

**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.)	

**THE STATE OF OHIO'S
REPLY BRIEF
IN SUPPORT OF
DEFENDANTS'-RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

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**“Walking the Beach to the Core of Sovereignty: The Historic Basis for the
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Haskell Abrams, University of Michigan Journal of Law Reform, Vol.
40:4 Summer 2007, pgs. 861-906.D**

I. INTRODUCTION

Defendant-Respondent the State of Ohio (hereinafter “the State of Ohio” or “the State”), by and through counsel, Attorney General Marc Dann, submits this Reply Brief in Support of the Motion of Defendants-Respondents for Summary Judgment and Brief in Support (hereinafter “the State’s Motion for Summary Judgment”) and in response to both the Class Plaintiffs’ Brief in Opposition to the State of Ohio’s Motion for Summary Judgment (hereinafter “Plaintiffs’ Brief in Opposition”) and the Intervening Plaintiffs’ Brief in Reply to Defendants-Respondents Motion for Summary Judgment and Brief in Support (hereinafter “Taft & Duncan’s Brief in Opposition”), and respectfully requests that the Court grant the State’s Motion for Summary Judgment for the reasons set forth below.¹

II. LAW AND ARGUMENT

A. **PLAINTIFFS’ BRIEF IN OPPOSITION TO THE STATE’S MOTION FOR SUMMARY JUDGMENT FAILS ON ALL THREE QUESTIONS OF LAW BEFORE THE COURT, AND THE STATE’S MOTION FOR SUMMARY JUDGMENT MUST BE GRANTED.**

Plaintiffs’ Brief in Opposition primarily opposes the State’s Motion for Summary Judgment under the first question of law before the Court. Plaintiffs offer only minimal opposition to the law presented in the State’s Motion for Summary Judgment under the second issue, and no opposition to the existing law presented by the State under the third question. Plaintiffs’ only arguments under the third question of law pertain to juxtaposed rights that have yet to be officially recognized under Ohio law, one to the exclusion of the other – a littoral right of exclusive use of the shore vs. the public right to walk the shore. To the extent that Plaintiffs

¹ Many of the legal arguments made in both the Plaintiffs’ and Intervening Plaintiffs’ Briefs in Opposition to the State’s Motion for Summary Judgment have already been addressed in the State’s Briefs in Opposition and in its original Motion for Summary Judgment. In the interest of minimizing repetition, the State will incorporate the law established in its prior briefings by reference, without re-citation to the authorities listed therein, as often as possible in this Reply Brief. Accordingly, the State’s Motion for Summary Judgment, The State of Ohio’s Brief in Opposition to Plaintiffs’-Relators’ Motion for Summary Judgment (hereinafter “State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment”), and The State of Ohio’s Brief in Opposition to Intervening Plaintiffs’-Relators’ Supplemental Motion for Summary Judgment (hereinafter “State’s Brief in Opposition to Intervening Plaintiffs’ Motion for Summary Judgment”), are all hereby incorporated into this Reply Brief as if fully re-written herein.

have offered no opposition to the State’s Motion for Summary Judgment, the State’s Motion must be granted. To the extent that Plaintiffs have offered arguments in opposition to the State’s Motion for Summary Judgment, those arguments fail in law and in fact to refute the State’s Motion for Summary Judgment. The State is entitled to Summary Judgment for the reasons set forth in this Reply and for the reasons set forth in its other briefings filed herein.

1. **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 of Lake Erie, and the State of Ohio holds both sovereign authority as Trustee over the “territory,” and title as proprietor in trust for the people of the state to the “territory.” The boundary of the “territory” is not and never has been “the low water mark” of Lake Erie, or the physical location of the water of Lake Erie from moment to moment.**

As established in the State’s Motion for Summary Judgment and in its Briefs in Opposition, 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, 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 of 1953 (hereinafter “the Submerged Lands Act”). State’s Motion for Summary Judgment, pgs. 1-8; State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs. 2-4; State’s Brief in Opposition to Intervening Plaintiffs’ Motion for Summary Judgment, pgs. 3-9. Therefore, 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, and the predecessors in title to the Class Members were not granted any title to the lands beneath the navigable waters of Lake Erie by virtue of a federal grant before or after Ohio’s admission to the Union. At the time of Ohio’s 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.

As was also established in the State’s Motion for Summary Judgment and in its Briefs in Opposition, the State of Ohio has never granted Plaintiffs any title in its public trust lands since the organization of the state, and is in fact forbidden from abdicating its interest in those lands or its responsibilities as Trustee of those lands for the people of the state. State’s Motion for Summary Judgment, pgs. 8-18; State’s Brief in Opposition to Plaintiffs’ Motion for Summary

Judgment, pgs. 3-29; State's Brief in Opposition to Intervening Plaintiffs' Motion for Summary Judgment, pgs. 4-9. Accordingly, as a matter of law, the State of Ohio continues to hold the lands, waters and contents of Lake Erie up to the Ordinary High Water Mark that it has held since the organization of the state, and has made no grant of title in these lands to the littoral owners who border the Lake.

There is no support in law or fact for the proposition that Plaintiffs or their predecessors in title were the recipients of a pre-statehood or post-statehood grant to the lands below the Ordinary High Water Mark of Lake Erie from either the federal or state government. Plaintiffs' Motion for Summary Judgment and Brief in Opposition do not even allege that such a grant was ever made, and they fail to address the two determinative legal questions under this issue:

- (1) Where, as a matter of federal constitutional mandate, is the landward boundary of Ohio's public trust ownership of the lands beneath the navigable waters of Lake Erie established upon Ohio's admission to the Union, and;
- (2) Were any such lands granted to littoral owners bordering Lake Erie in the State of Ohio either by:
 - (a) the United States prior to Ohio's statehood, or;
 - (b) the State of Ohio after Ohio's statehood.

