

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

STATE ex rel. MERRILL, TRUSTEE, et al.,	}	
	}	
Plaintiffs-Relators-Appellees/Cross- Appellants,	}	Court of Appeals No. 2007-L-008
	}	
HOMER S. TAFT,	}	Lake County Court of Common Pleas
	}	
Intervening Plaintiff-Appellee[/Cross- Appellant],	}	Case No. 04-CV-001060
	}	
and	}	
	}	Oral Argument Requested
L. SCOT DUNCAN, et al.	}	
	}	
Intervening Plaintiffs-Appellees,	}	
	}	
vs.	}	
	}	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.	}	
	}	
Defendants-Respondents/Appellees	}	
	}	
STATE OF OHIO,	}	
	}	
Defendant-Respondent/Appellant-Cross Appellee	}	
	}	
and	}	
	}	
NATIONAL WILDLIFE FEDERATION, et al.,	}	
	}	
Intervening-Defendants/Appellants-Cross Appellants	}	

**ANSWER BRIEF OF INTERVENING PLAINTIFF – APPELLEE
HOMER S. TAFT**

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Cases

<i>Canal Commissioners v. The People</i> , 5 Wend. 423	17
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Cases

Kaiser Aetna v United States (1979), 444 U.S. 1625
United States v. Marion L. Kinkaid Trust (E.D. Mich. 2006), 463 F. Supp.2d 68024
United States v. Oregon (1935), 295 U.S. 123

Regulations

33 C.F.R. §329.11(a)(2)24

Other

U.S. Army Corps of Engineers, Detroit District, Long Term Average Min-Max Water Levels, <http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historicdata/longtermaveragemin-maxwaterlevels/>)23

Assignment 2. Appellee agrees the trial court should have declared the rights and liabilities of accretion, reliction, avulsion, and erosion as well as other rights, but the State’s assertion that the littoral rights of upland owners and even the private shore of upland owners are “subject to” whatever the State desires, not limited to its “public trust” responsibilities solely for the purposes of navigation and fishery simply reverses every Ohio legal authority.26

a. The State’s assertion of superiority over the littoral property rights of upland owners is misplaced except solely for protection of navigation, water commerce and fishery, as explicitly provided in Ohio by statute, by decisional law and correctly found the trial court below.26

Cases

State ex rel. Squire v. Cleveland (1948), 150 Ohio St. 30327

Statutes

General Code Section 3699-a26
O.R.C. 1506.1026

b. All parties appear to agree the trial court should have declared the littoral rights of accretion, reliction, and avulsion and the liability of natural erosion.27

c. Upland owners have the littoral right to protect fast lands.28

Cases

Boling v. United States, (Fed. Cir. 2000) 220 F. 3rd 136530
Owen v. United States, 851 F.2d 1404 (Fed.Cir. 1988) (en banc)30
State ex rel. Duffy vs. Lakefront East Fifty-Fifth Street (1940), 137 Ohio St. 8 ..28
State ex rel. Squire v. Cleveland (1948), 150 Ohio St. 30328
United States v. 461.42 Acres of Land, 222 F. Supp 55 (N.D. Ohio, 1963)29
United States v. Dickinson (1947) 331 U.S. 745,30

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O.R.C. Section 1506.1029

Treatises, Articles

North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty First Century, (2005), Joseph J. Kalo, 83 N.C. Law Rev. 1427, at 149029

d. Littoral Owners have the right to exclude the public from all of their private lands.30

Cases

Glass v. Goeckel, (2005), 473 Mich. 66731
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Hughes v. Washington (1967), 389 U.S. 29031
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II. Statement of the Case

Intervening Plaintiff-Appellee accepts much of the Statement of the Case presented by Appellant, with certain additions and corrections. Once the class was certified and the notice granting members of the class the right to intervene was agreed upon, the Court recognized the right of Intervening Plaintiffs Taft and Duncans to intervene of right, which was memorialized in various orders of the trial court. (T.d. 160 , 161 ¶3, 162 ¶5) Defendant State of Ohio actually filed its appeal on January 8, 2008.¹ (T.d. 192) Appellant State of Ohio's former joint parties Defendants-Respondents State of Ohio Department of Natural Resources ("ODNR") and its Director did not appeal and have not filed any matters before this Court. Presumably, by direction of the Governor, those parties have continued their decision below not to oppose the determination of the trial court and to honor upland owners' deeds, since the time within which to file an answer in either this appeal or the appeal of the Intervening Defendants-Appellants National Wildlife Federation and Ohio Environmental Council ("NWF/OEC") in the companion appeal 2008-L-007 have passed. (T.d. 170)

III. Statement of Facts.

No stipulation was ever agreed to that no facts were in dispute prior to or after "admission" of Intervening Plaintiffs, who were already participants in all proceedings by

¹ The Attorney General of Ohio apparently appeals to this Court from the judgment below on his own authority, without the request or approval of the Governor of the State of Ohio. In the trial court below, upon substitution of counsel for the Attorney General, the Department of Natural Resources and its Director, by separate counsel, advised the trial court that it had withdrawn its prior non-rule based "policy" that the upland owner owned only to ordinary high water, and that the determination was made with the knowledge and approval of the Governor of the State of Ohio (T.d. 170). The Constitution of the State of Ohio provides that the complete executive authority to act on behalf of the State of Ohio is vested in the Governor. Ohio Const. Art III, § 5. The Attorney General is authorized by statute to represent the "State of Ohio" in the Supreme Court of Ohio or in its lower courts upon the "requirement" of the Governor or General Assembly. O.R.C. § 109.02. There is no evidence of such a request, and the Governor directed the remaining Defendants-Respondents to abandon their former position. In light of these circumstances, the authority of the Attorney General to prosecute an appeal in opposition to the Governor exercising the full executive power of the State of Ohio is unclear.

order of the trial court in the consolidation of the cases, and the trial court issued no such order, ruling only that there were common questions of law. (T.d. 160-162) The trial court had previously ordered all parties (including Intervening Plaintiffs) to attempt to stipulate to such facts as they could prior to the certification hearing, but never suggested that all facts were agreed upon, much less that any party was prevented from relying on such facts or evidence as they might believe appropriate. (T.d. 50) Supporting its Ordinary High Water Mark (OHWM) argument, the State of Ohio and its then joint party Defendants, now Appellees, presented partial, incomplete and inaccurate legal conclusions, couched as a “fact” affidavit of a title search of Plaintiffs and Intervening Plaintiffs’ chains of title. (T.d. 166, Appendix A) The State also proffered affidavits of ODNR employees with supporting documents about Plaintiffs’ properties, publications, reports and studies of the United States Army Corps of Engineers, the affidavit of a Corps employee given in an unrelated federal case and many other fact based materials. (T.d. 166 Appendix; T.d. 174, T.d. 175 (Appendices), T.d 181, Appendices). The State of Ohio demanded in discovery hundreds of pages of documents relied upon by Plaintiffs and Intervening Plaintiffs and took depositions of two Intervening Defendants and several Plaintiffs-Relators. (T.d. 99-112) The State’s extensive factual assertions in support of OHWM is hardly indicative of a supposed stipulation that there were no issues of fact

Most of the “facts”, however, that the State belatedly objects to now are actually the determined and declared law and land transfer records of the State of Ohio, previously resolved and enacted by both Ohio’s courts and its General Assembly, as well as the Continental Congress, the United States Congress, the President of the

United States, the General Assembly and Governor of the State of Connecticut, and the Supreme Court of the United States. Nevertheless, despite now complaining about the result below, the State of Ohio never presented so much as a scintilla of proof below to establish a “genuine issue of material fact” on the facts or historic legal record presented by Plaintiffs. It might have been difficult where several executive officers of the State have published official publications verifying those facts and records, which are also adopted by the legislative and judicial branches of Ohio government.

