equal-footing doctrine and the Submerged Lands Act.” *Oregon ex rel. State Land Bd.*

¹ Most scholars believe that this principle originated with the Natural Law philosophers of ancient Greece, and was later codified a number of times in the ancient Roman Civil Law. Perhaps the most famous codification is this made during the rule of the Emperor Justinian:

By the laws of nature these things are common to all mankind; the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore.

Institutes of Justinian, Lib. II, Tit. I, @ 2 (T. Cooper transl. 2d ed. 1841).

Much of the Roman civil law was incorporated into the English common law, inclusive of the public trust doctrine. The Ebb and Flow of the Public Trust Doctrine (2000), 48 RI Bar Jnl. 5. Over the centuries, the English common law held “that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King” and “that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark.” *Shively*, supra, at 11-13. “[U]pon the settlement of the colonies like rights passed to the grantee in the royal charters, in trust for the communities to be established.” *State v. Cleveland & Pittsburgh Railroad Company* (1916), 94 Ohio St. 61, 72, citing *Shively*, supra.

v. Corvallis Sand & Gravel Co. (1977), 429 U.S. 363, 369. In re-affirming and declaring the upper boundary of Lake Erie in the State of Ohio, it must first be determined where it was originally set at statehood under federal law. All further analysis stems from there.

The United States Supreme Court has instructed the nation's courts that the "seminal case in American public trust jurisprudence is *Shively v. Bowlby* (1894), 152 U.S. 1." *Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469, 473. The Court in *Shively* held that the United States held title in trust to the shores and lands of navigable waters in the territories, reserved to future states by the Constitution.

The shores² of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones.

Shively, supra, at 36. This is the articulation of what is known as the Equal Footing Doctrine. Accordingly, it has been held that "the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. *Corvallis Sand & Gravel Co.*, supra, at 372 - 374.

Both the United States Supreme Court, in subsequent decisions, and the United States Congress, pursuant to the Submerged Lands Act of 1953 (hereinafter "the Submerged Lands Act"), 43 U.S.C. 1301-1315, have reaffirmed what each of the coastal states received upon statehood under the U.S. Constitution. Both the federal judicial and legislative branches have made a distinction in the landward boundary of the lands originally granted to a state depending upon whether that state's boundary is adjacent to tidal navigable waters or non-tidal navigable waters.

In the ocean states, bounded by tidal waters, "the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide" defined as the line of the "mean high tide." *Phillips Petroleum Co.*, supra, at 478-479; *Borax*, supra, at 26-27; 43 U.S.C. 1301. However, in those states bounding non-tidal navigable waters, such as the Great Lakes, the original grant to the state has been held to extend only to the ordinary high water mark, as that line denotes the common law boundary for navigable waters upon which the

² The common law further defined "the shore" as "that ground that is between the ordinary high water and low water mark," as "all land below that line is more often than not covered at high water." *Shively*, supra, at 11-13; *Borax, Ltd. v. Los Angeles* (1935), 296 U.S. 10, 25.

state's "jurisdiction was made to depend ... and not upon the ebb and flow of the tide." *Phillips Petroleum Co.*, supra, at 478-479.

The United States Congress, in the Submerged Lands Act, expressly confirmed to the states, "the title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters" along with "the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law." 43 U.S.C. 1311(a)(1) and (2). The Submerged Lands Act reiterated the law as it had been previously articulated by the U.S. Supreme Court in its definition of "lands beneath navigable waters" for both tidal (ocean) states and non-tidal (inland, fresh water) coastal states. 43 U.S.C. 1301(a)(1), (2) and (3). This reaffirmation of "lands beneath navigable waters" for non-tidal states in the Submerged Lands Act is as follows:

(a) The term "lands beneath navigable waters" means--

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and water thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined.

43 U.S.C.A. 1301(a)(1) and (3) (Emphasis added).

- b. The federal government cannot make any grant of title to the lands below the Ordinary High Water Mark after a state's admission to the Union, and did not make such a grant regarding Lake Erie prior to Ohio's statehood.**

The states hold title in trust to all lands beneath navigable waters within their territorial boundaries. *Phillips Petroleum Co.*, supra, at 476. The Supreme Court has held that due to the nature of a state's interest in the lands beneath navigable waters received under the Equal Footing Doctrine, the United States does not have the power to convey any title to those lands after the state is admitted to the union. As explained by the high Court:

"First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules

and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy....”

In so holding, the Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating.

Thus under Pollard’s Lessee the State’s title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in Pollard’s Lessee has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned.

Corvallis Sand & Gravel Co., supra, at 373-374 referencing *Pollard’s Lessee v. Hagan* (1845), 3 How. 212; See also *Borax*, supra (recognizing that a patent purporting to convey lands beneath navigable waters after statehood would be invalid, as the federal government has no power to convey lands which have become the state’s under the Equal Footing Doctrine). Therefore, if the United States issued patents to Plaintiffs’ predecessors in title that purported to convey any title to the lands beneath the navigable waters of Lake Erie after Ohio became a state, such conveyance was void as beyond the power of the federal government.

As for any grant of upland property bordering Lake Erie prior to Ohio’s statehood, the U.S. Supreme Court has held that the question as to the boundary between upland property conveyed by a federal grant prior to the organization of a state and the navigable body of water it borders, is a question of federal law. *Borax*, supra, at 22; see also *Corvallis Sand & Gravel Co.*, supra; *Phillips Petroleum Co.*, supra. On this federal question, the Court found the following:

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands³ to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

³ Uplands or upland property is defined as real property bordering a body of water. Upland property may be referred to as either littoral or riparian depending upon the nature of the body of water which the upland borders. Littoral property is understood in the State of Ohio to be land which borders a navigable ocean, sea, lake, or a bay of any of these water bodies, while riparian land is generally regarded as that land adjacent to navigable rivers and streams. The owners of upland property are universally called upland owners, or littoral owners or riparian owners as the case may be. See *Thomas v. Sanders* (1979), 65 Ohio App.2d 5; 1993 Op. Att’y Gen. No. 93-025.

Shively, supra, at 58.

Congress has a “long held and unyielding policy of never permitting the sale or settlement of land under navigable waters under the general land laws.” *Utah Div. of State Lands v. United States* (1987), 482 U.S. 193, 204. Rather, the Supreme Court has “consistently acknowledged congressional policy to dispose of sovereign lands only in the most unusual circumstances” described as “exceptional instances when impelled to particular disposals by some international duty or public exigency.” *Utah Div. of State Lands*, supra, at 197 quoting *United States v. Holt State Bank* (1926), 270 U.S. 49, 55.

While in some extraordinary circumstances the United States could withhold lands beneath navigable waters from the future State to be created, it has done so in only a very few instances. For this reason the Supreme Court has consistently instructed that “[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption against defeat of a State’s title,” and “will not infer an intent to defeat a future State’s title to inland submerged lands ‘unless the intention was definitely declared or otherwise made very plain.’” *United States v. Alaska* (1997), 521 U.S. 1, 34 quoting *Montana v. United States* (1981), 450 U.S. 544, 552; *Utah Div. of State Lands*, supra, at 197-198; and *Holt State Bank*, supra, at 55; See also *Alaska v. United States*, (2005), 545 U.S. 75, 102. The United States never manifested any such intent with regard to Lake Erie prior to Ohio’s statehood.

As established above, the State of Ohio received title in trust to all lands below the Ordinary High Water Mark of Lake Erie upon its admission to the Union. Conversely, Plaintiffs’ predecessors in title were not granted any title to the lands beneath the navigable waters of Lake Erie by virtue of a federal grant before Ohio’s admission to the Union, and could not have been granted any title to those lands by a federal grant after Ohio’s statehood. Therefore, at the time of statehood, the landward boundary of the “territory” was established as a matter of federal law at the universal boundary between the State of Ohio’s Lake Erie public trust lands and the upland property that bordered them – the Ordinary High Water Mark.

Yet Plaintiffs assert in this action that their predecessors in title were granted and that they currently possess, “fee simple” absolute title to lands below the Ordinary High Water Mark of Lake Erie, and that such title extends at least to wherever the water is at any given moment.⁴

⁴ Plaintiffs claim in their First Amended Complaint that they “own fee title” to the lands of Lake Erie below its ordinary high water mark by virtue of “their original patent” and that they are “entitled to an order of this Court declaring that . . . Plaintiffs own fee title to the lands located

As demonstrated in this section, no such title was granted to them by the federal government. Therefore, the only way Plaintiffs could possess such a title is if the State of Ohio had abdicated its title to any of its sovereign lands below the Ordinary High Water Mark of Lake Erie by an express conveyance of all of the State's rights, title and interest to Plaintiffs' predecessors in title after statehood. This is a question of state law. Under the law of Ohio an abdication of the public trust is not allowed and has never occurred.

2. **The Ordinary High Water Mark is the landward boundary of the “lands beneath navigable waters” of Lake Erie granted to the State of Ohio at statehood. Thereafter, any title recognized or conveyed by the State of Ohio in the lands beneath that boundary to the owners of the adjacent uplands is a question of state law.**

The U.S. Supreme Court has held that federal law is to be used “solely for the purpose of fixing the boundaries ... acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State.” *Corvallis Sand & Gravel Co.*, supra, at 374. As was held in the landmark public trust case of *Shively*:

Grants by Congress of land bordering navigable waters leave the question of the use of the shores by the owners of uplands to the sovereign control of each State ... The title and rights of riparian or littoral owners in the soil below high water mark are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.

Shively, supra, at 58.

between OHW and the actual legal boundary of their properties, as defined by ... their original patent.” They also claim to “own fee title” to the lands of Lake Erie below its ordinary high water mark by virtue of “Ohio law” and “their deeds” and that they are “entitled to an order of this Court declaring that ... Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by ... Ohio law” and “their deeds.”

It should be noted that in recent depositions some of the Named and Intervening Plaintiffs asserted that Plaintiffs hold fee simple absolute title (including mineral rights and oil and gas rights) to the lands of Lake Erie up to the 42nd Parallel (roughly equivalent to the International Boundary Line between the United States and Canada) and that the State of Ohio has no such interest in any of the submerged lands adjacent to what was known as the Connecticut Western Reserve. The Western Reserve encompassed approximately six of the eight counties that currently border Lake Erie in the State of Ohio, the two exceptions being Lucas and Ottawa Counties. These claims, if true, would mean that almost 80% of the lands underlying Lake Erie within the State of Ohio would not belong to the State, but would belong to the upland owners that border the Lake. However, these claims have not been made in pleadings or supported by facts or legal arguments by Class Counsel.

“It is equally well settled that, in the absence of any local statute or usage, a grant of lands by the State does not pass title to submerged lands below high water mark; and that this principle also applies to the Great Lakes.” *Illinois Central Railroad v. Chicago* (1900), 176 U.S. 646, 660 citing *Pollard’s Lessee v. Hagan* (1845), 3 How. 212; *Goodtitle v. Kibbe* (1850), 50 U.S. 47, 19 How. 471; *United States v. Pacheco* (1865), 2 Wall. 587; *Weber v. Harbor Commissioners* (1873), 18 Wall. 57; *Hardin v. Jordan* (1891), 140 U.S. 371, 381-382; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387; *Shively v. Bowlby* (1894), 152 U.S. 1, 13; *Seaman v. Smith* (1860), 24 Ill. 521; *People v. Kirk* (1896), 162 Ill. 138, 146; *Revell v. The People* (1898), 177 Ill. 468, 479.

Ohio is a classic high water mark state with regard to its Great Lake, and it has never claimed ownership and dominion over anything more or anything less than what was granted to it at statehood in 1803. Ohio has never granted any title beyond the common law boundary of Lake Erie to the littoral property owners who border the Lake. The State of Ohio has recognized certain littoral rights⁵ which are rights of use that upland property owners may exercise in the State’s “territory” of Lake Erie, but it has never conveyed, and in fact has been prohibited from conveying, any portion of its trust property to private interests.

a. The State of Ohio has not made any grant of title to the lands below the Ordinary High Water Mark of Lake Erie to the upland owners that border the Lake.