Plaintiffs' Brief in Opposition gives insight into why Plaintiffs have failed to present any argument under the essential two-part inquiry necessary for resolution of the first question before the Court. The first part of the inquiry is a matter of federal law settled by the U.S. Supreme Court under the Equal Footing Doctrine, and re-affirmed by the U.S. Congress in the Submerged Lands Act. Upon admission to the Union, states hold title to lands beneath non-tidal navigable waters "up to the ordinary high water mark." State's Motion for Summary Judgment, pgs. 1-8; State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 2-4; State's Brief in Opposition to Intervening Plaintiffs' Motion for Summary Judgment, pgs. 3-9. However, in response, Plaintiffs make the surprising claim that "the 'equal footing' doctrine ... is neither in dispute nor determinative of the issues here" because "[t]he 'equal footing' doctrine only addresses the boundary of the federal government's authority." Plaintiffs' Brief in Opposition, pg. 2. Perhaps even more startling is Plaintiffs' further reference to their perceived "Federal Jurisdiction Described in the Submerged Lands Act." Plaintiffs' Brief in Opposition, pg. 7.

Plaintiffs' Brief in Opposition on this point demonstrates a fundamental misunderstanding of the uncontroversial and completely well-settled meaning of the Equal

Footage Doctrine and purpose of the Submerged Lands Act. As a matter of settled federal law, Ohio, upon statehood, received title in trust to lands beneath Lake Erie up to the Ordinary High Water Mark pursuant to the Equal Footing Doctrine. There could hardly be a clearer recognition of that fact than the explanation of the law given by the U.S. Supreme Court in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel* (1979), 429 U.S. 363, 372. *Corvallis Sand & Gravel* was repeatedly cited by the State in its Motion for Summary Judgment, in addition to other authorities, though conspicuously omitted from the Plaintiffs' Brief in Opposition, and particularly from footnote 2, in which Plaintiffs incorrectly claim that the State's Motion for Summary Judgment presented no authority in support of that long-settled proposition. Plaintiffs' Brief in Opposition, pg. 3, n. 2.

After failing to acknowledge that the State had presented definitive authority, Plaintiffs contradict themselves and wrongly represent to the Court that "[t]he earliest case relied upon the State for this proposition" (the proposition that "the 'equal footing' doctrine set the boundary of the 'territory' at the ordinary high water mark") is "*Shively v. Bowlby*" which "was not decided until 1894." Plaintiffs' Brief in Opposition, pg. 7. The State's briefings to the Court have cited to the U.S. Supreme Court's Equal Footing Doctrine decisions and other mandatory authorities both before and after the Court's decision in *Shively*. State's Motion for Summary Judgment, pgs. 1-8; State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 2-4; State's Brief in Opposition to Intervening Plaintiffs' Motion for Summary Judgment, pgs. 3-9. See The Northwest Ordinance of 1787; *Pollard's Lessee v. Hagan* (1845), 44 U.S. 212, 3 How. 212; *Barney v. Keokuk* (1876), 94 U.S. 324; *Illinois Central Railroad Co. v. Illinois* (1892), 146 U.S. 387; *United States v. Holt State Bank* (1926), 270 U.S. 49; *Borax, Ltd. v. Los Angeles* (1935), 296 U.S. 10; The Submerged Lands Act of 1953, 43 U.S.C. 1301-1315; *Corvallis Sand & Gravel Co.*, supra; *Montana v. United States* (1981), 450 U.S. 544; *Utah Div. of State Lands v. United States* (1987), 482 U.S. 193; *Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469; *United States v. Alaska* (1997), 521 U.S. 1; *Alaska v. United States*, (2005), 545 U.S. 75.

Similarly, Plaintiffs' claims in footnote 6 on pages 8-9 of their Brief in Opposition are, at best, confused. Obviously what the states received upon statehood from the United States, and what the United States withheld from grants to private parties bordering navigable rivers and lakes, was a matter of federal law and federal obligation under the Equal Footing Doctrine. However, what the U.S. Supreme Court has also repeatedly explained is that, ***thereafter*** (after statehood), it is up to the states, under their respective state law, whether that state may grant

some of its constitutionally granted title to the owners of the uplands bordering the navigable waters within the territorial boundaries of that state. Both the U.S. Supreme Court in *Shively*, and the U.S. Congress under the Submerged Lands Act, have recognized that some states **after statehood** conveyed their jus privatum interest (title) below the Ordinary High Water Mark (or below the line of mean high tide for ocean states) of its navigable bodies of water to the upland owners that border them, while the majority did not. The State’s Motion for Summary Judgment and Briefs in Opposition acknowledges this, but also points out that no such state grant of title has yet been made in Ohio.

As to the second state law part of the inquiry, Ohio’s Fleming Act of 1917 is an unambiguous reaffirmation that Ohio has retained the Lake Erie “territory” that it received under federal law – those lands, waters and contents 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**” – the lands, waters and contents of Lake Erie up to the Ordinary High Water Mark. R.C. 1506.10; State’s Motion for Summary Judgment, pgs. 11-14; State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs. 5-13. Plaintiffs’ Brief in Opposition opposes this express language on four incorrect bases: (1) misinterpretation of the language in the Fleming Act referencing the lands beneath “the waters of Lake Erie;” (2) misapplication of inapplicable cases involving the federal law of boundary disputes between two sovereign states; (3) misrepresentation of the Ohio Supreme Court’s decision in *Sloan v. Biemiller*, and (4) outright mischaracterization of the State’s “position” in this litigation regarding other bodies of water in Ohio such as rivers, streams, and other inland lakes.