IV. ARGUMENT

SUMMARY OF ARGUMENT

The State of Ohio continues its circular, illogical and incorrect arguments that the question of property rights in Ohio is purely a matter of State law, yet federal law defines the upper landward boundary of the “public trust” which the State is powerless to change:² The State also inaccurately argues that the federal courts determined that the law of the inland lakes is the same as ocean tidal waters where the Ordinary High Water Mark is the average high tide which the waters inundate twice on an average day, while asserting a water mark that the waters of Lake Erie have almost never reached in recorded history. Appellant State of Ohio and its counsel seem to believe that if they argue their mantra of “equal footing”, “navigable waters” and “public trust” and the arguments respecting them to the point of numbing repetition, that this Court will accede to their re-write of the law of Ohio and of the United States.

² “Contrary to the trial court’s opinion, the upper boundary of navigable waters may **only** be set in accordance with the **mandates** of the federal Equal Footing Doctrine, the federal Submerged Lands Act, Ohio’s common law Public Trust Doctrine, and the codification of that doctrine in the Fleming Act, and all of those authorities clearly provide that boundary is the ordinary high water mark of Lake Erie.” Appellant’s Brief at 24. (Emphasis supplied)

Perhaps most peculiar is the Attorney General's new-found assertion that the decision of the trial court constitutes an unconstitutional taking of the property of the State without citing a constitutional provision that was violated, much less any case that has ever found this has occurred. Appellee submits no provision prohibits a state court from determining that the State has overstepped its lawful bounds, nor protects public as opposed to private property from "taking".

Neither Ohio nor any other Great Lakes State employs "Ordinary High Water Mark" as the terminus of private ownership. The withdrawal by ODNR of its former position and determination to "honor the deeds" of upland owners is essentially an agreement at the very least with the trial court's decision, if not low water mark. Were OHWM the terminus, it would be a fact based question inappropriate for summary judgment or determination on appeal. The parties agree the trial court should have declared the littoral rights and liabilities of upland owners, which are now largely conceded.

Appellant State of Ohio and other parties have accurately indicated to this Court that the issues before this Court were extensively discussed below in the Motions for Summary Judgment and supporting and opposing memoranda on the respective motions of the parties. (T.d. 165-168, 170, 172-182). Intervening Plaintiff-Appellee will highlight arguments raised below and supplement them with materials raised by other parties or new authorities before this Court, but joins in requesting the Court give full consideration to the arguments of the parties below, which in the case of Appellants does not appear to be identical to their contentions here.

Assignment 1. As to lands not privately held when a State is admitted to the Union, federal law determines the upward possible boundary to which a State may assert public rights if it chooses, but in no manner requires it to do so under the “Equal Footing” or “public trust” doctrines. In Ohio, the boundary is low water mark.

Before this Court, Appellants have tried to re-cast this case as not a property title or boundary dispute, but a determination of the termination of “fast lands”, which does not reflect the claims of Plaintiffs, the determinations of the trial court, the law of Ohio, nor largely its own arguments below.

a. Express Decisions of the Supreme Court of the United States demonstrate the inaccuracy of the State’s interpretation of the “equal Footing” and “public trust” doctrines, under which many States and most inland waters have been held to extend to the low water or the entire bed of inland waters and the Submerged Lands Act does not impair upland owners’ property rights.

One of the greatest weaknesses of Appellant’s Assignments of Error is that it is completely inconsistent as to whether the State does or does not have the right to determine that lands between high and low water, or even the entire bed under navigable waters, can be privately owned to the exclusion of the State and all others.

There is no contest by any party that the State of Ohio holds the waters of Lake Erie in public trust for navigation, fishery and water commerce. The dispute is to the “soil” of Ohio and almost completely to the “soil” that is not under water most or all of the time and transferred before Ohio’s admission to the Union. Appellant State of Ohio argues the United States was prohibited from transferring any lands below the asserted Ordinary High Water Mark before Ohio’s admission to the Union under the “Equal Footing” doctrine and the absence of language satisfactory to Defendants-Respondents as to the intent of the United States, was essentially prohibited from doing so before then by force of the “public trust” doctrine, and was prohibited from doing so thereafter

by the same doctrine. The State relies almost entirely upon misreadings of *Shively v. Bowlby* (1894), 152 U.S. 1, *Illinois Central R Co. v. Illinois* (1892) 146 U.S. 387, and the Submerged Lands Act, 43 USC sec 1301 et seq., and their progeny.

The claim that under the Equal Footing Doctrine no lands along the shore below Ordinary High Water Mark can be ceded to private ownership or control of anyone but the new State upon admission is contradicted by many decisions, from *Handly's Lessee v. Anthony*(1820), 18 U.S. 374, to *Vermont v. New Hampshire* (1933), 289 U.S. 593, *Ohio v. Kentucky* (1973), 410 U.S. 641, and *Alabama v. Texas* (1954), 347 U.S. 272.

In *Shively* itself, the Court makes its decision based on the law of that State, but extensively surveys the law of the Original Colonies, showing many used **low** water even on tidelands. *Shively* concludes that t]he title and rights of littoral owners in the soil below high-water mark are governed by the laws of the several states. As to the the Great Lakes in general and Lake Erie in particular, it is clear from *Massachusetts v. New York* (1926), 271 U.S. 65 as well as *Niles v. Cedar Point Club* (1899), 175 U.S. 300, that lands at least to the historic low water mark may and have been transferred into private ownership before and after statehood by both federal authority and the transfer of a prior claimant "sovereign state" to private ownership in what became part of another state by treaty. The Court in *Massachusetts v. New York* very clearly stated that the rule of law followed in *Shively* does not apply to the tideless seas (the Great Lakes). 271 U.S. at 92-93. Appellant fails to account how all lands under inland waters except Lake Erie in Ohio have been held to be privately held to the center of the channel or lake if *Illinois Central* or *Shively* prohibit all ownership of navigable waters below OHWM. As Ohio's courts have consistently held from *Gavit v. Chambers*

(1828)), 3 Ohio 496 and *Lamb v. Ricketts* (1842)), 11 Ohio 311 to *Portage Cty. Bd. of Commrs. v. Akron* (Dist. 11, 2004)), 156 Ohio App.3d 657 *affd.*, *Portage Cty. Bd. of Commrs. v. Akron* (2006), 109 Ohio St.3d 106, the **beds** of all navigable streams, rivers and lakes (except Lake Erie) within the state are in private ownership.