In 1878, the Ohio Supreme Court decided its first case regarding the extent of an upland owner’s rights in Lake Erie and Sandusky Bay in *Sloan v. Biemiller* (1878), 34 Ohio St. 492. The United States Supreme Court’s decision in *Shively*, holding that in this country all waters which were navigable in fact were navigable in law regardless of whether they possessed the ebb and flow of the tide, would not be issued by the U.S. Supreme Court for another 16 years. Yet without the benefit of the U.S. Supreme Court’s guidance, the Ohio Supreme Court applied the very common law principles the U.S. Supreme Court would subsequently announce in *Shively*.

Specifically, in *Sloan*, the Ohio Supreme Court held that the rule previously found applicable by Ohio courts regarding the title of riparian owners to the lands of navigable rivers and streams (i.e. title to the center of the bed) ***was not*** applicable to littoral owners of upland adjacent to Lake Erie:

⁵ The littoral rights of upland owners are set forth in Section C of this Brief in Support – in response to the third question of law certified by the Court.

The question before us is, whether the rule there laid down, as applicable to navigable rivers, applies to the owners of land bordering on Lake Erie and Sandusky Bay. In our opinion, it clearly does not.

Sloan, supra, at 512.

Sloan did not adjudicate the public trust boundary of Lake Erie. Its holding was limited to the public right of fishery and held that upland owners do not possess exclusive private fishing rights in the Lake by virtue of their ownership of the uplands that border it. However, during the course of the opinion, the Court quoted the case of *Seaman v. Smith*, which was the only case cited in the Court's opinion that offered a determination as to the proper boundary of uplands bordering a Great Lake, and stated as follows:

In the opinion it is said: "A grant giving the ocean or a bay as the boundary, by the common law, carries it down to ordinary high-water mark. *Costelyou v. Brundt*, 2 J. R. 357 ... The principle, however, which requires that the usual high-water mark is the boundary on the sea, and not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water has no appreciable tides ..."

We are not required in this case to consider any question in regard to the right of a riparian owner to build out beyond his strict boundary line.

Sloan, supra, at 512-513, citing with approval to *Seaman v. Smith*, 24 Ill. 521 (emphasis added).

The landmark public trust doctrine decision with regard to the respective rights of the State, the public, and littoral owners to Lake Erie was issued by the Ohio Supreme Court in 1916 in *State v. Cleveland & Pittsburgh Railroad Company* (1916), 94 Ohio St. 61. The Court began its analysis by incorporating the holding of the U.S. Supreme Court in *Shively*, that title and dominion of the shores and lands of navigable waters had been granted to the states upon entry to the union and that, thereafter, "the title and rights of riparian or littoral proprietors in the soil below the ordinary high water mark ... are governed by the laws of the several states." *Cleveland & P. R. Co.*, supra, at 72, citing to *Shively*, supra. The Court stated in reference to the *Shively* decision:

The Court held that the question of the use of the shores by the owners of uplands was left to the sovereign control of each state, subject only to the rights vested by the constitution in the United States.

Cleveland & P. R. Co., supra, at 72 (emphasis added). The Court then proceeded to determine what use of the shore by upland owners could be permitted under Ohio law.

The Court noted that it had received “able and exhaustive briefs” which “disclose a wide diversity of view as to the public and private rights in subaqueous land below the ordinary high water mark of public waters.” *Cleveland & P. R. Co.*, supra, at 68 (emphasis added). The Court noted that “although under the common law of England such a structure [a wharf] is regarded as purpresture or an unlawful encroachment upon the rights of the sovereign, and subject to removal at his pleasure,” some states recognized a “right of access” which included “the construction of a pier” and which could be exercised by upland owners “beyond the high water mark ... subject to such general rules as congress or the state legislature may prescribe.” *Cleveland & P. R. Co.*, supra, at 75-76.

In the final paragraph of the Ohio Supreme Court’s decision, the Court calls upon the General Assembly to enact legislation in conformance with its opinion stating, “It is presumed that the legislature, in the enactment of legislation on the subject, will appropriately provide for the performance by the state of its duty as trustee for the purposes stated.” *Cleveland & P. R. Co.*, supra, at 84.

The case of *Cleveland & P. R. Co.* was decided on February 29, 1916. On March 20, 1917, the General Assembly passed the Fleming Act, which became effective July 2, 1917. The Act was originally found in Sections 3699-a to 3699-9 of the General Code, and the first section read as follows:

It is hereby declared that the waters of Lake Erie within the boundaries of the state together with the soil beneath and their contents do now and have always, since the organization of the state of Ohio, belonged to the state of Ohio as proprietor in trust for the people of the state of Ohio, subject to the powers of the United States government, the public rights of navigation and fishery and further subject only to the right of littoral owners while said waters remain in their natural state to make reasonable use of the waters in front of or flowing past their lands, and the rights and liabilities of littoral owners while said waters remain in their natural state of accretion, erosion and avulsion. Any artificial encroachments by public or private littoral owners, whether in the form of wharves, piers, fills or otherwise beyond the natural shore line of said waters not expressly authorized by the General Assembly, acting within its powers, shall not be considered as having prejudiced the rights of the public in such domain. Nothing herein contained shall be held to limit the right of the state to control, improve or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

G.C. 3699-a.

The second, and only other public trust doctrine case to be decided by the Ohio Supreme Court was the case of *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303. In its decision,

the Court provided a thorough discussion of the “natural shoreline,” the effects of artificial fill placed by upland property owners upon the State’s public trust lands, and a constitutional review of the Fleming Act line by line.

In *State ex rel. Squire*, the Ohio Supreme Court stated at the outset of its decision, that it did not “deem it necessary” to “analyze or discuss the vast number of cases cited” in the “voluminous briefs” which had been filed with the Court, because the Court had already determined the public and private rights in Lake Erie. The Court then reaffirmed its holding in *Cleveland & P. R. Co.* in its entirety.

Thereafter, the Court turned to an analysis of the Fleming Act, beginning with Section 3699a, reprinted in its entirety above, with regard to which the Court specifically held the following:

It is obvious that this section does not change the concept of the declaration of the state’s title as found in the *C. & P. case supra*. The littoral owners of the upland have no title beyond the natural shoreline; they have only the right of access and wharfing out to navigable waters. That right is a property right although not a tangible one and is subject to the superior right of the state as owner of the title in trust for the people of the state, and of the United States with the authority accruing to it by virtue of its exclusive power over interstate commerce.

State ex rel. Squire, supra, at 336-337. Accordingly, the Court held that “the passage of the Fleming Act in 1917 merely codified the existing law in this state with respect to a particular body of water, i.e., Lake Erie.” *State ex rel. Squire*, supra, at 325. “The Fleming Act did not purport to change the common law with regard to navigable waters in this state.” *Thomas*, supra, at 9.

b. The Fleming Act⁶ by its express language re-affirms that the “territory” conveyed to the State of Ohio at statehood is what the State continues to hold in trust for its people.

The Fleming Act expressly re-affirmed that the lands, waters, and contents of Lake Erie composing the “territory” are those that were granted to the State at statehood. The statute

⁶ The declaratory section of the Fleming Act containing the terms at issue, along with the Act’s other leasing/management sections, have been recodified and renumbered in the years since 1917. G.C. 3699-a. was recodified as R.C. 123.03 in 1953 and, subsequently, renumbered as R.C. 1506.10 in 1989. In its current location in the Revised Code, “the provisions of R.C. 1506.10 are substantially similar to the provisions of former G.C. 3699-a.” 2000 Op. Att’y Gen. No. 2000-047 at n4.

speaks of the waters and lands of Lake Erie that “do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state.” R.C. 1506.10 (emphasis added). This language clearly asserts, codifies and reaffirms that what belongs to the State of Ohio is what it received at statehood; which is to say, what the federal government held for it and conveyed to it under the Equal Footing Doctrine.

The words of the statute, such as “territory,” “southerly shore,” and the “soil beneath” the “waters of Lake Erie” are all simply different terms used to describe the same thing – what Ohio received upon statehood to hold in trust for its people. The term “shore,” for instance, was regularly used to embrace the area between high and low water marks in the common law prior to the passage of the Act. This is exactly the area of lands in dispute in this case, and the lands that the Fleming Act expressly confirmed “do now belong and have always...belonged to the state.” G.C. 3699-a currently R.C. 1506.10. At the time of the enactment of the Fleming Act, the United States Supreme Court had consistently used the term “shore,” in explaining what title the states received at statehood, to mean the land extending from the mean high-tide line down to the mean low-tide line on tidal navigable waters, and from the ordinary high water mark down to the ordinary low water mark on non-tidal navigable waters such as the Great Lakes.⁷ By 1917,

⁷ Pollard’s Lessee v. Hagan (1845), 44 U.S. 212, 230: “First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.”

Barney v. Keokuk (1876), 94 U.S. 324, 336: “It appears to be the settled law of that State [Iowa] that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State. This is also the common law with regard to navigable waters....”

Hardin v. Jordan (1891), 140 U.S. 371, 381: “With regard to grants of the government for lands bordering on tide-water, it has been distinctly settled that they only extend to high-water mark, and that title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state...”

Illinois Central R. Co. v. Illinois (1892), 146 U.S. 387, 435: citing Pollard’s Lessee v. Hagan above, “The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes.”

Shively v. Bowlby (1894), 152 U.S. 1, 11-13: Defining “the shore” as “that ground that is between the ordinary high water and low water mark,” as “all land below that line is more often than not covered at high water.”

legal scholars and legislative drafters in Ohio and elsewhere were well aware of what the U.S. Supreme Court had determined the term “shore” to mean.

Thus, there is no doubt that the Ohio General Assembly meant to use the word “shore” as it previously had been defined at common law, in describing the lands that have always belonged to the State since statehood as extending from the “southerly shore of Lake Erie [northward] to the international boundary.” The Fleming Act’s description of the “territory” extending from the “shoreline” / “southerly shore” could mean nothing more or nothing less than what had been held by the State “since the organization of the state of Ohio” – the lands and navigable waters of Lake Erie up to the Ordinary High Water Mark.

Just as clear are the references to the words “natural” and “artificial” in the Act to further describe the landward boundary of the “territory,” such as “natural shoreline” and “lands formerly underlying the waters of Lake Erie and now artificially filled.” R.C. 1506.10 and 1506.11. The Fleming Act was passed in 1917, one year after and in response to the Ohio Supreme Court’s request at the end of its opinion in *State v. Cleveland & P.R. Co.* in 1916, that the Legislature pass legislation to regulate and manage Lake Erie. The “natural” and “artificial” references served to codify the previously established common law pronounced by the Ohio Supreme Court in *State v. Cleveland & P.R. Co.* with regard to artificial fill.

With these principles in mind, it is clear that the Fleming Act codified and re-affirmed the existing Ordinary High Water Mark common law boundary of the “territory.” Construing the plain language of the Fleming Act in accordance with the law, principles and definitions existing at the time, as well as the subsequent interpretations of the Act by Ohio courts, the terms “natural shoreline,” “southerly shore,” etc., served to codify the common law legal boundary as it had existed under the Equal Footing Doctrine since statehood – the Ordinary High Water Mark.

- c. **The State of Ohio has never abdicated, and is forbidden from abdicating, its title in trust to the lands below the Ordinary High Water Mark of Lake Erie to the upland owners that border the Lake. The Fleming Act did not abdicate, and did not even purport to convey any title interest in the “territory” to the upland owners that border it.**

Not only has the State of Ohio never granted any title in the lands of Lake Erie to the littoral property owners that border it, the State cannot entirely abdicate or abandon any portion of that property:

If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use,

a clearer view can be had. An individual may abandon his private property, but a public trustee cannot abandon public property.