First, Plaintiffs allege that “the State’s Motion fails to address in any manner how its recent claims to hold title to the shore – the strip of dry land extending between the ordinary high water mark and low water mark – square with the plain language of 1506.10 (defining ‘territory’ as the ‘waters and lands *presently underlying* the waters of Lake Erie ...’)” and claim that “the State must necessarily explain how that strip of dry land is ‘beneath’ and ‘presently underlying’ the waters of Lake Erie.” Plaintiffs Brief in Opposition, pg. 3 (emphasis in original).

As already established in the State’s briefings to the Court, the land between the ordinary high and low water marks of Lake Erie known as the shore, is **not** a “strip of dry land.” Even now, with current lake levels, the water level of Lake Erie is nowhere near the low water mark as Plaintiffs’ would have it defined by the “Low Water Datum.” Contrary to Plaintiffs’ suggestions, the “Low Water Datum” is in no way representative of the “water’s edge.” See

Appendix A – Certified Copy of Aerial Photograph depicting upland property of Named Plaintiff/Class Representative Sandra Wade and the Low Water Datum of Lake Erie (prepared by the ODNR Division of Geological Survey pursuant to OAC 1501-6-01(W) and using the methodology described by the State in its briefings under the Second Question of Law in this case); See also State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pg. 34, Appendix A. Rather the shore, limited by its upper boundary the Ordinary High Water Mark, has been defined at common law as the area routinely covered by and washed by the water with sufficient repetition to make physical impressions and prevent the growth of terrestrial vegetation.² At other times the water of Lake Erie has flooded the uplands above the shore, above the Ordinary High Water Mark, as defined by all of the lines that have been established as a result of those flooding events above ordinary high water. See http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historicdata/longtermaverage_min-maxwaterlevels/ and http://www.michigan.gov/documents/deq/lwm-nfip-great-lakes-flood-levels-part1_202788_7.pdf.

Beyond the factual reality of the Lake Erie coast, and even more relevant to the interpretation of the legal terminology chosen by the Legislature in the Fleming Act, phrases such as “soil beneath the waters” and “lands beneath navigable waters” have never been interpreted by courts to mean “land always covered by water,” as the usage of the U.S. Supreme Court made eminently clear in decisions prior to the passage of the Fleming Act in 1917. Rather, those phrases have been interpreted to mean the soil/lands beneath those waters to the highest point those waters ordinarily reach, excluding storm surges and flooding events, as described above. It has been long held in this nation that a body of water is not limited in its description to

² “The line to which high water normally reaches under natural conditions, but not including floods, storms, or severe meteorological conditions ... The term ‘ordinary high water mark’ (OHWM) describes the lateral extent of a waterbody, but does not include the point reached by unusual floods. In theory, the ordinary high water mark is just that, a mark upon the soil, such as stratified surface deposits, changes in soil composition or grain size, an escarpment, or signified by particular plant species. In practice biological, geographical and geomorphic indicators are often ambiguous and mathematical evidence of average water levels is increasingly becoming accepted.” Putting the Public Trust Doctrine to Work, pg. xv and 153. As will be discussed under the Second Question of Law before the Court, many Great Lakes’ States use the common law legal definition which relies upon such biological, geological and geomorphic features, while others utilize long term averages of water levels based on the International Great Lakes Datum (“IGLD”) to determine the upper boundary for the respective Great Lake(s) within their territorial boundaries.

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 v. Bowlby* (1894), 152 U.S. 1.

As established in the State's Motion for Summary Judgment, the United States Supreme Court has instructed the nation's courts that the "seminal case in American public trust jurisprudence is *Shively v. Bowlby*." *Phillips Petroleum Co. v. Mississippi*, supra, at 473. In *Shively*, the U.S. Supreme Court provided a thorough review of the federal and state law "upon the subject of public and private rights in lands below high water mark of navigable waters" in existence at that time, a full 22 years before the Ohio Supreme Court's landmark Ohio public trust doctrine decision regarding Lake Erie in *Cleveland & Pittsburgh Railroad Co.* (1916), 94 Ohio St. 61, and 23 years before the Fleming Act of 1917. *Shively*, supra, at 11. In that learned decision the words "lands beneath the waters" were used page after page, consistently and synonymously with the words "below high water mark" and "below ordinary high water mark" under both state and federal law, and were universally applied to all states regardless of whether their navigable waters were tidal or non-tidal.³ One of the many examples is as follows:

Mr. Justice Bradley, speaking for the majority of the court, and referring to many cases already cited above, said: "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 the title to the shore and lands under water in front of lands so granted enures 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 -- a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery -- and cannot be retained or granted out to individuals by the United States. Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce ... This right of the States to regulate and control the ***shores of tide waters and the land under them*** is the same as that which is exercised by the Crown in England. ***In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas.***"

³ Plaintiffs assert that *Shively* observed that Ohio was one of the states "not following the high water mark position." Plaintiffs' Brief in Opposition, pg. 4, citing *Shively*, supra at 31 (emphasis in original). However, the rule observed at page 31 of the *Shively* opinion relates exclusively to the English common law rule of ***non-tidal rivers***, which was followed by most of the early states, including Ohio, but was rejected by the Ohio Supreme Court with regard to Lake Erie. State's Brief in Opposition, pgs. 13-19; See *Sloan*, supra.