Similarly, *Illinois Central, supra*, does not hold that the State is prohibited under the “public trust” theory from transferring any lands (even if actually submerged). Rather, it holds that it may not transfer the “entire” bed of Lake Michigan, nor the “entire” bed of any bay or harbor within it, into private ownership:

“It is the settled law of this country that 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, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of the congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.” *Illinois Central* at 435.

Appellants also overlook the Court’s express holding that its ruling was limited to transfers of the “entire” bed of a lake or bay, allowing that some transfers might be permissible of limited areas. Illinois cases have found the transfer from State ownership of limited near shore areas permissible before and after the *Illinois Central* decision. *Bowes v. City of Chicago* (1954), 3 Ill.2^d 175. Further, as discussed below, the *Illinois Central* decision itself and the Illinois law do not use OHWM, but rather the “shoreline” or “water’s edge” where the water usually stands in an undisturbed condition, citing and following *Seaman v. Smith* (1860), 24 Ill. 521. Curiously, while urging in its First Issue that it is impossible for anything to be privately owned below OHWM, the State in discussing littoral rights in its Third Issue concedes that some other states have opted

for ownership of the lands to low water "where grants of the *jus privatum* down to the ordinary low water mark have been recognized." Appellant's Brief at 40.

Like most of the authority cited, Appellant's reliance on *Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469, and *Jefferis v East Omaha Land Co.* (1890), 134 U.S. 178, are misplaced. *Phillips* holds that the Mississippi Supreme Court and Mississippi law were free to determine where the demarcation between public and private land was under state law, and the U.S. Supreme Court would not interfere. *Jefferis* is even more contradictory to their characterization, since it does not rely upon "ordinary high water mark". Likewise in *Oregon ex rel. State Land Bd. V. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, the Court held:

"The disputed ownership of the riverbed lands should be Decided solely as a matter of Oregon law, and not by federal common law, since application of federal common law is required neither by the equal-footing doctrine nor by any other principle of federal law"

The Submerged Lands Act was enacted in 1953 primarily to alter decisions of the Supreme Court and resolve off-shore oil leasing issues that favored the view the federal government controlled lands below the low water mark (lower low tide) on the oceans. Congress plainly expressed its intent not to alter private ownership between the OHWM and low water mark, depending on prior transfers and state law, and confirming the doctrines of accretion, erosion, and reliction. Appellant State of Ohio neglects quoting provisions of the Submerged Lands Act relating to the ownership of lands that do not comport with their view.

43 U.S.C. Section 1301 provides in pertinent part:

"...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 waters thereafter, up to the ordinary high water mark **as heretofore or hereafter modified by accretion, erosion, and reliction;**

“(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;” (emphasis supplied)

43 U.S.C. sec 1311 provides in pertinent part:

“It is determined and declared to be in the public interest that (1) 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, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all **in accordance with applicable State law** be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States **or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;**” (emphasis supplied)

43 U.S.C. sec 1315 provides in pertinent part:

“Nothing contained in this subchapter or subchapter I of this chapter shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter or subchapter I of this chapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired

In short, the Submerged Lands Act “quiets” title between the OWHM and low water mark in whomever owns the land under prior grant, whether the State or private parties, and protects the owner of lands to the rights of reliction and accretion and liability of erosion. The Act intended and works no change in pre-existing property law. A full examination of the Act and its legislative history will show the Congress was concentrating on ownership by the States, rather than the United States, of oil, gas and mineral rights below the low water mark or “coastline” of the sea to settle disputes previously determined adversely to some states in the Supreme Court of the United

States. Congress' was not focused on the area between low and high water in the first instance, but continued the legal principle that the area between those marks was governed as to ownership by the States. The U.S. Supreme Court has also since held that the "shoreline" under the Act and federal law is the **low** water mark, and provides a good history of the issues leading to the Act and subsequent decisions. *United States v. California* (1980), 447 U.S. 1.

b. In Ohio, most lands were in fact transferred into private ownership as territory of the State of Connecticut before Ohio existed, and the State's patently flawed interpretation of "Equal Footing" is inapposite in any event.

The State of Ohio having failed to dismiss as "theory" the transfers by the State of Connecticut of its then-territory along Lake Erie below, it completely fails to discuss or account for them now factually or legally. As to the "historical record" now complained, the trial court relied upon supposed "facts" found in recorded documents and laws including enactments of the Continental Congress, United States Congress, Connecticut General Assembly, Ohio General Assembly, President of the United States, and Supreme Court of Ohio, all of whom have validated and memorialized the "facts" of the historical record of property law and transfer in what became the State of Ohio. Oddly, so have Opinions and publications of the Attorney General of Ohio and the Auditor of the State of Ohio, among other public officials and entities. See, e.g., 1 Ohio Laws XXIX, (1803); *Lockwood v. Mills* (1844, 13 Ohio 430; *Hogg v. Beerman* (1884), 41 Ohio St. 81. Against this entire legal record, the State presented below exactly nothing.

The record of land transfer was extensively documented below and in briefing in Case No. 2008-L-007 on Cross Appeal of this Appellee and will not be repeated in its

entirety here. The record establishes that most of Lake Erie's shoreline was transferred into private ownership in 1792 by its then owner, Connecticut, and was subsequently recognized and accepted by Ohio as part of and at the time of its admission to the Union.

c. With full federal approval, many states, including every Great Lakes state, rejected "ordinary high water mark" as the terminus of private ownership and title of uplands on the Great Lakes.

The State keeps referring to the "shore line" as defined at OHWM under common law, yet that is utterly untrue. While the State objects to use of a dictionary definition (and virtually all dictionaries agree), the term "shore line" in common law, Ohio, federal, and other statutory and decisional law has been universally used to mean the low water mark, with the "shore" that area lying between ordinary high mark and low water mark. Any search of the authorities and literature will provide pages purely of citations that "shoreline" is "low water", a few instances for water's edge, and almost no instances for "ordinary high water mark". E.g., *State v. McFarren* (1974), 62 Wis.2d 492. In Ohio, many cases have used "shoreline" for the termination of shallow waters or water's edge. *Mitchell v. Cleveland Elec. Illum. Co.* (1987), 30 Ohio St.3d 92; *State, ex rel. Crabbe v. S., M. & N. Rd. Co.* (1924), 111 Ohio St. 512; *Hart v. Figueroa* (6th Dist.), 2008-Ohio-1230; *Smith v. Huron* (6th Dist.), 2007-Ohio-6370; *Galinari v. Koop* (12th Dist.), 2007-Ohio-4540; *Faulkner v. Bay Village* (8th Dist.), 2002-Ohio-16; *Haldeman v. Cross Enterprises, Inc.*, 2004-Ohio-4997; *Gulley v. Markey*, 2003-Ohio-335; *Mason v. Swartz* (6th Dist., 1991), 76 Ohio App.3d 43.