Cleveland & P. R. Co., supra, at 77. In support of its reasoning that the State of Ohio, as trustee, can not abandon, or abdicate, any portion of the public trust lands granted to it upon statehood, the Ohio Supreme Court adopted the U.S. Supreme Court's decision in the landmark Great Lakes public trust doctrine case of *Illinois Central R. Co. v. Illinois* (1892), 146 U.S. 387. *Illinois Central R. Co.* has been described by the U.S. Supreme Court in more recent times as follows:

The Court held that the Illinois Legislature did not have the authority to vest the State's right and title to a portion of the navigable waters of Lake Michigan in a private party even though a proviso in the grant declared that it did not authorize obstructions to the harbor, impairment of the public right of navigation, or exemption of the private party from any act regulating rates of wharfage and dockage to be charged in the harbor. **An attempted transfer was beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual.**

Coeur d'Alene Tribe, supra, at 285 (emphasis added).

Following the precedent set in *Illinois Central R. Co.*, the Ohio Supreme Court held that State of Ohio cannot abdicate its trust over the lands and navigable waters of Lake Erie, stating in relevant part:

In *Illinois Central R. Co. v. Illinois*, supra it is held by the United States supreme court that the trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property...

In the opinion Mr. Justice Field says, at page 453: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties ... than it can abdicate its police powers in the administration of government and the preservation of the peace. * * * So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State" ... It is further said, at page 455: "The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated."

Cleveland & P. R. Co., supra, at 80-82.

This admonition was expressly re-affirmed by the Ohio Supreme Court in its most recent public trust decision:

The ownership of the waters of Lake Erie and of the land under them within the state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot by acquiescence or otherwise abandon the trust property or permit a diversion of it to private uses different from the object for which the trust was created. The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate.

State ex rel. Squire, supra, at 323. As a result, when the Ohio Supreme Court later found that there was one provision of the original Fleming Act that did not reflect the common law, in that the provision called for the outright conveyance of certain filled and submerged lands in Cleveland Harbor to private entities – the very abdication of the public trust lands which had been previously found invalid by both the U.S. and Ohio Supreme Courts – that provision of the statute was struck down as unconstitutional by the Ohio Supreme Court. *State ex rel. Squire*, supra; *Cleveland & P. R. Co.*, supra, at 80-82; see also *Illinois Central R. Co.*, supra.

Not surprisingly, the law of *Illinois Central R. Co.* has been adopted by the Supreme Court of every Great Lakes State. Most recently and unanimously by the Michigan Supreme Court in what has come to be known as “the beach walking case” – *Glass v. Goeckel* (2005), 473 Mich. 667; 703 N.W.2d 58.

Courts throughout the country hold that the lands beneath navigable waters held by a state in public trust may be granted, if at all, only to a public agency or only for a public use such as the development of a commercial wharf that promotes the public interest in waterborne commerce. The California Constitution, for example, prohibits any grant or sale of tidelands within two miles of any city, county, or town, to private persons, partnerships or corporations (Art. XV, § 3). In Illinois, conveyances of state trust land to private entities on Lake Michigan are prohibited. *People, ex rel. Scott v. Chicago Park Dist.* (1976), 66 Ill.2d 65 (proposed grant to U.S. Steel); *Lake Michigan Federation v. U.S. Army Corps of Engineers* (1990), 742 F.Supp. 441 (conveyance of submerged land to Loyola University to construct a landfill); see generally *Illinois Central R. Co.*, supra. In states where grants to private entities are permitted in order to promote needed public uses such as wharves for commercial navigation, the land remains subject to the state’s public trust if such public uses are ever abandoned. *State of Vermont v. Central Vermont Rwy., Inc.* (1989), 153 Vt. 337; *Boston Waterfront Dev. Corp. v. Commonwealth* (1979), 378 Mass. 629, 649.

The only known instance in which the State of Ohio ever attempted to “grant title” to the lands and waters of Lake Erie, other than the failed conveyance by the Ohio legislature to private

railroad companies which was struck down as unconstitutional by the Ohio Supreme Court in *State ex rel. Squire*, was a conveyance in 1967 to the Toledo-Lucas County Port Authority. It must be noted that this transfer, like those in the cases from other states above, was to a public entity for public purposes, not to a private person for private purposes. Further, this conveyance was never the subject of a decision by any Ohio Court. However, it was the subject of a recent Opinion of the Ohio Attorney General. 2000 Op. Att’y Gen. No. 2000-047.

The Opinion found that in order to for the State to convey any title interest in its public trust lands, the State must first meet a three-prong test. “Under the public trust doctrine, any such conveyance must be authorized by the legislature through specific legislation, must advance public trust purposes, and must not substantially impair the public’s use of the remaining public trust lands or waters.” 2000 Op. Att’y Gen. No. 2000-047 at 11, citing Putting the Public Trust Doctrine to Work (2nd Edition, 1997), pgs. 231-35, 277.

The Opinion further found that, even if the three prong test is met, the title conveyed would not be “fee simple absolute,” but would remain subject to the State’s dominant interest as trustee and the public’s rights of use. Specifically, the Opinion noted that in states that had made such conveyances, it has been held that the title to public trust lands can be separated into two titles – “jus publicum” and “jus privatum” – such that a conveyance does not necessarily result in an unlawful abdication of the public trust:

Public trust land is vested with two titles, one dominant and the other subservient, a concept necessary to understand in order to apply the Public Trust Doctrine. The dominant title is the jus publicum, simply described as the bundle of trust rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes. The subservient title is the jus privatum, or the private proprietary rights in the use and possession of trust lands. The distinction between the two titles is often cited by the courts when they define a State’s authority to convey public trust land to private ownership, and when describing the rights of the public remaining in public trust land that has been so conveyed.

2000 Op. Att’y Gen. No. 2000-047 at 10.

Accordingly, the Opinion found that, even if the three-prong test is met, the “jus privatum” title remains subservient to the “jus publicum” title which must continue to be held by the State as the dominant title. 2000 Op. Att’y Gen. No. 2000-047 at 12-13. A State can never convey the “jus publicum” title to its public trust lands, not even to a public entity for a public purpose. 2000 Op. Att’y Gen. No. 2000-047; see also *Illinois Central R. Co.*, supra.

The Fleming Act fails to meet any one of the three prongs of the test necessary to be construed as an attempted conveyance. The Fleming Act did not even purport to convey any interest in Lake Erie, let alone use the definite declaration or plain language necessary to overcome the presumption against the State's conveyance. Just as the United States never manifested any such intent with regard to Lake Erie prior to Ohio's statehood, the State of Ohio never did so in the Fleming Act after its organization as a state. *United States v. Alaska*, supra, at 34; *Montana v. United States*, supra, at 552; *Utah Div. of State Lands*, supra, at 197-198; *Holt State Bank*, supra, at 55; *Alaska v. United States*, supra, at 102. Further, even if the Fleming Act had conveyed a title interest to the upland owners that border Lake Erie (it did not, but if it had), that title would not have been the "fee simple absolute" desired by Plaintiffs, but at most a qualified title held subject to regulation and control by the State and use by the public.

3. **Plaintiffs cannot claim title to the lands below the Ordinary High Water Mark of Lake Erie on the basis of grant language from post-federal grantees or the legal descriptions in their current deeds.**

Plaintiffs claim to own lands below the Ordinary High Water Mark of Lake Erie in fee simple partly on the basis that their title descended from a federal grant. However, as established above, federal law provides that the title of upland owners under a federal grant "extends only to ordinary high water mark, and the shore between high and low water mark, as well as the bed ... belongs to the State." *Shively*, supra, at 44. No federal grantee of upland bordering the lands and waters of Lake Erie could have received valid title from the federal government for any lands lakeward of the Ordinary High Water Mark of Lake Erie, and Plaintiffs' reliance on such grants is in error.

The only way an upland property owner bordering the lands and navigable waters of Lake Erie within the territorial boundaries of the State of Ohio could have attained any rights or title lakeward of the ordinary high water mark was if the State of Ohio, subsequent to statehood, had expressly granted such rights or title. Again, as demonstrated above, the State of Ohio has never made such a grant. Since the ultimate predecessor in title to any deed in the State of Ohio to upland property could have never received any title lakeward of the ordinary high water mark, likewise the current holder of an upland title cannot sustain such a claim under federal or state law. A holder of title can never succeed to more of an interest than his predecessor in title held.

How is it then that Plaintiffs have come to assume that they own these lands in fee simple? The answer is simple. The uncontroverted facts are that some of the Plaintiffs'

predecessors in title changed the language that referenced the lakeward boundary in the legal descriptions of the deeds for their upland property, such that the deeds now read “to the low water mark of Lake Erie” or words of similar import. See Appendix A: Affidavit of Linda M. Green, Esq., Vice President and Northeast Ohio Commercial Manager, Chicago Title Insurance Company. This language change occurred subsequent to Ohio’s statehood and was not the result of a grant by the State of Ohio. See Appendix A. This change in deed language was a false promise of title made by one private owner to another, claiming that they owned land that they did not and could not own because that land had never been conveyed to them by the United States or the State of Ohio.

One cannot gain title simply by changing the legal description in their deed such that they now claim to own more land than they did before. The land claimed must be granted to them. They cannot take it from another by the stroke of a pen. Plaintiffs and Class Members may have a claim with respect to their title, but it is not against the State of Ohio. It is against the persons in their respective chains of title who falsely claimed that they owned and could convey to others lands that neither the United States nor the State of Ohio ever granted to them. There is an apt legal maxim that protects against this deed drafting chicanery:

Jus publicum privatorum pactis mutari non potest

“A public law or right cannot be altered by the agreements of private persons.”

The law of this State and this nation holds that the boundary of a navigable body of water is the Ordinary High Water Mark. The law desired by Plaintiffs is not the law of the State of Ohio or the United States. The law desired by Plaintiffs would divest the sovereign people of Ohio of that which their public servant the State has been entrusted to hold faithfully for them. Plaintiffs’ request that this Court disregard or change the existing law must be rejected, and the State is entitled to Summary Judgment on the First Question of Law certified by the Court.

B. THE FURTHEST LANDWARD BOUNDARY OF THE “TERRITORY” IS THE ORDINARY HIGH WATER MARK AS A MATTER OF LAW, AND THAT LINE MAY BE LOCATED AT THE PRESENT TIME USING THE ELEVATION OF 573.4 FEET IGLD (1985).

1. **The appropriate methodology for locating the Ordinary High Water Mark on the Great Lakes is an unsettled question of federal law. Such a methodology must parallel the method established for locating the landward boundary for tidal navigable waters in accordance with the Equal Footing Doctrine. The use of the current Ordinary High Water**

Mark for Lake Erie (IGLD 1985) by the federal and state governments is such a methodology.

As set forth above, the land beneath Lake Erie up to the Ordinary High Water Mark vested in the State of Ohio upon its admission to the Union; and no title lakeward of that line was granted by the federal government to those who received patents from the United States. *Packer v. Bird* (1891), 137 U.S. 661, 672; *Summa Corporation v. California ex rel. State Lands Commission* (1984), 466 U.S. 198, 205. Where, as in Ohio, no state grant of these state-owned lands beneath Lake Erie was ever made, the legal definition of the landward boundary of the State's ownership remains where it was set in the grant by the federal government at the time of Ohio's statehood.

Since Ohio's title derives from the federal government, what Ohio received – and, in particular, the location of its landward boundary – is a matter of federal law. “[D]etermination of the initial boundary between a [lakebed], which the State acquired under the equal-footing doctrine, and riparian fast lands [is] decided as a matter of federal law rather than state law.” *Corvallis Sand & Gravel Co.*, supra, at 376; *Borax*, supra, at 22; *Wilcox v. Jackson* (1839), 38 US 498, 517.

That the boundary under the transfer from the United States to Ohio at the time of statehood was the high water mark, usually denominated the “ordinary high water mark” (*Packer*, supra, at 666), is undisputed:

“The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants...but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and ... shall not be granted away during the period of territorial government, but ...shall be held by the United States in trust for the future states, and shall vest in the several states when...admitted into the Union...”