In the yet more recent case of *Illinois Central Railroad v. Illinois*, (1892) which also arose in Illinois, it was recognized as the settled law of this country that the ownership of and dominion and sovereignty **over lands covered by tide waters, or navigable lakes**, within the limits of the several States, belong to the respective States within which they are found.

Shively, supra, at 42 quoting from *Hardin v. Jordan* (1891), 140 U.S. 371, 381-382 and citing *Illinois Central*, supra, at 435-437. See *Barney*, supra, at 338 (expressly holding in 1876 that the United States limited its surveys to the high water mark of navigable freshwaters, and approved the Iowa law, following “the common law of navigable waters” that the title of upland owners extends only to ordinary high water mark); and *Mann v. Tacoma Land Co.* (1894), 153 U.S. 273, 284-285 (holding that “the **soil beneath the tide waters and those of navigable streams**,” to be the lands that were granted to the states and were not reserved to the nation, and referring to non-tidal waters (citing *Barney*) in finding that the United States abstains from extending its surveys and grants “beyond the **limits of high water**.”). See also *Illinois Central Railroad v. Chicago* (1900), 176 U.S. 646, 660 holding that “[i]t 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**.” citing, among others, its predecessor case, *Illinois Central*, supra, *Shively*, supra, and *Seaman v. Smith* (1860), 24 Ill. 521 which was subsequently quoted by the Ohio Supreme Court in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, in its reference to the “**ordinary high water mark**” and “**usual high water mark**” as the lakeward boundary of upland property bordering Lake Michigan in Illinois); and *Donnelly v. United States* (1913), 228 U.S. 243, 260-261 (holding that “the title of the **navigable waters, and the soil beneath them** was in the state and subject to its sovereignty and jurisdiction” citing *Barney* and referring to the Great Lakes).

Prior to the passage of the Fleming Act of 1917, 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 *State v. Cleveland & Pittsburgh Railroad Company* (1916), 94 Ohio St. 61. The Court began its analysis by incorporating the holdings 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).

After finding that “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,” the Ohio Supreme Court had the ability to recognize both, either or neither. *Cleveland & P. R. Co.*, supra, at 72, citing to *Shively*, supra. The Court chose to recognize certain littoral rights below that mark, but not title. In its determination of what rights and/or title upland owners possessed under Ohio law, the Ohio Supreme 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 found 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.

The Ohio Supreme Court’s decision in *Cleveland & P. R. Co.* recognized that: (1) under federal constitutional law the title and dominion of the shores and lands of the navigable waters of Lake Erie below the Ordinary High Water Mark had been granted to the State of Ohio upon entry to the union pursuant to the Equal Footing Doctrine and, thereafter, (2) under state law pronounced in that very case, the littoral rights of access and wharfing out to navigable waters upon the shore of Lake Erie below the Ordinary High Water Mark would be heretofore recognized in upland owners. But the Court did not recognize any title interest below that mark in upland owners, and expressly held that upland owners could not divest the State of its title by the construction of artificial structures and fills in exercise of their newly recognized littoral rights. Such a title interest was not recognized in *Cleveland & P. R. Co.* and has not been recognized in any subsequent decision of the Court.

As established above, the lands described by the U.S. and Ohio Supreme Courts in their Equal Footing and Public Trust cases were not lands always covered by, or beneath, the water of the oceans or the Great Lakes at every moment, since tides rise and fall, and so do the water levels of the non-tidal Great Lakes. *Shively*, supra, at 11 and 46-47. As has been more appropriately discussed by the State under the second question of law presented in this case, public trust lands do not lose their nature as public trust lands with the ebb and flow of the ocean tide or with the transitory fluctuations of the Great Lakes' water levels. Such continues to be the interpretation under the well-settled law today. As acknowledged in *Phillips Petroleum*, when the Court cited back to both *Barney* and *Illinois Central R.R., Co.*, and held that it is “the settled law of this country that the lands under navigable freshwater lakes and rivers were within the public trust given the new states upon their entry into the Union.” *Phillips Petroleum*, supra, at 479, citing *Barney*, supra, at 338 and *Illinois Central R.R., Co.*, supra, at 435-436.

At any rate, prior to the Ohio Legislature's passage of the Fleming Act of 1917, the U.S. Supreme and Ohio Supreme Courts had repeatedly used the words and phrases “waters,” “navigable waters,” “soil beneath the waters” and “lands beneath navigable waters” in referring to the lands, water, and contents of navigable waters acquired by the states upon statehood under the Equal Footing Doctrine which, as set forth above and in the State's other briefings, was always used to denote the lands up to the Ordinary High Water Mark, but never the land physically under water at any particular point in time. This was, and continues to be, the standard usage of the Courts. The authority consulted by the Ohio General Assembly in drafting the Fleming Act, was not the common dictionary, but the definitions used by the U.S. and Ohio Supreme Courts over the prior century. Accordingly, Ohio's Fleming Act, as a recognized codification of this established law, notably begins its declaratory section with that long-defined common law phraseology:

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 line between the United States and Canada, together with the soil beneath and their contents, 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, for the public uses to which they may be adapted ...

R.C. 1506.10 (emphasis added); *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 336-337 (recognizing that the Fleming Act merely codified the existing common law); See also *Thomas v. Sanders* (1979), 65 Ohio App.2d 5.