There is also generally a distinction between the "high water mark", which is referred to as "ordinary" and the "low water mark" which customarily does not use that

designation. Certainly as to the Great Lakes, the decisional law is relatively unchallenged that “shore line” is the low water mark, as discussed fully below. The same definition of shore line also occurs in the survey manuals of the United States Bureau of Land Management, successor to the Surveyor General, in many glossaries of terms including learned treatises and organizations such as the Coastal States Organization, and many other sources. “Coast line” and “shoreline” were used interchangeably by the Supreme Court to mean lower low tide on the ocean coast line, and “submerged” lands were those seaward of the lower low water mark. *United States v. California* (1980), 447 U.S. 1.

The low water boundary was fully applied by New York and Pennsylvania, before and after the Union was established, to all navigable inland lakes including the Great Lakes, on both Lakes Ontario and Erie. Application of the low water mark to lands along the Great Lakes received unanimous approval of the Supreme Court of the United States in a dispute regarding private ownership of Lake Ontario frontage.

“The 'seashore' is that well-defined area, lying between high-water mark and the low-water mark, of waters in which the tide daily ebbs and flows. The fact that by the English common law, and by the law of those states bounded by tidal waters, the public has rights in the seashore, and that grants extending only to the high-water mark of such waters nevertheless give access to the sea, accounts for the rule, generally recognized and followed, that a grant whose boundaries extend to the 'shore' or 'along the shore' of the sea, carries only to highwater mark. (citations omitted).... But the word 'shore,' even in its application to tidal waters, is subject to construction by the terms of the deed and surrounding circumstances, and may mean the water's edge at low-water mark. *Storer v. Freeman*, supra; *Hathaway v. Wilson*, 123 Mass. 359; *Haskell v. Friend*, 81 N. E. 962, 196 Mass. 198.

The application of that rule to conveyances of land bordering upon non-tidal waters is supported by neither reason nor authority. The lack of clear definition, by natural landmarks, of the shore of non-tidal waters, would make its application impracticable. It would deny to grantees all access to such waters except on the irregular and infrequent occasions of flood, since there are no public rights in the

shores of non-tidal waters, and the abutting owner could not cross the shore to the water without trespass. Such a result would contravene public policy and defeat the intention with which such conveyances are normally made. New York has consistently refused to apply the rule to non-tidal waters, holding that a conveyance 'to the shore' or 'along the shore' of such waters carries to the water's edge at low water...(citations omitted), and the local rules for interpreting conveyances should be applied by this court in the absence of an expression of a different purpose ...(citations omitted). The same rule is, however, generally followed elsewhere. See *Castle v. Elder*, 59 N. W. 197, 57 Minn. 289; *Lamb v. Rickets*, 11 Ohio, 311; *Daniels v. Cheshire R. R.*, 20 N. H. 85; *Kanouse v. Slockbower*, 21 A. 197, 48 N. J. Eq. 42, 50; *Seaman v. Smith*, 24 Ill. 521; *Slauson v. Goodrich Transp. Co.*, 69 N. W. 990, 94 Wis. 642; *Burke v. Niles*, 13 New Bruns. 166; *Stover v. Lavoia*, 8 Ont. W. R. 398." *Massachusetts v. New York* (1926), 271 U.S. 65, at 92-93 .

See especially, *Stewart v. Turney* (1923), 237 N.Y. 117, 142 N.E. 437. Pennsylvania, which acquired its Lake Erie lands by purchase from the "low water mark" Commonwealth of Massachusetts, has applied low water mark on lakes including Lake Erie, *Harborcreek Twp. v. Ring* (1980), 48 Pa. Commw. 542 , 410 A.2d 917, subsequent appeal (1990), 1990 PA 40653, 131 PA Commw. 502; *Sprague v. Nelson*, (1924 Pa. Dist. & Cnty. Dec), 6 Pa. D. & C. 493, and even allows the private ownership of filled lands in the shallow waters of Lake Erie, and Presque Isle Bay in particular. *City of Erie v. R.D. McCallister & Son* (1964), 416 Pa. 54; *Harbor Marine Co. v. Nolan* (Pa.Super. 1976), 244 Pa.Super. 102. Notably, the court in *Sprague* cited to and relied upon Ohio's *Sloan v. Biemiller* decision, *infra*, in determining that private property along Lake Erie extends to the low water mark. *Sprague*, at 494, 495-96. Pennsylvania's legislature also enacted submerged land lease requirements only for lands lakeward of low water datum. 25 Pa. Code § 105.3.

In Minnesota (Lake Superior), low water mark is the legal limit of private ownership. *State v. Korrer* (1914), 127 Minn.60; *Mitchell v. St. Paul* (1948), 225 Minn. 390; *Lamprey v. Metcalf* (1893), 52 Minn. 181, 53 N.W. 1139. Michigan (Lakes

Superior, Michigan, Huron, St. Clair and Erie) also use low water mark as the standard in many decisions. *Hilt v. Weber* (1930), 252 Mich. 198; *Klais v. Danowski* (1964), 373 Mich. 262, though there is mention of “water’s edge” in some decisions. *E.g.*, *Boekeloo v. Kuschinski* (1982), 117 Mich. App. 619 (boundary is water’s edge or shoreline).

Illinois applies a “water’s edge” standard which may mean low water, even in the oft cited *Illinois Central R. Co. v Illinois*,(1892), 146 U.S. 387. Illinois decisions refer to “shoreline”, including any accretions and recessions of water to the water’s edge to the exclusion of others, which customarily means low water mark. *Bowes v. City of Chicago*, (1954) 3 Ill.2d 175; *Brundage v. Knox* (1917), 279 Ill. 450; *Seaman v. Smith*, (1860) 24 Ill. 521. Indiana has never unequivocally determined its standard, perhaps in part because most of its Great Lakes shoreline is already owned either by the State or the United States. However, its statutes do explicitly permit the transfer of State owned submerged lands of Lake Michigan into private ownership. Ind. Code 14-18-6-4.