Shively, supra, at 49-50. This policy, the Court has explained, was commanded by the Equal Footing Doctrine, so that the newly-admitted states were equal in their sovereignty and ownership ability to govern the navigable waters within their states, and the lands beneath them. *Shively*, supra; *Pollard's Lessee*, supra, at 221-222.

Though there is no dispute that the property line is set at the Ordinary High Water Mark, the question of how to identify and locate that property line has never been addressed by the U.S. Supreme Court or by the Congress. The Court has set such a test for tidal waters (*Borax*, supra,

at 22-26), but the rise and fall of the tides is governed by lunar cycles that do not affect the water levels of the Great Lakes. A number of state and lower federal courts have articulated somewhat varying tests or ways to locate the Ordinary High Water Mark. As one text on water boundaries explains, “Those tests are usually expressed in the following terms: The ordinary high-water mark is the margin of the land over which the waters have visibly asserted their dominion or the mark impressed on the soil by the effect of water covering it for a sufficient period to deprive the land of vegetation and to destroy its value for agriculture purposes.”⁸ This is what is commonly referred to as the “visual inspection test.” See e.g. *Glass*, supra (Michigan Supreme Court adopted such a test from the Wisconsin Supreme Court in locating the Ordinary High Water Mark for the purpose of establishing the landward limit of the public’s right of pedestrian travel along the shores of the Great Lakes in Michigan).

In any event, no proposed test has yet been authoritatively adopted as the sole measure of what the Equal Footing Doctrine calls for as a measure of the landward boundary of soil under the Great Lakes that vested in a state upon statehood. That question is at issue here, and presents an unsettled question of federal law of great importance. A proposed reasonable and workable resolution of that question, conformable to the constitutional concept of equal footing, is also presented here.

The purpose of the Equal Footing Doctrine, as the Supreme Court has explained, is to assure that newly admitted states get the same title and sovereignty over their navigable waters and the lands beneath them as did the original thirteen states. *Pollard’s Lessee*, supra, at 222-223. Because the ownership and control of such lands are deemed essential to the equal sovereign status of each of the states, (*Coeur d’Alene Tribe*, supra at 283-284), it is important that the ownership and control of such lands in non-tidal-water states be implemented to be as much as possible on all fours with that in the 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.

In tidal waters, under the Equal Footing Doctrine, states got title landward up to the “mean high tide line.” There is, of course, no mean high tide line in the non-tidal waters of the Great Lakes, but it is clear that under federal law the analogous boundary is the Ordinary High

⁸ Bruce S. Flushman, Water Boundaries, Demystifying Land Boundaries Adjacent to Tidal or Navigable Waters (2002), pgs. 301-302.

Water Mark.” See 43 U.S.C. §1301(a)(1)(“ordinary high water mark”) & (2)(line of mean high tide). Finding the location of the mean high tide line is well settled as a matter of federal law. The U.S. Supreme Court has approved the use of an accepted methodology, adopting the definition of the mean high tide as given by the U.S. Coast and Geodetic Survey based on the 18.6 year lunar cycle that can be predictably calculated through statistical methods to determine tidal water levels. *Borax*, supra, at 26-27. However, no parallel technical measure has been recognized by the U.S. Supreme Court for use on the non-tidal waters of the Great Lakes.

Since “Equal Footing” is the standard, the question for non-tidal navigable waters is what is the “equal” on such waters of the mean high tide line on tidal waters? The location of the mean high tide line, which defines the landward boundary of state-owned tidelands, is not determined by observation of the location where water intersects the shore at any given moment in time, nor by observing the limit of vegetation or lines suggested by the location of debris on the shore. It is, instead, an elevation line consisting of an arithmetic average of all the ordinary high tides over a single lunar gravitational cycle of 18.6 years. *Borax*, supra, at 26-27. To find the state boundary on a tidal shore, one projects that average calculated elevation to its intersection with the shore, wherever along the coast that shore happens to be. The notable elements of this standard are: (1) it is an elevation line; (2) it is an average over time; (3) it is an average of high tides, rather than all tides; and (4) it is a known point where the elevation line intersects the shore, and not a line that changes hour to hour, day to day, or year to year, with level of the water.

While the Great Lakes have no tides, lake levels do vary both during the year (with higher levels in the summer and lower levels in the winter), and from year to year.⁹ Thus, there are variations analogous to tidal variations: (1) there are high and low water levels, and (2) there are, over cycles of years, variations that are amenable to averaging to an ordinary high water level. There is an existing federal formulation for locating the Ordinary High Water Mark which parallels the tidal formulation of “mean high tide line,” in that there is an ordinary/mean, high-water/high-tide, mark/line. The question, then, is how one determines the location of the Ordinary High Water Mark so as to obtain a maximal equivalent to the mean used to determine

⁹ Detailed information about the water levels on the Great Lakes is provided in U.S. Army Corps of Engineers, Detroit District, Great Lakes Updates. See, e.g., “Short Term Water Level Changes on the Great Lakes”, vol. 163 (April 2006); and “Great Lakes Water Level Data Collection”, vol. 165 (October 2006).

the “mean high tide line”, and thus to meet the constitutional standard of assuring that the Great Lakes states are on an Equal Footing with the ocean states.

In light of the methodology for determining the mean high tide line in tidal waters, the most closely analogous methodology lies in finding an elevation line that reflects the mean high water mark, averaged over a long enough period of time to even out periodic outlier cycles of lower and higher water years. Such an elevation line, like the mean high tide elevation line, would serve to mark the boundary of a state’s public trust ownership along the Great Lakes shoreline, just as the mean high tide line does along an ocean shoreline, without the potential for dispute and litigation over the boundary along every individual lakeshore property.

The data for making such a measurement is available and used by the federal and state governments in the exercise of their concurrent authority over Lake Erie. The federal government has for many years taken actual water level measurements on Lake Erie, as well as the other Great Lakes, and has collected monthly high water levels going back to 1918.¹⁰ As mentioned above, the United States Supreme Court has long held that that an ocean state may use the “average height of all the high waters ... over a considerable period of time” based upon “a periodic variation in the rise of water above sea level having a period of 18.6 years” to determine its public trust boundary. *Borax*, supra, at 26-27 citing “Tidal Datum Plane,” Special Publication No. 135, at pg. 76.

This is analogous to the methodology used by the U.S. Army Corps of Engineers for determining the “Ordinary High Water Mark (OHWM)” of Lake Erie. See Appendix B – What is IGLD 1985?, U.S. Army Corps of Engineers; Appendix C – Why was a revised datum required?, U.S. Army Corps of Engineers; Appendix D – Who Revised the Datum?, U.S. Army Corps of Engineers; Appendix E – What changes (between IGLD 1955 and IGLD 1985)?, U.S. Army Corps of Engineers; Appendix F – When was IGLD 1985 implemented?, U.S. Army Corps of Engineers. In so doing, the federal government determined that the “Ordinary High Water Mark (OHWM)” for Lake Erie under the most recent determination is 573.4 feet IGLD 1985. See Appendix E: What changes (between IGLD 1955 and IGLD 1985)?, Table 2 – Ordinary High Water Mark in Feet, U.S. Army Corps of Engineers. (Appendix B, C, D, E and F are online at <http://www.lre.usace.army.mil/greatlakes/hh/newsandinformation/iglddatum1985/>).

¹⁰ See, “Historic Great Lakes Water Levels,” available at <http://lre.usace.army.mil/>. The same site contains “Long Term Average Min-Max Water Levels.”

How the Ordinary High Water Mark of the Great Lakes may be located today has progressed beyond the visual inspection test. Certainly the long-term average measured and routinely recalculated “ordinary high water mark” is far superior to any on-site effort today to examine the physical attributes of the shore for evidence of water influence on the beach, as some other states have done. It is the best evidence of the location of the Ordinary High Water Mark on the Great Lakes available under current scientific standards. Additionally, and more significant to any Equal Footing analysis, the IGLD Elevation Method is analogous to the methodology established as a matter of federal law for locating the landward extent of the public trust boundary on tidal navigable waters, thus insuring that the Great Lakes States are on equal footing with their ocean sister states with regard to their own giant “inland seas.”

2. **The federal and state common law doctrines which govern the ambulatory nature of the shore and determine when the location of the boundary moves and when it does not, are either accommodated by or not affected by the IGLD Elevation Method.**

Plaintiffs believe that the landward boundary of Lake Erie moves with the water from moment to moment. Plaintiffs’ belief is incorrect. Under the long settled law of this state, and every other coastal state, the Ordinary High Water Mark is a boundary that can physically and legally move by virtue of gradual, natural, long-term processes, but it does not legally move by rapid, temporary or artificial changes. This is the common law concept known as the “moveable freehold.”¹¹ Therefore, though the Ordinary High Water Mark is a moving boundary, it is not a boundary that moves, as Plaintiffs believe, to follow wherever the water is at any given moment.¹²

There are generally two types of long term, imperceptible physical changes that result in a change of the location of the boundary at law. The first, involves gradual, natural changes to lands and is embodied in the common law doctrines of erosion and accretion. The second,

¹¹ The concept of the “moveable freehold” was first applied by the United States Supreme Court in the accretion case of *Jefferis v. East Omaha Land Co.* (1890), 134 U.S. 178 in which the court found that over a period of 17 years new land “formed by natural causes and imperceptible degrees” until “the new land so formed became high and dry, **above the usual highwater mark.**” Accordingly, the Court held that this new land belonged to the riparian owner to whose existing upland the newly accreted upland had attached. *Jefferis*, supra, at 181-182 (emphasis added).

¹² It has been long held in this nation that a water body is not limited in its description to only that portion of it covered by water at any given moment, but that portion which is ordinarily covered by water during periods of naturally and routinely occurring high water. *Shively*, supra.

relates to long term changes in the water level of the body of water, and is governed by the common law doctrines of reliction and submergence. Conversely, any natural changes to lands that are rapid, changes to water levels that are transitory, or artificial changes to the “territory,” ***do not*** change the location of the boundary at law. All of these longstanding principles are explained in further detail below, and are all either encompassed within, or not altered by, the use of the IGLD Elevation Method for locating the Ordinary High Water Mark of Lake Erie.

Under Ohio law, there are two gradual, natural processes by which physical changes to upland are held to result in a change of title at law. These two natural processes are erosion and accretion. “The term ‘erosion’ is generally understood to mean a gradual washing away of land bordering on water by the action of the water.” *United States v. 461.42 Acres of Land* (1963), 222 F.Supp. 55; see also *Baumhart v. McClure* (1926), 21 Ohio App. 491. Accretion has been defined as the “increase of real estate by the addition of portions of the soil, by gradual disposition through the operation of natural causes to that already in the possession of the owner,” and the “term alluvion is applied to the deposit itself, while accretion rather denotes the act.” *Lake Front-East 55 St. Corp. v. Cleveland* (1939), 21 Ohio Op. 1, 8, 7 Ohio Supp. 17, affirmed 66 N.E.2d 328, appeal dismissed 139 Ohio St. 138, 38 N.E.2d 410.

Both erosion and accretion must occur naturally and “gradually and imperceptibly through the action of waves and currents” in order to effect a change in title. *State ex rel. Duffy v. Lakefront East Fifty--Fifth Street Corp.* (1940), 137 Ohio St. 8, 11; *Lake Front-East 55 St. Corp.*, supra, at 8. “The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.” *Lake Front-East 55 St. Corp.*, supra, at 8, quoting *County of St. Clair v. Lovington*, 23 Wall. 46, 68. If upland is taken by the gradual process of erosion, title to the upland property so lost is extinguished at law. *United States v. 461.42 Acres of Land*, supra; *Baumhart*, supra. “What is lost to erosion is lost.” *State ex rel. Duffy*, supra, at 10.