The Ohio Supreme Court and the Ohio General Assembly were well aware of what had been granted to the State and had belonged to the State since its organization – the lands, waters and contents of Lake Erie up to its Ordinary High Water Mark. They were also well aware that, after statehood, the State of Ohio could recognize or grant rights or title in those lands below that mark to the upland owners that bordered them in accordance with its state law. The Ohio Supreme Court chose to recognize littoral rights, but not to grant title in Lake Erie, and further held that, under Ohio law, the State’s public trust interest in Lake Erie can never be entirely abdicated. The Ohio Legislature chose to codify that federal and state common law in the Fleming Act. The choices made by the Ohio Supreme Court and the Ohio General Assembly compose the existing law of Ohio. Regardless of Plaintiffs’ desires for what Ohio law could be or should be, it is clearly not what Plaintiffs allege it to be.⁴ Therefore, seeking a declaration of the existing law in this forum cannot provide Plaintiffs with the remedy they desire. The proper forum to seek any change in the existing law is not before the judiciary, but before the legislative branch, and the State’s Motion for Summary Judgment in this action must be granted.

The second of the four incorrect bases by which Plaintiffs oppose the State’s Motion for Summary Judgment under the First Question of Law before the Court, results from Plaintiffs’ attempt to apply inapplicable cases involving the federal law of boundary disputes between two sovereign states to this action, which involves the federal law of the upper boundary of the lands beneath navigable waters held in trust by a state that are indisputably within its territorial boundaries. Plaintiffs’ cite to *Massachusetts v. New York* (1926), 271 U.S. 65, which involved the settlement of boundaries between two states, not with the issue here – the federal Equal Footing Doctrine that determines the initial boundary of the lands beneath navigable waters granted to each state at statehood to hold in trust for its citizens.

Such boundary cases between sovereign states make clear that the legal issues involved and the law to be applied are entirely different. When a sovereign cites a river as its boundary, the law of nations treats the entire river up to the low-water mark on the other side, as within its territory. But that is only a matter of where the line is drawn between two sovereignties, not the

⁴ Indeed, as will be discussed under the Third Question of Law before the Court, Plaintiffs would be unsatisfied with the existing law of any Great Lakes State, as none of them have recognized a title interest in the lands below the Ordinary High Water Mark of their Great Lakes that is of the nature, scope and extent that Plaintiffs seek in this litigation, and the State of Ohio is forbidden under its state law from doing so.

line demarcating the upper boundary of a state's public trust interest in the lands beneath navigable waters within its territorial boundaries or the line to which upland owners' rights or title may extend. This case does not involve a dispute over the boundary between Ohio and Pennsylvania or Michigan in Lake Erie. Those boundaries are not in dispute, in this case or otherwise. This case involves the sovereign rights of the State of Ohio over the navigable body of water known as Lake Erie within its own territory.

In *Massachusetts v. New York* the U.S. Supreme Court makes clear, that nothing in that case, with its very unusual facts, is meant to limit in any way "the sovereign rights of [a state] over navigable waters within its territory." *Massachusetts v. New York*, supra, at 87. Indeed, the Court reaffirms in the strongest terms the issue in this case, that is, that:

[T]he dominion over navigable waters and property in the soil under them are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign.

Massachusetts v. New York, supra, at 89. *Massachusetts v. New York* has nothing whatever to do with the traditional sovereign rights of sovereign states in their navigable waters and the shore lands beneath them; nor does it have anything to do with the rights in such lands that states as sovereigns obtain upon statehood under the Equal Footing Doctrine. The cases cited by the State to the Court recognize what this case is about – the rights and duties of a sovereign state to its citizens as Trustee – not who the sovereign is going to be. Plaintiffs' cases do not refute this clear authority. Accordingly, the State's Motion for Summary Judgment must be granted.

The third incorrect basis by which Plaintiffs oppose the State's Motion for Summary Judgment under the First Question of Law before the Court, again involves their misrepresentation of the Ohio Supreme Court's decision in *Sloan v. Biemiller*, supra. As already established in the State's prior briefings, and contrary to Plaintiffs deliberate citation of unrelated portions of the *Sloan* opinion, Plaintiffs claim that *Sloan* "fixed the boundary between public and private property along Lake Erie at 'the line at which the water usually stands when free from disturbing causes'" which "limits the 'territory' to the lands below the low water mark." These claims are plainly wrong. State's Motion for Summary Judgment, pgs. 9-10; State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 23-26; Plaintiffs' Brief in Opposition, pgs. 3, 9.

The Ohio Supreme Court issued its decision in *Sloan* in 1878, 16 years before the U.S. Supreme Court would resolve the confusion between tidal and non-tidal navigable waters. Yet

without the benefit of the U.S. Supreme Court's guidance, the Ohio Supreme Court applied the very principles that the U.S. Supreme Court would subsequently approve in *Shively*, and 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 thread of the stream) was not applicable to littoral owners of upland adjacent to Lake Erie:

“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.

As already established by the State, *Sloan* did not adjudicate the public trust boundary of Lake Erie. Its holding addressed 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. During the course of its opinion, the Court also discussed an Illinois Supreme Court decision regarding the extent of an upland owner's title bordering Lake Michigan in Illinois. *Sloan*, supra, at 512-513 quoting *Seaman v. Smith* (1860), 24 Ill. 521. It is in that discussion that the phrase “the line at which the water usually stands, when free from disturbing causes” makes its way into the *Sloan* opinion as a definition for the “usual high water mark,” not the low water mark. As explained most recently in the 1993 AG Opinion:

Sloan v. Biemiller did not hold that a littoral property owner on Lake Erie holds title to the low water mark ... In fact, the *Sloan v. Biemiller* Court cited an Illinois case, *Seaman v. Smith*, 24 Ill. 521 (1860), which determined that the **“usual high water mark,” defined as “that line where the water usually stands when unaffected by any disturbing cause,”** Id. at 524, was the boundary for littoral property on Lake Michigan.