Only Wisconsin (Lakes Michigan and Superior) actually has used the words “ordinary high water” as the boundary, which it uses for **all** navigable waters within the state (Great Lakes, navigable inland lakes with or without inlets and outlets, rivers and streams), unlike every other Great Lakes state and virtually every state in the eastern half of the United States. *State v. McFarren* (1974), 62 Wis. 2d 492. However, though Wisconsin says the public trust applies for the sole purposes of navigation and fishing landward on waters to the ordinary high water mark, Wisconsin has also held from the earliest times that the upland owner acquires title and exclusive use of all recessions and accretions to the water’s edge and has a riparian property right to exclude all persons from transiting or landing upon the shore below ordinary high water mark in

front of their land, resulting in the same practical effect as the other states. *Jansky v. Two Rivers* (1938), 278 N.W. 527; *Doemel v. Jantz* (1923), 180 Wis. 225.

d. Ohio, having the right to determine its ownership law for itself since admission to the Union, has constantly, consistently and unambiguously held that “ordinary high water mark” is not the terminus of upland property along Lake Erie, its bays, estuaries or tributaries.

In claiming the Fleming Act is not ambiguous and plain as to the ordinary high water mark, the State brushes aside the complete and unambiguous words of the Act, including “underlying the waters of Lake Erie”, “covered by water”, “beneath the waters”, and “natural shore line” among others. Instead the State claims that the General Assembly meant “ordinary high water mark”, a term well known in 1917, but which the General Assembly chose not to use, selecting instead words at complete variance with that term.

All parties agree that two decisions of the Ohio Supreme Court, confirmed by enactment of the Fleming Act in 1917 and followed by subsequent decisions, are the central points of authority in Ohio. Along with prior decisions relied upon by both Appellee and Cross-Appellant, *Sloan v. Beimiller*, *State v C & P R Co* , *State ex rel. Duffy v. Lakefront East Fifty-Fifth Corp.*, and *State ex rel. Squire v. Cleveland*, set forth controlling authority in Ohio. The State’s reliance on those decisions is entirely misplaced, and it substantially edits them to support its argument. As the trial court held, those decisions and that enactment show beyond the slightest doubt that the one place the demarcation between public and private ownership cannot be in Ohio is the Ordinary High Water Mark. This is especially apparent where those decisions cite and concur with the law of other Great Lakes jurisdictions rejecting OHWM.

Appellee agrees with Cross Appellant that low water mark is most consistent with the application of both statutory and decisional law in Ohio, as it developed from Ohio's earliest days to the present. The Ohio Supreme Court has consistently emphasized that Ohio retains the "waters of Lake Erie" as a public trust, together with the "subaqueous" (submerged) lands "underlying", "beneath" or "covered by" those waters.

One of the earliest Lake Erie cases involving lands of Lake Erie and Sandusky Bay in the Cedar Point area, and the early Firelands surveys, was *Lockwood v. Mills* (1844), 13 Ohio 430. In *Lockwood*, the Court examined the history of the lands of the Western Reserve, the division of the Firelands from the Connecticut Land Co. lands by survey, and the proper division of lands within the Firelands, especially by the 1808 survey of Ruggles. The court placed great emphasis and reliance on the survey, field notes and map of Ruggles. The court also placed great emphasis on the distinction between all lands that were dry and those actually covered by water in computing the 500,000 acres and in determining individual parcels. In *Hogg v. Beerman* (1884), 41 Ohio St. 81, the Supreme Court held that lands of a confined bay of Lake Erie were privately owned to the "shore line" of Lake Erie itself, across the outer edge of an island defining the enclosed bay. Both cases adopt the Connecticut land transfers dismissed by Appellant.

The most definitive early case respecting Lake Erie was *Sloan v. Beimiller* (1878), 34 Ohio St. 492. The Court held that the entire "shore" between high and low water was owned exclusively by the upland owner, could be alienated (transferred) separately from the upland above the "shore", and that the owner of the "shore" had the right of any private landowner to exclude all others from walking across or "landing"

upon the “shore”, plainly referring to the area between high and low water. Speaking through its own Syllabus, the Court held:

“4. Where no question arises in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to the line at which the water usually stands when free from disturbing causes.”

“5. ... Held, ... The right reserved to the grantor is the exclusive right of landing on either shore ...” *Sloan* at 492

The Court expressly discussed approvingly cases involving “low water mark” in New York and expressly stated that lands above water when the water was free from disturbing causes was all privately held, citing an Illinois decision, *Seaman v. Smith*, that stands for either low water mark or “water’s edge”. . *Id.*, at 512.-513.

Following this line of cases, the Ohio Supreme Court decided what is generally considered the seminal case of Ohio law and foundation of the distinction between public and private rights in and along Lake Erie. Appellant State of Ohio characterizes *State v. C&P R Co.* (1916), 94 Ohio St. 61 as an “ordinary high water” decision. This contradicts the syllabus holdings provided by the Court as well as the text of the opinion. The Court speaks of “subaqueous” soil, and “land under the waters of Lake Erie”. Syllabus 2, 3, 6. The body of the opinion makes crystal clear that the Court means lands under water, as it consistently uses the term “subaqueous”. It further cites with approval the language from *Sloan v. Beimiller*, quoting New York’s *Canal Commissioners v. The People*, 5 Wend. 423, that “... our local law appears to have assigned the shores down to ordinary low-water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public.” *Id.*, at 81.

When the Ohio General Assembly took up the suggestion of Justice Johnson in *State v. C&P R Co.* to enact law regarding the “public trust”, the resulting Fleming Act used words that are most consistent with a “low water” standard of lands permanently submerged, and by its plain and unambiguous terms exclude any possibility of OHWM being the demarcation. Section 1506.10, prior to amendment and recodification, was initially enacted in 1917 as GC 3699-a 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 ... shall not be considered as having prejudiced the rights of the public in such domain. ...” 107 V 587 (1917)

The section remained undisturbed until an enactment in 1955, when the section was restated as Sec. 123.03 of the Revised Code, in pertinent part as follows:

“It is hereby declared that the waters of Lake Erie *consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary between the United States and Canada,* 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 as proprietor in trust for the people of the state, *for the public uses to which it may be adapted,* subject to the powers of the United States government, *to the public rights of navigation, water commerce,* and fishery, and further subject ~~only to the property rights right~~ of the littoral owners, *including the right* ~~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 accretion, erosion and avulsion.~~ Any artificial encroachments by public or private littoral owners, *which interfere with the free flow of commerce in navigable channels, ...*” (amended language italicized and stricken language with strike-through)

Section 1506.11 was first enacted by this same 1955 Act as Sec. 123.031 of the Revised Code. Subsection (A) provided:

“(A) “Territory”, as used in this section, means the waters and the lands presently underlying the waters of Lake Erie and lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shore line and the harbor line or the line of commercial navigation where no harbor line has been established.”