Conversely, “a littoral owner on Lake Erie is entitled to alluvion formed by natural accretion.” *Lake Front-East 55 St. Corp.*, supra, at 8. However, before an upland owner “can recover the new-formed land on the margin of the solid land ... he must be able to establish his ownership of the bank against which the accretion has formed.” *Stockley v. Cissna* (1902), 119 F. 812, 829. This is because, by its definition, alluvion is an addition to littoral property “made by the water to which the land is contiguous.” *Stockley*, supra, at 829. Further, an upland owner

in Ohio does not gain title to alluvion formed by artificially induced accretion (i.e. accretion that would not have occurred naturally but for an artificial structure or fill placed in the Territory), unless the alluvion accreted to the upland owner's property was due to the acts of third persons, such as neighboring upland owners, in which that upland owner did not participate. *State ex rel. Duffy*, supra.

While the title to upland property can be lost or gained due to the natural processes of erosion and accretion, that title may not be affected at law if the action which decreases the upland is avulsive. "The term 'avulsion' connotes a sudden and perceptible loss of land by the action of water." *461.42 Acres of Land*, supra. A loss of upland by avulsion must be "so rapid or sudden, or in such a short time, that the change is directly perceptible or measurably visible at the time of its progress." *Turpen v. O'Dell* (October 14, 1986), 4th Dist. No. 97-CA-2300, 1998 Ohio App. LEXIS 4909, unreported, quoting *Cinque Bambini Partnership v. State of Mississippi* (1986), 491 So.2d 508. Under Ohio law, if upland is lost due to "a storm or storms resulting in a sudden avulsion," the upland owner does not automatically lose title to the land so lost. *461.42 Acres of Land*, supra.

If the upland owner can prove that the upland was lost due to avulsion and that the land lost can be reasonably identified, then the upland owner may "regain" the land lost. *461.42 Acres of Land*, supra; *Baumhart*, supra. In the absence of sufficient evidence that the loss of land was the result of avulsion, courts will presume that the change occurred slowly and imperceptibly. The rationale for this presumption is as follows:

This presumption is based in logic that an avulsive change is usually an event of such magnitude that it is normally noted, if not by the riparian landowner, at least by persons in the vicinity and testimony is therefore easy to obtain as to the fact of the avulsive change. The fact that no evidence is available to indicate the manner of movement is in itself an indication that the movement was slow and imperceptible.

Turpen, supra at [*19 - 20] citing to *State of Arizona v. Bonelli Cattle Co.* (1970), 11 Ariz. App. 412, 464 P.2d 999. Therefore, in order to avoid this presumption "a party must present evidence to prove that the changes were not gradual and imperceptible." *Id.* Further, an upland owner's title to land lost by avulsion may still be lost and the title extinguished by operation of law if the upland owner fails to "regain" the land lost to avulsion within a reasonable time. See *461.42 Acres of Land*, supra; *Baumhart v. McClure*, supra.

Under the law, upland owners are entitled to “regain” upland by artificially reconstituting land at the same location where their natural upland was lost to avulsion. However, the law distinguishes between a person placing artificial fill to “regain” upland lost to avulsion, and a person placing artificial fill upon lands below the Ordinary High Water Mark of Lake Erie in an attempt to “reclaim land” – to create artificial land in Lake Erie where none existed before, or where any upland that did exist in the past was lost to erosion rather than avulsion. “The question then is raised as to whether the state may be deprived of this title so held when a littoral owner intentionally makes or authorizes a fill to reclaim land in front of his property.” *Lake Front-East 55 St. Corp.*, supra, at 19. This was the very question before the Ohio Supreme Court in the landmark public trust doctrine cases of *Cleveland & P. R. Co.*, supra, and *State ex rel. Squire*, supra.

In these decisions, and in the subsequent decisions of Ohio courts, it has been held “the littoral owner of land does not deprive the state of its title to the submerged lands of Lake Erie either by making a fill in front of his upland to reclaim submerged land or by wharfing out to the line of navigability.” *Lake Front-East 55 St. Corp.* supra, at 21; *Cleveland & P. R. Co.*, supra, at 84; *Thomas*, supra; *Cleveland Boat Service, Inc. v. Cleveland* (1955), 102 Ohio App. 255, affirmed 165 Ohio St. 429.

The Ohio Supreme Court has further held that the placement of artificial fill by a littoral owner has the effect of fixing the boundary between public and private lands at its last known natural location. In *State ex rel. Squire*, supra, the Court noted that “after 1914, littoral owners began filling in the shallow waters to create land north of the natural shoreline.” As explained in 1993 Op. Att’y Gen. No. 93-025, at 11, citing to *State ex rel. Squire*, supra:

In *State ex rel. Squire v. Cleveland* the natural shoreline was altered by the filling in of shallow waters by littoral owners. The fill created an artificial shoreline. The last “natural shoreline,” therefore, was the shoreline as it existed prior to the filling in of the shallow waters, and littoral owners of land along the filled area and their grantees held title only to the natural shoreline as fixed prior to the time the shallow waters had been filled.

See also *Thomas*, supra; *Beach Cliff Board of Trustees v. Ferchill* (2003), 8th Dist. No. 81327, 2003 Ohio 2300, unreported, app. denied, 100 Ohio St. 3d 1485, 2003 Ohio 5992.

Therefore, in situations in which artificial fill or structures are placed upon the lands below the ordinary high water mark of Lake Erie, the State’s title to its trust property will not be altered or extinguished, and the fill or structure must be authorized by the State. Regardless of

how much time has passed since the placement of the artificial fill, the State's title to its trust property cannot be extinguished. The littoral owner may own the artificial fill itself, but the title to the lands beneath remain in the State. An upland owner gains no title and the state loses no title to the public lands of Lake Erie occupied by artificial fill no matter how long it remains.

Unlike erosion, accretion, avulsion, and artificial fill, the terms "submergence" and "reliction" do not refer to physical changes to uplands or to the lands of the navigable body of water they border. Rather, these terms refer to how much land is exposed or covered by the waters of the waterbody, over long periods of time, and are reflective of long term changes in water levels.

In order to understand what submergence and reliction are, it is most illustrative to first understand what they are not. During periods of temporary high lake levels, the water rises above the Ordinary High Water Mark, and upland property bordering Lake Erie is inundated. At such times, the upland property owner continues to hold title to their upland property down to the Ordinary High Water Mark, not to the new, transitory location of the flooding water, regardless of the fact that the current flooding water level is above the Ordinary High Water Mark. Though the public and the government always retain their respective rights to the water itself, they make no claim to this temporarily inundated upland, for this is not "submergence" any more than the transitory recession of lake levels below the Ordinary High Water Mark constitutes "reliction."

Reliction is defined in Black's Law Dictionary as "[a]n increase of the land by the permanent withdrawal or retrocession of the sea or a river" and as a "[p]rocess of gradual exposure of land by permanent recession of body of water." (emphasis added) There is nothing permanent in the nature of Lake Erie's water levels that take endless temporary turns at submerging uplands and exposing the "territory," but there are long term changes that are documented and calculated as part of the determination of the "ordinary high water mark" under the IGLD Elevation Method. See Appendix B, C, D, E, and F.; see also Appendix G – Long Term Average Min-Max Water Levels, U.S. Army Corps of Engineers; Appendix H – Historic Great Lakes Water Levels, U.S. Army Corps of Engineers (Appendix G and H are online at <http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/>).

Both Ohio's Fleming Act of 1917 and the United States' Submerged Lands Act of 1953 codified the "moveable freehold" concept that the common law boundary between the state's "lands beneath navigable waters" and the upland properties bordering those lands can change through gradual, natural processes, but do not change by avulsive, temporary or artificial

changes. See 43 U.S.C. 1301(a)(1) and (3): “Lands beneath navigable waters” include, for nontidal waters, lands “up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction” and “all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters” (emphasis added); See also GC 3699(a) of the original Fleming Act which recognized: “the rights and liabilities of littoral owners while said waters remain in their natural state of accretion, erosion and avulsion” (emphasis added); and R.C. 1506.11(A) of the Act stating that the “territory” held in trust by the State includes “the lands formerly underlying the waters of Lake Erie and now artificially filled” (emphasis added). The Ohio Supreme Court held that the Fleming Act, as merely a codification of the common law in Ohio, did not change any of these common law doctrines, and Ohio’s courts have specifically so found. *State ex rel. Duffy*, supra.

The law is well settled as to how the Ordinary High Water Mark boundary constitutes a “moveable freehold.” The only unresolved question is how to locate that boundary over time. The IGLD Elevation Method for locating the Ordinary High Water Mark of the Great Lakes accounts for long-term changes in water levels defined in the doctrines of submergence and reliction in its periodic re-calculation every 30 years. See Appendix B, C, D, E, F, G and H. This methodology also respects and does not alter the common law doctrines of erosion or accretion. If the elevation of the land has changed over time due to erosion or accretion, the elevation line for the Ordinary High Water Mark will necessarily intersect the land at a different location. See Appendix I – Lake Michigan – Ordinary High Water Mark, Indiana Department of Natural Resources, Division of Water (Appendix I is also available online at http://www.in.gov/dnr/water/lake_michigan/coastal/ord_hwm.html).

Further, and as explained more fully below, the State’s use of the IGLD Elevation Method in locating the boundary of the “territory” for the purposes of issuing leases for the use and occupation of the “territory” pursuant to R.C. 1506.11 which is at issue in this case, is supplemented by information regarding past avulsion of the upland, or artificial filling of the “territory,” at the area sought to be leased by the applicant. This method in all respects conforms to the existing federal and state law pertaining to the determination, location, and alternately moveable/immovable nature of the boundary.

3. **Pursuant to R.C. 1506.11, the Ohio Department of Natural Resources has been delegated responsibility to manage the use and occupation of the “territory” by issuing a lease from the State for any portion of the “territory” occupied by an artificial improvement. The Ohio**

Department of Natural Resources is a state agency with all powers expressed or necessarily implied by R.C. 1506 and the administrative regulations promulgated thereunder. A decision by the Department pursuant to R.C. 1506.10 – 1506.11 is reasonable and entitled to administrative deference.

Beginning with the Fleming Act of 1917, the State of Ohio has managed the artificial improvement and development of its public trust lands through the medium of leases. In the current version of the Fleming Act, found at R. C. 1506.10 – 1506.11, the General Assembly designated the State’s Department of Natural Resources (“ODNR”) as the lead state agency in all matters pertaining to the care, protection and enforcement of the State’s rights in Lake Erie. The General Assembly, in R. C. 1506.11, prescribed that ODNR is to control, manage and direct an upland owner’s use and occupation of Lake Erie public trust lands through the medium of leasing Lake Erie submerged lands. When persons properly follow the leasing procedures required by Ohio law for use of the State’s territory, it has been held that other parties “[can] not attack the validity of the submerged land lease itself” and “the trial court lacked any authority to invalidate [the leases].” See *Lemley v. Stevenson* (1995), 104 Ohio App.3d 126, dismissed, appeal not allowed, 74 Ohio St.3d 1417, reconsideration denied 74 Ohio St.3d 1465.

As an administrative agency, ODNR has all powers that are expressly conferred on it together with such powers as are necessarily implied in order to effectuate such expressly granted powers. See *Waliga v. Bd. of Trustees of Kent State University* (1986), 22 Ohio St.3d 55. “Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do.” *Industrial Comm. v. Brown* (1915), 92 Ohio St. 309, 311. The administrative construction and application that ODNR has given the statute and administrative rules since the Legislature unanimously passed Ohio’s Coastal Management Act in 1989, which delegated the authority under R.C. 1506.10 – 1506.11 to ODNR, has been both reasonable and in accordance with law.

Pursuant to the law of the United States and the law of Ohio, as detailed above, ODNR must use the Ordinary High Water Mark of Lake Erie as the landward boundary of the “territory” held in trust for the people of the State when issuing leases for the use and occupation of the “territory” pursuant to R.C. 1506.11. As also set forth above, the IGLD Elevation Method of locating the Ordinary High Water Mark on the Great Lakes complies with the Equal Footing Doctrine, as it most closely mirrors the method approved as a matter of federal law for locating

the line of the mean high tide in the nation's ocean states. It is undisputed by the parties that ODNR utilizes the IGLD Elevation Method in locating the landward boundary of the "territory," following the current federal determination of the Ordinary High Water Mark of Lake Erie – 573.4 feet IGLD 1985. See Appendix E: What changes (between IGLD 1955 and IGLD 1985)?, Table 2 – Ordinary High Water Mark in Feet, U.S. Army Corps of Engineers.