1993 Op. Att’y Gen. No. 93-025 at 2-3 (emphasis added).

Indeed, in quoting 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, the Ohio Supreme Court's opinion reads in full as follows:

In *Seaman v. Smith*, 24 Ill. 521, the question was as to the location of a boundary line calling for Lake Michigan in the various deeds in a chain of title. It was held that **the line at which the water usually stands, when free from disturbing causes, is the boundary of lands in a conveyance calling for Lake Michigan as a line.**

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. . . . The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes.”

Sloan, supra, at 512-513 (emphasis added).

Moreover, the phrase in *Sloan* – “the line at which the water usually stands, when free from disturbing causes” – not only expressly references the “ordinary high-water mark” and “usual high-water mark,” but also correlates with the common law definition of the ordinary high water mark, as opposed to the low water mark. See n. 2, infra, (“The line to which high water normally reaches under natural conditions, but not including floods, storms, or severe meteorological conditions.”) In contrast, the low water mark, as Plaintiffs define it using the Low Water Datum, is not that line, and not even where the water stands today during a period of lower lake levels. The last time the water stood there for even a brief time was during the dust bowl era of the Great Depression in the 1930s, which was anything but usual. See Appendix A; See also State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pg. 34.

The Ohio Supreme Court and Ohio Legislature were certainly aware of the *Sloan* decision when the Court issued its decision in *Cleveland & P. R. Co.* in 1916 and when the General Assembly passed the Fleming Act in 1917. If they had believed, as Plaintiffs do, that *Sloan* changed the common law boundaries of both the State’s interest as Trustee and the upland owner’s title from the ordinary high water mark to the low water mark, why did they not so hold and declare? If these boundaries were changed by *Sloan* in 1878, then why does the Fleming Act refer to the “territory” held in trust by the State as the lands, waters and contents 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”, and why has the Ohio Supreme Court found that the Fleming Act merely codified the law as it has always been since statehood in 1803? If *Sloan* was an attempt to change the law, it was certainly not recognized as such by Ohio’s Supreme Court or the General Assembly. If, for the sake of argument alone, *Sloan* did change pre-existing law, then it was summarily superseded by the express language of the Fleming Act as of 1917. The Court should not countenance Plaintiffs’ deliberate misreading of *Sloan* or their arguments in reliance thereon.

The fourth and final incorrect basis⁵ by which Plaintiffs oppose the State's Motion for Summary Judgment under the First Question of Law before the Court, is also an openly incorrect characterization of the State's "position" in this litigation regarding other bodies of water in Ohio such as rivers, streams, and other inland lakes, and this fiction has gone on long enough.

As already established in the State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, Ohio law pertaining to rivers, streams and other bodies of water is not the same as Ohio's law pertaining to Lake Erie. State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 13-22. As a result of Ohio's legal history, Ohio law pertaining to rivers and other inland lakes is different than the law regarding Lake Erie. The natural bodies of water existing within Ohio's territorial boundaries have been divided into different categories by Ohio law. Under which category a waterbody falls, determines whether the lands and waters composing that body of water are susceptible to private ownership, or are impressed with the public trust. These categories have been defined as:

1. Private water courses, when they were in fact not navigable. Here, the riparian proprietor owns the water course absolutely, and any person going upon the water, for any purpose, is a trespasser.
2. Quasi-public water courses. Under this class come those streams which have no ebb and flow of the tide, but are of sufficient depth for floatage or boating. The bed of the stream is the subject of private ownership. The public have an easement therein for the purpose of transportation and commercial intercourse.
3. Water courses wholly public. Here, the public or the state owns the bed of the river. By the laws of Ohio, the great lakes belong to this, the third class.

Pollock v. Cleveland Ship Building Company (1895), 2 Ohio Dec. 151-152; 1895 Ohio Misc. LEXIS 26 (Cuyahoga County). Under Ohio law, an example of a purely private waterbody, in which both the water and the bed may be privately owned, is a non-navigable lake. Bodies of

⁵ Plaintiffs also make scant reference to other matters. These matters include Plaintiffs claims that "the State has adopted several positions over time regarding the boundary of the 'territory,'" that the Coastal Erosion Area rules are somehow applicable to R.C. 1506.10 – 1506.11, and that the findings of the 1993 AG Opinion in some way operated to abdicate the public trust from the Ordinary High Water Mark to wherever the water may be at any given moment. These issues have already been raised more completely in Plaintiffs' Motion for Summary Judgment, and have already been thoroughly responded to in the State's Brief in Opposition thereto. Therefore, in the interest of avoiding unnecessary repetition, those arguments are hereby incorporated into this Reply Brief as if fully rewritten. State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 10-11 n. 3, 23, 25, 26-32.

water that are quasi-public in nature under Ohio law include Ohio's navigable rivers and streams, in which the title to the lands composing the river are held by the upland owner that borders the river to the center thread of the stream, and only the water can be used by the public. However, Ohio law has always properly accorded Lake Erie with full public trust status, unique and apart, from every other body of water in the state, and it falls unquestionably within the third category. State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 13-22.