Were there any doubt of the General Assembly’s meaning, it cannot be mistaken when reading the above in conjunction with section 721.04 of the Revised Code enacted in the early enactments and remaining in the Code and retained and recodified in the 1917 and 1955 enactments. Section 721.04 refers to the territory as “within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land...” Read in *pari materia* with the Fleming Act and subsequent enactments, the territory referred to is plainly only that which is permanently submerged or “covered” by the waters of Lake Erie.

Since the 1917 enactment of the Fleming Act, the Ohio Supreme Court has consistently continued to rule that private owners’ property rights extend to, but not into, the waters of Lake Erie “beyond” the natural shoreline and that only submerged or “subaqueous” land may be within the domain of the State’s “public trust”. The Supreme Court of Ohio unanimously held that the private landowner had the right to fill on top of an unnaturally accreted shore to prevent their re-inundation or loss so long as no substantial fill was placed beyond the shore into the “waters” of Lake Erie. *State ex rel. Duffy v. Lakefront East Fifty-Fifth Corp.* (1940), 137 Ohio St. 8. *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, heavily relied on by Intervening Defendants-

Appellants, upholds provisions of the Fleming Act. The Syllabus of the Court stating its holdings rejects Appellants' position:

"2. The state of Ohio holds the title to the subaqueous soil of Lake Erie ..."

...
"5. Where a littoral proprietor has filled in the shallow waters of Lake Erie in front of his upland property, for the purpose of wharfing out to navigable waters..." *Squire*, at 303-304.

In Justice Potter Stewart 's Opinion for a unanimous Court, many passages demonstrate that "ordinary high water mark" is not the Court's holding:

"The owners of these properties have title which extends to the natural shore line of Lake Erie, which is the 1914 shore line as determined by survey" *Squire* at 317

" ... the other upland owners conceding that they did not fill in any of the lake beyond the 1914 natural shoreline ..." *Id.*, at 321

"The claim was made by the state that the submerged territory in front of the lands of the railroad companies was owned by the state of Ohio and that the companies were filling up the waters of Lake Erie ..." *Id.*, at 323

"to dump waste and fill material into the shallow waters in front of plaintiff's upland property." *Id.*, at 340

"that plaintiff and its predecessor in title had the waste material dumped into the shallow waters in front of their uplands." *Id.*, at 340

The Court further cites General Code Section 3699-1 from the Abele Act, now O.R.C. section 721.04, which speaks of "over and on any submerged or artificially filled land ... within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land." As just quoted, this section remains part of Ohio law to this day.

The State now argues ODNR is entitled to administrative deference in its interpretation that the statutes require OHWM and as to what that mark is. O.R.C. 1506.02(A)(3) requires ODNR to adopt rules and regulations in the manner required by

O.R.C. 119.01 to 119.13, with special provisions in Chapter 1506 as well. Those rules are also to “sunset” every 6 years. O.R.C. 1506.021. Though 1506.10 requires the State to adopt rules, no rules regarding the definition or location of “shoreline” or even OHWM or low water were ever adopted under it, so the only definitions of ODNR properly adopted were those quoted by the trial court from the same Chapter. In any event, if the unlawfully adopted belief or “policy” of DNR as to the OHWM and the location thereof, first applied after 1999 without public hearing or legislative oversight as legally required, were not eviscerated by Chapter 119 ORC, nevertheless ODNR already has— formally placing the trial court on notice that it has abandoned any reliance on its **former** policy. (T.d. 170)

The State’s reliance on 1514.01(L) as to ordinary high water although streams are owned to thread of stream is inapposite. The statute has no bearing on ownership, addressing regulatory issues, and the high water mark definition used is not inaccurate as to streams and rivers where the term has a different definition than for lakes. See, however, Chapter 1547 of the Revised Code, where “shoreline” is clearly used to denote contact with waters of the Lake.

In concluding its argument that the trial court’s boundary is in error, it engages in an extended, unsupported polemic to show it couldn’t administer the territory under the trial court’s ruling. Aside from the fact that Chapter 1506 permits the State to issue **either** a permit or a lease, and a permit for littoral rights as well as private property improvements is more appropriate for regulation of property rights, the administrative convenience or difficulty of obeying the law is not an excuse to disregard it.

e. The elevation 573.4 ft. (IGLD 1985) bears no relationship to the location of OHWM, which would in any event be a disputed question of fact not ripe for summary judgment.

Though Appellee rejects OHWM as the appropriate landward boundary of the “territory”, it cannot be found to be an elevation of 573.4 ft above sea level even if OHWM were the boundary. The State begins with a false and fatal premise – that there is an “IGLD method” and that the current ordinary high water mark of Lake Erie was determined and is adjusted every thirty years by scientific study under this method. The IGLD or International Great Lakes Datum is an elevation study of land, not water, designed to determine the relative elevations to a point on the seacoast of various water level gauges and other land based features. The resulting data is used to “adjust” the previously recorded water levels at each respective gauge, including any change in gauge level due to geomorphic rebound or recession. In the 1990s, the IGLD reference point was changed from one location to another and in the process a survey was done of late 1980s elevations to adjust the land elevations. The readings of the water levels of each gauge were adjusted accordingly. As part of that study, the determination was that the gauge levels on Lake Erie were .6 ft. different to the new reference point and in part due to isostatic rebound. Thereafter, the US Army Corps of Engineers asserted regulatory OHWM for purposes of the Rivers and Harbors Act was adjusted by .6 ft from the 1973 assertion of 572.8 ft. to 573.4 ft.. There was no determination or showing that the actual levels of the Lake changed by even one millimeter. At no time did the International Joint Commission, the USACE or any other body conduct a scientific study or computation of lake levels over any period of time to determine any actual water level, average or otherwise. The workpapers of USACE show that prior to 1973, Lake

Erie's OHWM for the Rivers and Harbors Act was different in the two responsible Districts for Lake Erie and was raised to the higher level of 572.8 at that time for uniformity and administrative convenience. More importantly, the level was supposedly set pursuant to a then-existing regulation that set the point of OHWM on a lake at that point where it was inundated 25% of the time over record, but the workpapers established that actually the level selected for Lake Erie were inundated less than 1% of the time. Factually, USACE has never asserted an OHWM for Lake Erie based on any water level average. All of this appears in the reports and studies attached to Defendants-Respondents and Intervening Plaintiffs' Appendices below. Shortly after the 1973 "determination" by USACE, USACE withdrew the regulation on OHWM of inland lakes as fatally legally flawed and contrary to federal court decisions and has never since adopted a regulation. For further review of the regulatory and factual background of the USACE "determination", see Intervening Plaintiffs' Rebuttal Brief (T.d. 179, p. 9-16).