In addition, ODNR supplements its use of the IGLD Elevation Method in locating the boundary of the "territory" with any information provided by the lease applicant regarding past avulsion at the site, and any information regarding artificial filling of the "territory." On this point, Ohio Administrative Code 1501-6-01(W) requires in relevant part:

Where the territory has been artificially filled, the director shall determine the natural shoreline as accurately as possible, using the best practicable measures including, but not limited to, an analysis of the earliest known charts, maps or photographs.

As a matter of principle, the State of Ohio, through its Department of Natural Resources, resolves any doubt on these issues in favor of the applicant – the upland owner. As a matter of law, ODNR must employ all of the established doctrines which combine to define the boundary and to determine its location.

The method ODNR uses for locating the landward boundary of the "territory" conforms in all respects to the existing federal and state law pertaining to the determination, location, and alternatively moveable/fixed nature of the boundary. It is reasonable and is entitled to administrative deference. The State of Ohio is entitled to Summary Judgment on the Second Question of Law certified by the Court.

C. THE RIGHTS AND LIABILITIES OF LITTORAL OWNERS IN THEIR UPLAND PROPERTY, AS WELL AS THE RESPECTIVE RIGHTS AND RESPONSIBILITIES OF THE FEDERAL GOVERNMENT, THE STATE OF OHIO, THE PUBLIC, AND THE LITTORAL OWNERS IN THE "TERRITORY," HAVE LONG BEEN SETTLED IN STATE AND FEDERAL LAW, AS HAS THE HIERARCHY OF THOSE RIGHTS.

1. The rights and responsibilities of the United States in the "territory" relate to the federal government's supreme power to regulate navigation and commerce among the several states, and are superior to the rights of all others in the "territory," but those rights do not include title to the lands, waters or contents of the "territory."

The federal government retained an easement over the states' "lands beneath navigable waters" for the purpose of regulating navigation and commerce.¹³ Both the original grant under the United States Constitution, which granted title to each state as it was admitted to the union to the lands beneath navigable waters within its boundaries, and the Submerged Lands Act, which confirmed that title, "... expressly recognized that the United States retained all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership." *Shively*, supra; *Zabel v. Tabb* (1970), 430 F.2d 199, cert denied, 401 U.S. 910 (emphasis added). Thus, it has been held that the same lands and navigable waters to which the states were granted title in trust for the people by the Constitution, as re-affirmed by the federal Submerged Lands Act and subsequent U.S. Supreme Court decisions, are the same lands and navigable waters to which the federal government maintains its supreme navigational servitude - its easement over the states' property for the purposes of regulating navigation and commerce, pursuant to the Commerce Clause of the Constitution. *Shively*, supra; *Zabel*, supra, at 206.

"[T]he Submerged Lands Act provides concurrent federal and state jurisdiction over submerged lands and the waters above them." *Doucette v. San Diego Unified Port Dist.* (1997), 125 F.3d 858 citing *Barber v. Hawaii* (1994), 42 F.3d 1185, 1190. See also *Cal. ex rel. State Lands Comm'n v. United States* (1982), 457 U.S. 273. The Act expressly confirmed that the United States retained its powers of regulation and control over the same "lands beneath navigable waters" granted to the states upon their admission to the union. 43 U.S.C. 1314(a). As established above, neither the United States nor the State of Ohio may disclaim or abandon their concurrent powers to regulate and manage these same lands and waters for the public interest.

The authority to regulate the lands beneath the navigable waters of the United States has been delegated to the U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act, 33 U.S.C. 401, et seq. The Corps has defined its jurisdiction of its concurrent regulatory authority in the same terms as the initial and reaffirmed grants to the states. See, 33 CFR 329.11 "Geographic and jurisdictional limits of rivers and lakes"; 33 CFR 329.12 "Geographic and

¹³ The United States holds both a navigational servitude and regulatory jurisdiction under the Commerce Clause in the navigable bodies of water throughout the nation. The authoritative view on the dual nature of federal authority over the navigable waters of the United States is Justice Rehnquist's opinion in *Kaiser Aetna v. United States* (1979), 444 U.S. 164.

jurisdictional limits of oceanic and tidal waters.” These are the same upper boundaries given for lands beneath non-tidal and tidal navigable bodies of water under the federal Submerged Lands Act, as both the states and the federal government have concurrent authority over the same lands – the lands beneath navigable waters. 43 U.S.C. 1301. The concurrent jurisdiction of the Corps over the Great Lakes “includes all the land and waters below the ordinary high water mark,” and the Corps locates that boundary in the State of Ohio using the current elevation for the Ordinary High Water Mark of Lake Erie – 573.4 IGLD 1985. 33 CFR 329.11(a); See also Appendix E.

2. **The rights and responsibilities of the State of Ohio in the “territory” relate to its status as proprietor in trust of the “territory” for the people of the state, and are dominant to all other rights or interests in the “territory” except the supreme authority of the United States.**

As established above, in the United States, shorelands, tidelands, tidewaters, and navigable freshwaters, which include Lake Erie as well as the other Great Lakes, are accorded special treatment under state and federal law. These lands and waters are owned by the public, but held in trust by the state for the benefit of the public. The body of law pertaining to the states’ rights and duties regarding these lands and waters is called the public trust doctrine. Authority vested in a state through the public trust doctrine is based upon its power over state property, rather than a state’s regulatory powers through its sovereign police powers. The lands and waters under the doctrine are governed and managed by a state as its own property. This is in sharp contrast to a state regulating a citizen’s private property through its police powers. *Cleveland P. R. Co.*, supra.

The State of Ohio’s sovereign proprietorship is in the hands of the citizens of Ohio, and in that character, the State holds the absolute right to all of Lake Erie for its citizens’ common use, subject only to the rights surrendered by the Constitution to the general government. The ownership of a state and the nature of its title to submerged lands of the Great Lakes was expressed by the United States Supreme Court in the first and second syllabi of *Illinois Central R. Co.*, supra:

The ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found ... and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

The same doctrine as to the dominion and sovereignty over and the ownership of lands under the navigable waters of the great lakes applies, which obtains at

the common law as to the dominion and sovereignty over and ownership of lands under the tide waters on the borders of the sea, and the lands by the same right in one case as in the other and subject to the same trusts and limitations.

(Emphasis added). The Ohio Supreme Court followed the lead of the United States Supreme Court, and recognized the public trust doctrine as the law of Ohio in the landmark public trust doctrine decision *Cleveland & P. R. Co.*, supra. The third and sixth syllabi of *Cleveland & P. R. Co.* describe the interest held by the State:

The title of the land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted.

The ownership of the waters of Lake Erie and of the lands under them within the state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot by acquiescence or otherwise abandon the trust property or permit a diversion of it to private uses different from the object for which the trust was created. The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate.

The Ohio Supreme Court further defined the responsibilities and duties of the State under the doctrine, holding that the State of Ohio could not abandon any of its Lake Erie public trust property, nor abdicate any of its control over that public trust estate:

The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created.

If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use, a clearer view can be had.

An individual may abandon his private property, but a public trustee cannot abandon public property. Mere nonuser of the trust property by the public cannot authorize the appropriation of it by private persons to private uses, and thus thwart the purposes of the trust.

Cleveland & P. R. Co., supra, at 80.

Having recognized and defined the public trust doctrine as the law of Ohio, the Ohio Supreme Court urged the General Assembly to provide for the regulation and control of the State's Lake Erie public trust lands and waters, stating at the conclusion of its opinion:

“It is presumed that the legislature, in the enactment of legislation on the subject will appropriately provide for the performance by the state of its duty as trustee for the purposes stated . . .”

Cleveland & P. R. Co., supra, at 84.

The next year, the General Assembly passed the Fleming Act (currently R.C. 1506.10 – 1506.11) which declared that the public trust doctrine has existed as the law of Ohio since statehood, and regulated the right to make private use of the “territory.” The purpose of the Act and the subsequent versions of the public trust law was to regulate the development of the Lake Erie shore through the medium of granting leases to those persons maintaining structures upon the submerged lands of Lake Erie. Though the entities delegated responsibility to oversee this submerged land management process has changed over the years, and the declaratory section of the Fleming Act has been amended slightly in subsequent legislation, its current version in R. C. 1506.10 remains the steadfast declaration of public trust law in Ohio.

The Ohio Supreme Court re-affirmed the State of Ohio’s interest and duties under the public trust doctrine as set forth in both its prior opinion in *Cleveland & P. R. Co.*, and by the Legislature in the Fleming Act, in its decision in *State ex rel. Squire* holding:

The state of Ohio holds the title to the subaqueous soil of Lake Erie, which borders the state, as trustee for the public for its aid in navigation, water commerce or fishery, and may, by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use.”

State ex rel. Squire, supra, syllabus ¶ 2.

In 1953, the federal Submerged Lands Act was passed, which not only confirmed “title to and ownership of the lands beneath navigable waters within the boundaries of the respective States” to the states, but also the states’ “right and power to manage, administer, lease, develop, and use the said lands ... in accordance with applicable State law.” 43 U.S.C. 1311(a). As set forth above, it has been held that “the Submerged Lands Act provides concurrent federal and state jurisdiction over submerged lands and the waters above them.” *Doucette*, supra citing *Barber*, supra. See also *Cal. ex rel. State Lands Comm'n*, supra.

In this case, Plaintiffs are asking this Court to divest the State of Ohio of its authority to manage the public trust lands below the Ordinary High Water Mark of Lake Erie – a right and duty that Ohio has held since its creation in 1803, and has been forbidden to abdicate under the public trust doctrine. Such a plea is contrary to the time honored law of this state and must be squarely rejected by this Court.

3. **The rights of the public relate to the recognized public uses of the “territory” recognized by Ohio law, subject to regulation and control by the state and federal governments.**

The public rights recognized under Ohio law include the rights of navigation, commerce, fishery, and recreation. These rights were also initially recognized by the courts, but have since been codified. See R.C. 1506.10 (“the public rights of navigation, water commerce, and fishery”); R.C. 1506.11(G) (“public right of recreation in the territory”).

The public right of fishery was addressed and protected from attempted privatization by the Ohio Supreme Court in *Sloan*, supra. In that case, the upland owner of Cedar Point believed that because he owned the upland, he also owned the bed of Sandusky Bay, and therefore, no one could fish in the Bay without his consent. The Supreme Court did not agree. Thereafter, in subsequent decisions, it was recognized by the Court that the public right of fishery was beyond reproach.

It is well settled in this state that the right of the public to fish in the waters of Lake Erie and its bays is as fixed and complete as if those waters were subject to the ebb and flow of the tide, and that the public rights of fishing in the waters of the open, navigable public bays of Lake Erie are not limited within such public bays to the particular portions thereof which are navigable.

The East Bay Sporting Club v. Miller (1928), 118 Ohio St. 360, 364.

Originally, the only other public uses recognized by Ohio common law were the intertwined concepts of navigation and commerce. In fact, the original test for navigability of a body of water required a determination of the waterbody’s capacity for serving as a “highway for commerce,” and was called the “commercial usage test.” See *East Bay Sporting Club*, supra. However, in 1955, the Ohio Supreme Court announced the modern concept of navigable waters, also known today as the “recreational boating test” as follows:

In a discussion of the change in the concept of navigability, the following summary appears in 56 American Jurisprudence, 648, Section 181: “There is, however, much authority for the view, which has been spoken of as being the better rule, that it is not necessary that the water be capable of commerce of pecuniary value, and that boating or sailing for pleasure should be considered navigation as well as boating for mere pecuniary profit. And the expression is frequently used that navigability for pleasure is as sacred in the eye of the law as navigability for any other purpose. It has been held that the term ‘navigable,’ as used in a statute relating to the ownership of submerged land, includes waters which are naturally available for use by the public for boating, fishing, etc., although they may not be susceptible of use for general commercial navigation.”