How these categories evolved has already been addressed in the State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, as has the inapplicability of Plaintiffs' cases and their retinue still relied upon in Plaintiffs' Brief in Opposition. Plaintiffs' Brief in Opposition, pgs. 9-14 State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 13-22, 35-37, 45-46. In the interest of avoiding undue repetition, the State will not re-present the law on these issues, but hereby incorporates those responsive sections of its Brief in Opposition to Plaintiffs' Motion for Summary Judgment by reference as if fully re-written.⁶

⁶ Plaintiffs also make bizarre claims alleging that the State has made "accusations that Ohio's citizens have engaged in fraud on a massive scale by altering the language of deeds" and that "the State suggests that a vast conspiracy arose in the late 1800s to falsely convey littoral property 'to low water.'" Plaintiffs' Brief in Opposition, pgs. 11-12. The State has made no such accusations or suggestions, and it is entirely uncertain as to why Plaintiffs would offer such a fantastical theory at all, let alone attribute it to the State of Ohio. What the State's Motion for Summary Judgment actually stated is found at pages 18-19, and was nothing more than the still uncontroverted facts on the record. These facts remain undisputed by Plaintiffs' Brief in Opposition, as well as the fact that Plaintiffs' remedy lies up their chain of title, or possibly against their title company, but not against the State of Ohio.

As established above, and in the State's other briefings to the Court, *Sloan* never held "that the boundary of a property abutting Lake Erie in the original Firelands was equivalent to low water," and *Lembeck v. Nye* (1890), 47 Ohio St. 336, was a case regarding a non-navigable private lake that expressly provided that it followed a different rule than Lake Erie. State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 9-10, 17-18, 23-26. Contrary to Plaintiffs' Brief in Opposition, neither provided a basis for a change in deed language, as neither provided a change in Ohio law pertaining to Lake Erie.

Plaintiffs have never received a grant of title from the State of Ohio to the lands below the Ordinary High Water Mark of Lake Erie. The rules generally applicable to traditional real property transactions stand in stark contrast to the rules applicable to any title claimed or attempted conveyance of the public trust lands, such as those held by the State of Ohio in Lake Erie. As established previously in the State's briefings, conveyances of public trust lands will not be lightly inferred, the language of conveyance must be clear and unequivocal, the presumptions are reversed and are against the grantee, and the ability of the state to even attempt a grant of its public trust lands is limited by its role and duty as Trustee. State's Motion for Summary Judgment, pgs. 14-18; State's Brief in Opposition to Plaintiffs' Motion for Summary

These important state law distinctions between Ohio's rivers and streams and Ohio's Great Lake that were made post-statehood, were fully recognized in the State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment. Therefore, Plaintiffs' claims that "the State's argument is {sic} logically extended, it would result in reversal of Ohio's unbroken string of riparian decisions" and "should the State's legal argument prevail here, it will also have laid claim, contrary to nearly 200 years of Ohio common law, to the beds of all navigable rivers, streams and lakes within Ohio's borders" are without merit. Plaintiffs' Brief in Opposition, pgs. 8-9.

Plaintiffs have made such claims repeatedly since 2005, with the full knowledge that they were not true. The State's Counterclaim against Plaintiffs and Cross-claim against the United States did indeed assert, as it continues to assert in the first part of the inquiry under this Question of Law (that involving the federal constitutional law Equal Footing Doctrine), that the federal government was bound to reserve all lands beneath navigable waters within the nation for the future states to be created, and to grant the same to each of the newly formed states at statehood, reserving for itself only a navigational servitude over those same lands and waters. The State of Ohio further asserted, and continues to assert, that the Federal Government did not grant title to the lands of Lake Erie within the territory that would become the State of Ohio in any original patent to an upland owner bordering the same. What Plaintiffs have known and consciously ignored since March of 2005 is the following statement that was made in State's response to one of Plaintiffs' own pleadings in this case after it was removed to federal court by the United States and the U.S. Army Corps of Engineers.

As set forth in paragraph 18 of the State of Ohio's Cross-claim, after statehood, a state can grant any property rights and interests in the lands of navigable waters to the owners of the adjoining upland, provided that such conveyance is in accordance with its own state law. See eg. *Gavit v. Chambers*, 3 Ohio 495; 1828 Ohio LEXIS 67 (1828), (holding that the land composing the beds of Ohio's navigable rivers and streams may be privately owned by the upland owners that border those water courses, while the waters themselves remain public) contrasted with *Sloan v. Biemiller*, 34 Ohio St. 492 (1878); *State v. Cleveland & Pittsburgh Railroad Company*, 94 Ohio St. 61 (1916); The Fleming Act of 1917, currently Ohio Revised Code 1506.10 - .11; *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303 (1948), (holding that the law of Ohio's rivers does not apply to Lake Erie and declaring that title to the lands, waters and contents of Lake Erie are held in trust

Judgment, pgs. 5-13, 29-32; See also *Martin v. Waddel* (1842), 41 U.S. 366, 411; *Shively*, supra, at 10; *Illinois Central R. Co.*, supra; *Appleby v. City of New York* (1925), 271 U.S. 364, 383-384; 2000 Op. Att'y Gen. No. 2000-047 at 22-23.

by the State for the people of the State, while upland owners bordering Lake Erie have no title beyond the natural shoreline).

Defendants-Respondents' Memorandum in Opposition to Plaintiffs-Relators' Motion to Strike Cross-Claim in Whole and Counterclaim in Part, U.S. District Court for the Northern District of Ohio Case No. 1:05-cv-00818, Document 7-1, filed 04/25/05, at pgs. 6-7

Plaintiffs' Complaint and the State's Counterclaim concern Lake Erie only. Upon return to the Court, this class action certified three questions of law pertaining to Lake Erie, with a Class composed of upland owners bordering Lake Erie. There was no good faith basis before, and certainly no good faith basis after the 2005 Memorandum in Opposition above was filed, for Plaintiffs' continuous misstatement of the State's "position" regarding Ohio's law of rivers and streams. Plaintiffs' are fully aware of the inaccuracy of their claims and yet they still attempt to present them to this Court. These inaccuracies cannot defeat the State's Motion for Summary Judgment on the First Question of Law before the Court, and it should be granted.