As many federal and state decisions have held, the key element of the "high water mark" determination is that it must be "ordinary" or "usual". It is not to be influenced by the unusual highs or "freshets" of the spring nor the lows of winter, but the ordinarily occurring levels. *Stewart v. Turney* (1923), 237 N.Y. 117. The Supreme Court of the United States has held, on inland fresh water lakes, that the term "ordinary" is interchangeable with "mean". *United States v. Oregon* (1935), 295 U.S. 1. The evidence presented by the State itself below shows that the mean average waters of Lake Erie is 571.26, more than 2 feet below the OHWM it claims. The State now tries to assert a new method that averages the high waters of the Lake in a method it claims

similar to averaging all high tides on the ocean. Though they provide no legal support for such a position and courts have not used that methodology, it would nevertheless produce an elevation of 571.9 ft., 1.5 feet below the State's claimed OHWM. U.S. Army Corps of Engineers, Detroit District, Long Term Average Min-Max Water Levels, (<http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historicdata/longtermaverage-min-maxwaterlevels/>).

The State can show no valid reason to use the USACE determination as any grounds for its assertion. Most importantly, the federal regulations state that the USACE OHWM is adopted purely for regulatory purposes under the Rivers and Harbors Act of 1899 or other subsequent statutes, and not intended nor suited for use with respect to state real property boundary law. 33 C.F.R. §329.11(a)(2). The regulations further require that any proposed level is essentially only the upper potential limit of regulatory jurisdiction, and is subject to determination by federal courts. Lastly, the regulations are completely subject to federal court determination, and a federal court found the asserted Great Lakes OHWMs of USACE to be wrong and not even administratively authorized by regulation or statute. *United States v. Marion L. Kinkaid Trust* (E.D. Mich. 2006), 463 F. Supp.2d 680.

Now the State asserts unsubstantiated claims about reliance on USACE OHWM by Ohio EPA or others. While it may be possible such definitions are relied on for consistency to the federal Clean Water Act or other federal regulatory purposes and programs, they would still have nothing to do with real property boundaries. Whether under the Commerce Clause as to the regulation of "navigable" waters (not lands) or other provisions, there is a decided difference between defining ordinary high water

mark for regulatory purposes and for property ownership purposes. *Kaiser Aetna v United States* (1979), 444 U.S. 164.

The essential point not acknowledged by the State is that there is a sea of difference between the right of the government to **reasonable regulation** of lands for proper governmental purposes and the right to seize or convert private property solely to public use. Neither Plaintiffs nor Intervening Plaintiffs have ever questioned the right of the State to reasonable regulation subject to legislative authority to prevent harm or promote the public safety and welfare, so long as such regulation respects littoral rights and does not amount to an unfair burden or a total destruction on the private ownership and use of privately held lands. No challenge is raised to the State's right to regulate and maintain the **waters** of Lake Erie for the "public trust" purposes of navigation and fishery. This dispute revolves solely around the right of the State to seize ownership and total control of those lands often above water contrary to its own law and the United States Constitution's prohibition on "taking" without just compensation.

It is not sufficient for the State to simply assert it doesn't like any facts relied upon by Plaintiffs. It must demonstrate by evidence a true contest as to those facts. Intervening Plaintiffs below, and no doubt Plaintiffs-Relators, believed there were no *genuine* issues of *material* fact, which proved correct based on the legal conclusions of the trial court, but never agreed not to contest nor to accept the State's flawed "facts" regarding Ordinary High Water Mark. Were OHWM to be relevant to the boundary between private ownership and the "territory", the record below and the State's arguments here illustrate beyond doubt that the level of OHWM is a significantly

disputed genuine issue of material fact, and cannot be determined either by summary judgment or by this Court on appeal.

Assignment 2. Appellee agrees the trial court should have declared the rights and liabilities of accretion, reliction, avulsion, and erosion as well as other rights, but the State’s assertion that the littoral rights of upland owners and even the private shore of upland owners are “subject to” whatever the State desires, not limited to its “public trust” responsibilities solely for the purposes of navigation and fishery simply reverses every Ohio legal authority.

a. The State’s assertion of superiority over the littoral property rights of upland owners is misplaced except solely for protection of navigation, water commerce and fishery, as explicitly provided in Ohio by statute, by decisional law and correctly found the trial court below.

Appellee urges the State has an obligation, as trustee, pursuant to the Ohio decisional law Defendants-Appellants themselves cite, to permit the reasonable use and occupation of the waters of Lake Erie and the lands beneath them by private littoral owners **beyond the natural shoreline** in furtherance of their use of and access to the waters for consumption, navigation, water commerce and fishery as well. These rights were expressly confirmed by the enactment of General Code Section 3699-a as originally enacted, and retained in the current section 1506.10 of the Revised Code, which states that the rights of the state in the territory are further “subject to” the littoral rights of upland owners. As enacted by the Ohio General Assembly in 1917, following the common law and unanimous decisions of the Ohio Supreme Court, the legislature declared that:

“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.” (*General Code Section 3699-a*, as enacted in 107 Ohio Laws 587, 1917) (emphasis added)

Thus, under Ohio law, the “public trust” of the state extends to the waters of Lake Erie and the lands actual beneath such waters, but expressly “subject to” three categories of rights:

- a. The powers of the United States
- b. Public rights of navigation and fishery, and
- c. The rights and liabilities of littoral owners while said waters remain in their natural state of accretion, erosion, avulsion, as well as use, access and wharfing out.

Ohio’s courts have subsequently cited approvingly the language of the statute making the state’s trusteeship “subject to” the rights of littoral owners, though certainly allowing the state to assure that the private owner’s exercise of those rights does not *substantially* impair the public’s rights in navigation, water commerce and fishery. *State ex rel Squire*, at 336. The trial court properly held that littoral rights trump all but the State’s trust to protect public rights of navigation and fishery.

b. All parties appear to agree the trial court should have declared the littoral rights of accretion, reliction, and avulsion and the liability of natural erosion.

Appellant State of Ohio agrees that the littoral upland owner retains the “common law” rights of accretion, reliction and avulsion, and liability of erosion, though still not acknowledging the statutory confirmation of those rights. Appellant’s Brief at 25. It appears all parties now agree to the existence of these rights and that the trial court should have declared them. Appellee will not therefore further discuss those rights here, relying upon the Memoranda filed by Plaintiffs and Intervening Plaintiffs below and in Intervening Plaintiff-Appellee/Cross-Appellant’s Consolidated Answer Brief and Assignments of Error before this Court in Case No. 2008-L-007. In this regard,

Appellee agrees with one limited point raised by the State. If the waters of Lake Erie briefly and temporarily, often because of storm events, exceed the level of “ordinary high water” and inundate the uplands, that does not and cannot convert them temporarily or otherwise into public lands, though the waters themselves remain part of the public trust. If low water mark is the proper dividing line as Appellee and Cross-Appellants assert, that result of course cannot occur.

c. Upland owners have the littoral right to protect fast lands.