In the case of *Lamprey v. State*, 52 Minn. 181, the court said: “The division of waters into navigable and non-navigable is merely a method of dividing them into public and private, which is the more natural classification; and the definition or test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial public use, they are public waters.”

Coleman v. Schaeffer (1955), 163 Ohio St. 202, 205-206.

The Ohio Supreme Court re-affirmed the recreational boating test, and the associated public rights of recreation, as the law of Ohio in the case of *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.* (1959), 170 Ohio St. 193.

As revealed in the *Coleman* case, *supra*, this court has extended the criteria for determining navigability beyond the so-called ‘commercial usage’ test as applied in paragraph two of the syllabus in the *East Bay Sporting Club* case, *supra*. To decide navigability solely upon the basis of such use fails to take cognizance of the tremendous increase in the public use of waterways. The capacity of a watercourse for recreational boating is also a factor which may now be considered. The Department of Natural Resources of this state estimates that over one million Ohio citizens make use of our waters. This department also estimates that a total annual expenditure of approximately fifty million dollars is being made in Ohio directly pursuant to such public use. And this increased recreational use of our waters has been accompanied by a corresponding lessening of their use for commerce. We are in accord with the modern view that navigation for pleasure and recreation is as important in the eyes of the law as navigation for a commercial purpose.

Mentor Harbor Yachting Club, *supra* at 199-200.

It is not directly the public rights of fishery or navigation, whether for commerce or recreation, which Plaintiffs primarily seek to nullify in this action. Instead, Plaintiffs seek a declaration that they, at a minimum, have exclusive rights of use, including the right to exclude others, from any portion of the “territory” adjacent to their upland that is not covered by water at any given moment. Plaintiffs seek a declaration allowing them, rather than the State, to control the public’s use of any part of the “territory” exposed by lower lake levels, and granting them the right to exclude the public from those exposed public trust lands – thereby preventing anyone from walking the shore of Lake Erie adjacent to their upland property.

Whether or not the public has a right to walk the Lake Erie shore in Ohio, is a question of first impression under Ohio law that is for the first time in controversy in this case. Because there is no Ohio law directly on point, the State respectfully directs the Court to the decisions of other Great Lakes States to assist it in declaring whether or not the public has always had the

right of pedestrian travel below the Ordinary High Water Mark of Lake Erie in the State of Ohio, subject to regulation and control by the federal, state and local governments.

The Great Lakes States that have directly addressed the issue of walking the shore below the Ordinary High Water Mark, have recognized its existence. In Pennsylvania, the legislature has designated the state's Department of Environmental Protection to manage riparian owners' use of "the regulated waters" and "submerged lands of the Commonwealth" under the state's statutes and administrative regulations. 32 P.S. 693.1, et seq.; 25 Pa. Admin. Code 105.1, et seq. The Pennsylvania Department of Environmental Protection published its Policy regarding Public Access on December 6, 2000, which provided as follows:

The Department's policy is that there is a public easement along the shoreline of Lake Erie between the ordinary high and low waters marks. This easement is for lateral movement along the shoreline and open for certain prescribed activities some of which are (but not limited to) fishing, fowling and navigation. Access to this easement area is not permitted across private property but is permissible at public access points along the lake. These public access points can include parks, navigable streams and plotted subdivision rights-of-way. Also, once in the easement area the public is encouraged not to move landward above the ordinary high water mark. This area is private property owned absolutely by the riparian owner.

To date, there have been no challenges from riparian owners bordering Lake Erie in the State of Pennsylvania to this policy or to any of the statutory provisions or common law holdings supporting this policy.

Like Pennsylvania, the legislature of New York has provided a comprehensive statutory and regulatory scheme for management and protection of its public trust lands and waters.

Public trust lands means those lands below navigable waters, with the upper boundary normally being the mean high waterline, or otherwise determined by local custom and practice. Public trust lands, waters, and living resources are held in trust by the state or by the trustees of individual towns for the people to use for walking, fishing, commerce, navigation, and other recognized uses of public trust lands.

19 NYCRR § 600.2(y).

The other Great Lake States have spoken strongly about the public's rights of use below the Ordinary High Water Mark, but have not had to address the specific issue of pedestrian travel along the shore.¹⁴ However, the Michigan Supreme Court was recently called upon to decide this

¹⁴ Indiana: See *Lake Land Co. v. State* (1918), 68 Ind. App. 439, 444-445 ("The title to the beds of such (navigable) lakes is in the state, but not for its own use as an entity. The mere naked legal title rests in the state, but the whole beneficial use thereof, including the use of the

ice formed thereon, is vested in the people of the state as a class.”); see also 312 Indiana Adm. Code 6-1-1 (“the dividing line on Lake Michigan and other navigable waterways between public and private ownership is the ordinary high watermark”).

Illinois: See *Seaman v. Smith, supra*. (“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. We are therefore clearly of the opinion, that the line at which the water usually stands, when free from disturbing causes, is the boundary of land in a conveyance calling for the lake as a line.”; see also 615 ILCS 5/24 (“Title to the bed of Lake Michigan ... is held in trust for the benefit of the People of the State of Illinois”).

Wisconsin: See *R.W. Docks & Slips v. State* (2001), 244 Wis.2d 497 (stating that the state has “jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them.”); see also *Illinois Steel Co. v. Bilot* (1901), 109 Wis. 418, 425-426:

The law in that regard is too well settled to warrant any discussion of it here. This court has been over the whole subject many times in recent years. The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, **up to the line of ordinary high-water mark**, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.

A patent from the United States, so far as it purports to cover any of such lands, whether made before the state was admitted into the Union or thereafter, is ineffectual. It has been so repeatedly held. A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, **does not convey title to the lands below the line of ordinary high-water mark**. The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. (Emphasis added).

Minnesota: See *In re Minnetonka Lake Improvement Carpenter v. Board of Comm’rs* (1894), 56 Minn. 513, 520-521 (holding that “[w]hile the title of a riparian owner on navigable or public waters extends to ordinary low-water mark, yet it is unquestionably true that **his title is not absolute, except to ordinary high-water mark. As to the intervening space, the title of the riparian owner is qualified or limited by the public right**. The state may not only use it for purposes connected with navigation without compensation, but may protect it from any use of it, even by the owner of the land, that would interfere with navigation. It may be conceded, as claimed by respondent, that ‘within the banks, and **below high-water mark, the public right is supreme**, and that damages to riparian proprietors are *damnum absque injuria*.’”) (Emphasis added).

very issue, in what has come to be known as “the beach walking case.” *Glass v. Goeckel* (2005) 473 Mich. 667. The Michigan Supreme Court’s decision in the *Glass* case is the only decision issued by a Supreme Court of any Great Lakes State directly on this issue.

The Court’s opinion begins as follows:

Our Court unanimously agrees that plaintiff does not interfere with defendants’ property rights when she walks within the area of the public trust. Yet we decline to insist, as do Justices Markman and Young, that submersion at a given moment defines the boundary of the public trust. Similarly, we cannot leave uncorrected the Court of Appeals award to littoral landowners of a “right of exclusive use” down to the water’s edge, which upset the balance between private title and public rights along our Great Lakes and disrupted a previously quiet status quo.

Glass, supra at 672-673. The Court then announced its holding regarding the public right to walk the shores of the Great Lakes:

We hold, therefore, that defendants cannot prevent plaintiff from enjoying the rights preserved by the public trust doctrine. Because walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark. Therefore, plaintiff, like any member of the public, enjoys the right to walk along the shore of Lake Huron on land lakeward of the ordinary high water mark. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

Glass, supra at 674-675. The Michigan Supreme Court so held in spite of the fact that in Michigan, unlike Ohio, a subservient title interest in the lands below the ordinary high water mark may have been conveyed to upland owners, for “although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property subject to the public trust.” *Glass*, supra at 679.

Having established that the public trust doctrine is alive and well in Michigan, we are required in this appeal to examine the scope of the doctrine in Michigan: whether it extends up to the ordinary high water mark or whether, as defendants argue, it applies only to land that is actually below the waters of the Great Lakes at any particular moment.

Glass, supra at 682. After acknowledging that the landward boundary of the public trust was the ordinary high water mark, and not the water’s edge, the Michigan Supreme Court announced its landmark holding followed by its rationale:

THE PUBLIC TRUST INCLUDES WALKING WITHIN ITS BOUNDARIES

We have established thus far that the private title of littoral landowners remains subject to the public trust beneath the ordinary high water mark. But plaintiff, as a member of the public, may walk below the ordinary high water mark only if that practice receives the protection of the public trust doctrine. We hold that walking along the shore, subject to regulation (as is any exercise of public rights in the public trust) falls within the scope of the public trust.

[T]he existence of a common sense assumption: walking along the lakeshore is inherent in the exercise of traditionally protected public rights.

Our courts have traditionally articulated rights protected by the public trust doctrine as fishing, hunting, and navigation for commerce or pleasure. In order to engage in these activities specifically protected by the public trust doctrine, the public must have a right of passage over land below the ordinary high water mark. Indeed, other courts have recognized a ‘right of passage’ as protected with their public trust.

We can protect traditional public rights under our public trust doctrine only by simultaneously safeguarding activities inherent in the exercise of those rights. Walking the lakeshore below the ordinary high water mark is just such an activity, because gaining access to the Great Lakes to hunt, fish, or boat required walking to reach the water. Consequently, the public has always held a right of passage in and along the lakes.

Even before our state joined the Union, the Northwest Ordinance of 1787, Art IV, protected our Great Lakes in trust: “The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free ...” Given that we must protect the Great Lakes as “common highways,” we acknowledge that our public trust doctrine permits pedestrian use - in and of itself - of our Great Lakes, up to and including the land below the ordinary high water mark.

Glass, supra at 694 – 696 (internal citations omitted).

In the conclusion of its decision, and prior to remand, the Michigan Supreme Court expressly noted the trial court’s correct opinion and the appellate court’s errors:

Our Court unanimously agrees that defendants cannot prevent plaintiff from walking along the shore of Lake Huron within the area of the public trust.

[T]he majority retains and clarifies the status quo. The trial court correctly permitted plaintiff to walk lakeward of the ordinary high water mark. The Court of Appeals also correctly recognized the importance of the public trust doctrine, though we reverse its requirement that plaintiff walk only where water currently lies.

Yet our colleagues in dissent would repeat this error by continuing to grant an exclusive right of possession to littoral landowners. Indeed, they would

compound this error by granting littoral landowners all property down to where unsubmerged land ends, which they locate at the water's edge, regardless of the terms of landowners' deeds. We would not so casually set aside the countless deeds that order property rights for the length of our state shoreline. We would not give away to littoral landowners the absolute title to public trust land preserved for the people. Such a departure would represent a grave disturbance to the property rights of littoral landowners and of the public.

Glass, supra at 698-700.

Just as in the *Glass* case, Plaintiffs are asking this Court to change the carefully preserved balance between public and private rights on a Great Lake's shore. They are insisting that this Court change the existing law to take from the public its vested rights to use the shore of Lake Erie, and instead to create a new law to grant Plaintiffs a never before recognized littoral right of exclusive use.

The State of Ohio respectfully recommends that the Court follow the sound reasoning of Ohio's sister Great Lakes States who have been called upon to address this issue, and declare that the public has a right of pedestrian travel below the Ordinary High Water Mark of Lake Erie in this state, subject to regulation and control by the federal, state and local governments. "Because [in Ohio, just as in Michigan] walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation" this Court should also recognize the common sense conclusion that Ohio's "public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark." *Glass*, supra, at 674. Thereby leaving the regulation and control of public rights on public lands to the public's duly elected representatives in the legislative branch, rather than the Plaintiffs.