The right of an upland owner to protect against loss of their lands, from inundation, erosion or avulsion and the right to fill in the lands to the water are recognized in both state and federal decisions. This right is fully shown under Ohio Law in *State ex rel. Duffy vs. Lakefront East Fifty-Fifth Street* (1940), 137 Ohio St. 8. In that case, even though the accretion to the upland owner resulted from **unnatural** “artificial” fill on adjoining property by an adjoining owner, with no participation of this upland owner, the Supreme Court of Ohio unanimously held that the owner had the unfettered right to fill all of those lands **to the waters** of Lake Erie to assure that they could not be resubmerged, provided that no material portion of such fill actually was into the waters of Lake Erie.

Similarly, in *State ex rel. Squire vs. Cleveland*, Justice Potter Stewart, writing for a unanimous Ohio Supreme Court, held:

“5. Where a littoral proprietor has **filled in the shallow waters of Lake Erie in front of his upland property**, for the purpose of wharfing out to navigable waters, the state or a city to which the state, by appropriate legislation, has delegated its authority, may construct works in aid of navigation, water commerce or fishery over such filled-in ground or wharf of the littoral proprietor, without compensating such proprietor for the impairment or destruction of his wharf or the impairment or destruction of his right to wharf out. In such a situation the fill of the proprietor constitutes a purpresture and its impairment or

destruction by the state or city under appropriate delegation of power, without compensating the littoral proprietor, does not violate either Section 19, Article I of the Ohio Constitution or the Fifth Amendment to the Constitution of the United States.” 150 Ohio St. 303, Syllabus 5 (1948) (emphasis supplied).

Thus, in holding that fill into the waters could be subjected to the “public trust” in favor of navigation and fisheries (and only those purposes), the Court carefully recognized and excepted the right of upland owners to fill to but not into the shallow waters of Lake Erie beyond the natural shoreline (low water mark). This case was decided after the passage of the Fleming Act by the General Assembly declaring that upland owners own to “the natural shoreline” and restricting rights to “artificial fill” beyond..

To a similar effect is *United States v. 461.42 Acres of Land*, 222 F. Supp 55 (N.D. Ohio, 1963). Judge Green ruled that a lot of land that extended to the sand beach of Lake Erie, which had been filled to de-water a marsh for purposes of agricultural production, was entitled to be restored after avulsive loss even many years after the event, rebuilding the dike on the dry sand beach.

Section 1506.10 of the Revised Code, discussed by other parties, confirms this view in its language

“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.”

Thus, the General Assembly explicitly recognized that fill not extending “beyond” the natural shoreline (the low water mark) was within the lands and rights of littoral upland owners. See also, North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty First Century, (2005), Joseph J. Kalo, 83 N.C. Law Rev. 1427, at 1490.

The United States Supreme Court has held that the upland owner may have not only a right, but a duty, to protect lands as mitigation of damage. *United States v. Dickinson* (1947) 331 U.S. 745, 751. A leading case applying *Dickinson* holds damages for “takings” by the government of lands must be determined on the complete value of the lands less the value of the remainder **plus** the cost of protective structures built to prevent the further loss of lands or the value of the lands to be lost thereafter, whichever is less. *Owen v. United States*, 851 F.2d 1404 (Fed.Cir. 1988) (en banc). In further explaining *Owen*, a recent ruling of the United States Court of Appeals for the Federal Circuit states at footnote 5 to the Opinion:

“[5]Substantial encroachment of the parcel also puts a duty on the landowner to take reasonable steps to protect the property from further erosion damage, such as by the construction of revetments. If the cost of these protections would have been less than the value of the property lost to such preventable erosion, then the government’s damages, if any, are limited to the cost of protection. See *Dickinson*, 331 U.S. at 751 (“If the resulting erosion . . . was in fact preventable by prudent measures, the cost of that protection is a proper basis for determining the damage.”); *Boling*, 41 Fed. Cl. at 694-95. “*Boling v. United States*, (Fed. Cir. 2000) 220 F. 3rd 1365, 1373.

d. Littoral Owners have the right to exclude the public from all of their private lands.

Appellant State of Ohio contends before this Court that the “public trust” extends even beyond the property lines of upland owners’ property, should that line be below the “ordinary high water mark.” However, Appellant never made this allegation nor sought this relief below in its Cross Claim/Counterclaim. Though later agreeing with Intervening Defendants’ arguments in Motion for Summary Judgment, Intervening Defendants also never raised this issue in pleadings and were equally unentitled to Summary Judgment on a claim never made. The trial court was fully justified in

denying their requests for Summary Judgment only on the grounds they never properly plead nor sought such relief.

Aside from their failure to properly seek such relief, the law of Ohio is not, as the State claims, a “matter of first impression.” *Sloan v. Beimiller, supra*, fully and finally disposed of any such claims, as have several cases discussed by Plaintiffs-Cross-Appellants. *Squire*, cited by Appellant, actually holds the State and City may not build a public highway across the lakefront that denies upland owners of their littoral rights. The decision does not support the State’s version of the law in any respect, especially as to lands privately held above water. The sole case that supports their position is the Michigan decision of *Glass v. Goeckel*, (2005), 473 Mich. 667, which concedes that the upland owner owns the entire beach to at least water’s edge, yet creates a new right to walk the beach. The decision is not only an aberration of the common law of inland waters and of all Great Lakes states among others, but is an aberration in the law of Michigan that constitutes nothing less than a judicial taking, simply casting aside many prior decisions. E.g., *Hilt v. Weber* (1930), 252 Mich. 198. As Justice Potter Stewart observed concurring in reversal of the Washington Supreme Court in *Hughes v. Washington* (1967), 389 U.S. 290, after his Ohio decision in *Squire*, even a court may unconstitutionally seize private property, though its intentions may be otherwise.

However, Appellant State of Ohio has asserted a right well beyond even *Glass*, claiming that the State has the right to permit all forms of recreation on the shore. This surpasses claimed public highways and regulation for the protection of “public trust” purposes to pure hostile possession to that of the upland owner over their own lands.

V. Conclusion

For the reasons stated above, Intervening Plaintiff-Appellee Taft respectfully prays that this Court will affirm the decision of the trial court in part, modify the Order of the trial Court and reverse the Order of the trial Court as follows:

- a. Affirming that Ordinary High Water Mark is not the demarcation point between the “territory” of the State of Ohio and the private lands of upland Lake Erie owners;
- b. Reversing and modifying the trial court’s determination of the “water’s edge” to “the low water mark” of Lake Erie as the customary demarcation of public and private ownership, subject to any evidence of lawful grants beyond the low water mark;
- c. Reversing and modifying the trial court’s failure to declare the littoral rights of upland Lake Erie owners by declaring those rights; and
- d. Remanding this cause for further hearing upon the remaining Counts and claims of Plaintiffs-Relators and Intervening Plaintiffs.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of Intervening Plaintiff-Appellee-Cross Appellant's Brief on all parties on this ____ day of May, 2008, by mailing copies to their counsel of record addressed as follows:

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APPENDIX