4. **The rights of upland owners bordering the "territory" relate to both the recognized public uses of the "territory" recognized by Ohio law, and their unique property rights, known as littoral rights, granted under Ohio law, subject to regulation and control by the state and federal governments.**

Littoral owners bordering Lake Erie in Ohio, such as Plaintiffs, do not have the same exclusive rights of ownership, possession and use over the public trust waters and lands of Lake Erie that they enjoy on their own upland. They have no title to the lands below the Ordinary High Water Mark of Lake Erie. However, Ohio law does recognize that Plaintiffs, as upland

owners, may exercise certain “littoral rights”¹⁵ in Lake Erie, in addition to all of the rights above as a member of the public. Yet, the law is equally clear that the exercise of those littoral rights is entirely subservient to the State’s proprietorship in trust of the lands and waters of Lake Erie. Appellants’ interest in Lake Erie is a qualified interest, a bare technical interest, not at their absolute disposal, as it is in their uplands. See *Scranton v. Wheeler* (1900), 179 U. S. 141. Accordingly, the Ohio Supreme Court has held:

[T]he littoral rights of the upland owners are not titles to land, and though they are property rights they are restricted and limited and entirely subservient to the power and authority of the state.

State ex rel. Squire, supra, at 342.

The littoral rights of upland owners bordering Lake Erie are well settled in Ohio law. Subject to regulation and control by the federal and state governments, littoral owners are entitled: (1) to make reasonable use of the waters in front of and flowing past their land; (2) access to navigable water on the front of which their property lies, and; (3) to wharf out to navigable water for the purposes of navigation. *Cleveland & P. R. Co.*, supra; R.C. 1506.10.

In their determination of the littoral rights of upland owners on Lake Erie, Ohio courts have also recognized four significant limitations the law places upon littoral owners in the exercise of littoral rights. First, littoral owners’ use of the waters in front of or flowing past their lands must be “reasonable.” R. C. 1506.10. Second, littoral rights do not confer any title to littoral owners in the waters and lands beyond the natural shoreline of Lake Erie. At best, these rights are incorporeal, intangible rights subject to the superior right of the State, as the owner of title in trust for the people of Ohio, and of the United States, with the authority accruing to it by virtue of its exclusive power over interstate commerce.

Subject to the paramount control by the United States of navigable waters and its power to establish harbor lines and regulations therein and subject to the title of the state, as trustee for the people, to the lands under the waters of Lake Erie, and subject also to the control by the state of harbors of Lake Erie within harbor lines, a littoral proprietor has an incorporeal property right to wharf out to navigable waters for the purpose of navigation.

State ex rel. Squire, supra, syllabus ¶ 1.

¹⁵ Littoral (or riparian) rights are the property rights of upland property owners to use and enjoy the navigable bodies of water abutting their upland property. *Lemley*, supra at 133.

The third limitation on littoral rights concerns navigability. Littoral owners may, subject to the regulations of the state, build piers, docks or wharves, in aid of navigation, to the point of navigability, but no further. The Ohio Supreme Court held:

[T]he littoral owner, for the purpose of navigation, should be held to have the right to wharf out to the line of navigability, as fixed by the general government, provided he does not interfere with public rights. . . . **Whatever he does in that behalf is done with the knowledge on his part that the title to the subaqueous soil is held by the state as trustee for the public, and that nothing can be done by him that will destroy or weaken the rights of the beneficiaries of the trust estate.** His right must yield to the paramount right of the state as such trustee to enact regulatory legislation.

Cleveland & P. R. Co., supra, at 79 (emphasis added).

As established above, the fourth and most significant limitation on littoral owners is that their rights are always subject to the paramount authority of the state and the federal governments. *Cleveland & P. R. Co.*, supra, at 83. The all-encompassing scope of this limitation is certain when it is seen that the “paramount authority” of the State includes not only the State’s ordinary incidents of legal title to Lake Erie, but also its powers and duties under the public trust doctrine. The rights of littoral owners exist only so long as their exercise thereof is not inconsistent with the authority of the State, as a trustee for the people, with regard to the care, protection and enforcement of the State’s rights in submerged lands and waters of Lake Erie, and their exercise has been authorized by the General Assembly pursuant to the requirements of R.C. 1506.11.

Ohio courts have consistently emphasized from the earliest decisions to the most recent on the topic, that upon exercise of such a right, the upland owner remains subject to regulation by the state and federal governments, and does not divest the State of any title to the lands it holds as proprietor in trust, for even the State itself cannot abandon any portion of its public trust lands. *Cleveland & P. R. Co.*, supra, at 84; *State ex rel. Squire v. Cleveland*, supra, at 325; *Thomas*, supra; *Lemley*, supra; *Schnittker v. Ohio Department of Natural Resources* (April 24, 2001), 10th Dist. No. 00AP-976, 2001 Ohio App. LEXIS 1828, unreported, appeal denied 93 Ohio St.3d 1411, reconsideration denied, 93 Ohio St.3d 1464; *Beach Cliff Board of Trustees*, supra.

The ownership of the waters of Lake Erie and of the lands under them within the state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot by acquiescence or otherwise abandon the trust property or permit a diversion of it to private uses

different from the object for which the trust was created. *The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate.*

Cleveland & P. R. Co., supra, syllabus ¶ 6 (emphasis added).

The nature of littoral rights, and their place in the public trust hierarchy, was firmly established from the earliest opinion in which such rights were tentatively recognized (*Cleveland & P.R. Co.*), and has been consistently followed by every appellate district in Ohio that has issued a decision in a public trust case, such as in this opinion from the 6th District:

It is clear to this court that the trust doctrine of state control over the submerged lands of Lake Erie ... for the beneficial ownership of the public ... has existed in this state since Ohio was admitted to the union in 1803. Consequently, any acts of ownership or dominion over the waters and subaqueous terrain ... have been done subject to the superior authority of the state of Ohio.

It has been established that the littoral owner of property bordering navigable lakes is held to have an intangible right to make use of those navigable waters ... provided that the exercise of this right does not interfere with the public rights. *State ex rel Squire v. Cleveland* (1948), 150 Ohio St. 303. Furthermore, the case of *State v. Cleveland & Pittsburgh Rd. Co.*, supra, held that whatever the littoral owner does is done with the knowledge on his part that the title to the subsoil is held by the state, as trustee for the public, and nothing can be done which will destroy or weaken the rights of the beneficiary's trust estate. The *Cleveland & Pittsburgh R.R. Co.* case further held that the state, by acquiescence, cannot abandon the trust property or enable a diversion of it by private ends different from the object for which the trust was created. Mere nonuse of the trust property by the public cannot authorize the appropriation of it by private persons to private uses and thus thwart the purpose of the trust, as was stated in *Illinois Central R.R. Co. v Illinois*, supra, at page 454.

Thomas, supra, at 14. See also *Lemley*, supra; *Schnittker*, supra.; *Beach Cliff Board of Trustees*, supra.

The State of Ohio has a duty to protect and manage the waters and lands of Lake Erie for the benefit of all Ohio citizens. Since 1917, the right to make private use of public trust land has been regulated by the General Assembly in the Fleming Act (currently R.C. 1506.10 – 1506.11). The purpose of the Act and the subsequent versions of the public trust law was to manage the development of the Lake Erie shore through the medium of granting leases to those persons constructing and maintaining artificial structures upon the Lake Erie “territory.” That purpose clearly would be frustrated unless read to require that those who use public trust lands for use and occupation by such artificial improvements apply for and obtain a lease as required by R.C.

1506.11. Management and protection of Ohio's public trust lands would be impossible without such regulation. A person may lawfully continue to use and occupy Lake Erie public trust lands for artificial improvements only as long as a lease is obtained from the State and rent is paid under the lease. See 1973 Op. Att'y Gen. No. 73-033.

Plaintiffs' refusal to enter into leases pursuant to R.C. 1506.11 for their respective use and occupation of public trust land adversely affects the ability of the State of Ohio to perform its duties as trustee to manage and protect the lands and waters of Lake Erie, and the interest of the public. Under the public trust doctrine, the State holds title in trust to the lands and waters of Lake Erie, and its title is subject only to paramount right of the federal government to regulate navigation on the navigable waters of the United States. Public trust lands may not be alienated except for significant public purposes, in furtherance of the trust, and even then, only by express grant with the consent of the legislative and executive branch. *Illinois Central R. Co.*, supra; 2000 Op. Att'y Gen. No. 2000-047. Plaintiffs are asking this Court to alienate the State from its public trust estate, and make the State's trust estate susceptible to wholly private use and ownership by Plaintiffs. This result is not permissible under Ohio law.

Since 1916, the Ohio Supreme Court has held that the State of Ohio cannot abdicate any control over the public trust estate of Lake Erie:

The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created.

If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use, a clearer view can be had.

An individual may abandon his private property, but a public trustee cannot abandon public property. Mere nonuser of the trust property by the public cannot authorize the appropriation of it by private persons to private uses, and thus thwart the purposes of the trust.

Cleveland & P. R. Co., supra at 80.

Under the public trust doctrine in Ohio, Plaintiffs and their predecessors in title were charged with the knowledge that they could do nothing on the State's public trust property which would destroy or weaken the public's rights in that estate. *Cleveland & P. R. Co.*, supra. Consequently, Plaintiffs could not have succeeded to any rights greater than those public and littoral rights established under Ohio law. Moreover, under Ohio law, the parcels of public trust

land and water upon which Plaintiffs' artificial improvements are located cannot be placed entirely beyond the direction and control of the State. *Cleveland & P. R. Co., supra*.

Plaintiffs demand a redistribution of rights in Lake Erie in direct contravention of the public trust doctrine in Ohio. Against the legal principles of the public trust doctrine, the State's title to and the public's rights in Lake Erie conclusively supersede any conflicting interests claimed by Plaintiffs. The public lands held under the trust estate are incapable of exclusive appropriation and privatization by individuals such as Plaintiffs. As against their claims, the public trust estate is, and for all times will be, illimitable, unrestrainable, irrevocable and inextinguishable. The State of Ohio is entitled to Summary Judgment on the Third and final Question of Law certified by the Court.

V. STANDARD OF REVIEW

The standard governing a motion for summary judgment is set forth in Ohio Rule of Civil Procedure (hereinafter "Civ.R.") 56. Subsections (B) and (C) of Civ.R. 56 provide in pertinent part as follows:

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. ...

(C) Motion and proceedings. ... Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

When presented with a properly supported motion for summary judgment, a court must view all evidentiary material in a light most favorable to the non-moving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317. However, a non-moving party may not simply rely upon the allegations in its pleadings, but must demonstrate the existence of a genuine issue of material fact based upon the types of evidentiary materials listed in Civ.R. 56(C). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

Pursuant to Civ.R. 56(C), summary judgment shall be granted when, construing the evidence most strongly in favor of the nonmoving party (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds

can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201.

Here, no genuine issue of material fact exists to require a trial, and only the three questions of law found to be common to the class by the Court must be resolved. As demonstrated in this Brief in Support of the State's Motion for Summary Judgment, the State of Ohio is entitled to judgment as a matter of law on each of the three questions of law before the Court in this class action. As there is no genuine issue of any material fact, and reasonable minds can come to but one conclusion, that conclusion being adverse to Plaintiffs, the State of Ohio is entitled to Summary Judgment in this action as a matter of law.

VI. CONCLUSION

For all of the above reasons, the State of Ohio respectfully requests that the Court issue an Order granting summary judgment to the State pursuant to Rule 56(B) and (C) of the Ohio Rules of Civil Procedure because there is no genuine issue of material fact and the State is entitled to judgment as a matter of law.

A proposed order granting this Motion is attached hereto for the Court's consideration pursuant to Paragraph {3} of the Honorable Judge Eugene A. Lucci's Order of Procedure (Civil) (Revised 10/28/2003).

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing **Motion of Defendants-Respondents for Summary Judgment and Brief in Support** was sent via electronic mail and by regular U.S. mail, postage prepaid, this 30th day of May 2007 to:

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