2. **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). The upper boundary of the "territory" is not and has never been "the low water mark" of Lake Erie, and the boundary of the "territory" cannot be located using the "low water datum" of Lake Erie**

As set forth in the State's prior briefings, determination of the proper methodology for locating the Ordinary High Water Mark of the Great Lakes is an unsettled question of federal law. Though this question was settled long ago by the U.S. Supreme Court as to the tidal navigable waters of ocean states, it remains unsettled and is now becoming a source of controversy for both the federal and state governments as to the non-tidal navigable waters of the Great Lakes. Because the question has already been settled as to the ocean states, the resolution of the issue for the Great Lakes states must mirror as closely as possible the methodology approved for tidal waters to avoid running afoul of the Equal Footing Doctrine. See State's Motion for Summary Judgment, pgs. 19-24; State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 32-33; State's Brief in Opposition to Intervening Plaintiffs' Motion for Summary Judgment, pg. 9.

Since "Equal Footing" is the standard, the question before this Court is what methodology for locating the Ordinary High Water Mark on the Great Lakes is "equal" to that approved for locating the line of mean high tide on the oceans? The method approved by the

U.S. Supreme Court for locating the mean high tide line of tidal navigable waters is the use of 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. The question, then, is how does one determine the location of the Ordinary High Water Mark so as to obtain a maximal equivalent to the mean used to determine the “mean high tide line,” thereby meeting the constitutional standard of assuring that the Great Lakes states are on an Equal Footing with the ocean states?

As established in the State’s prior briefings, there is an existing method for locating the Ordinary High Water Marks for each of the Great Lakes which parallels the tidal formulation of “mean high tide line” approved in *Borax* – the methodology used by the U.S. Army Corps of Engineers for determining the “Ordinary High Water Mark (OHWM)” for each of the Great Lakes, including Lake Erie. See State’s Motion for Summary Judgment, pgs. 23-24; Appendix B; Appendix C; Appendix D; Appendix E; Appendix F. This IGLD Elevation Method, as relied upon and used by the State under its concurrent sovereign authority to manage the uses of its public trust lands pursuant to R.C. 1506.11, not only meets the constitutional Equal Footing requirements of federal law, but also fully accommodates and does not alter the common law doctrines composing the concept of the “moveable freehold.” State’s Motion for Summary Judgment, pgs. 23-31; State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs. 38-40; State’s Brief in Opposition to Intervening Plaintiffs’ Motion for Summary Judgment, pgs. 9-12.

In response, Plaintiffs contend that the methodology used by the State “is based on only a six-year survey, and not the more than one century of records available” and that “Lake Erie experienced above average, indeed near record high, water levels in all seven of those years.” Plaintiffs’ Brief in Opposition, pg. 15. As already established in the State’s prior briefings, these contentions are incorrect. State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs. 40-43. The current Ordinary High Water Mark of Lake Erie as determined by the Corps under the IGLD is not based upon a six year time period of unusually high lake levels. The elevation for the current Ordinary High Water Mark of Lake Erie under IGLD 1985 was determined by the U.S. Corps of Engineers in the 1970s based upon over 100 years of water level data, and using the IGLD 1955 study. The higher water levels of the 1980’s had no effect on the determination of the elevations for either the Ordinary High Water Mark or the “Low Water Datum” of Lake Erie. State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs. 40-43, Appendix B, Appendix C at pgs. 17-18 and Declaration.

Plaintiffs also again wrongly assume that the State’s methodology “conflicts with the well-established property rights of reliction and accretion,” largely on the basis of the opinion of Class Member, Edward Herdendorf.⁷ Plaintiffs’ Brief in Opposition, pg.16. As well established in the State’s prior briefings to the Court, this assumption is also incorrect. State’s Motion for Summary Judgment, pgs. 24-31, Appendix I; State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs. 38-40. The methodology used by the State, as described in the State’s Motion for Summary Judgment, recognizes, accommodates and does not alter these common law doctrines. Under the existing common law doctrines, the temporary and transitory nature of water levels in Lake Erie does not give either Plaintiffs or the State the right to claim title to lands that have become temporarily exposed or temporarily inundated. However, Plaintiffs continue to believe, when it is to their benefit, that the landward boundary of Lake Erie moves with the water from moment to moment. As established herein and in the State’s prior briefings, Plaintiffs’ belief is incorrect as a matter of law, and is not practicable as a matter of fact.

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 only by virtue of gradual, natural, long-term processes. It does not legally move by rapid, temporary or artificial changes. Plaintiffs appear to take issue with the existing law of reliction, but fail to present any contrary authority to support their desired definition. Rather, they continue to urge, without citation to any supporting legal authority, that the law of reliction (but of course not the opposing doctrine of submergence) should include temporary changes, thereby giving them an automatic claim of title to any land below the Ordinary High Water Mark of Lake Erie exposed by the water at any given moment, while always maintaining title to their upland above the Ordinary High Water Mark regardless of how high above that line the water rises. Plaintiffs’ Motion for Summary Judgment, pgs. 23-24; Plaintiffs’ Brief in Opposition, pg 16. The State’s Motion for Summary Judgment presents the accurate, complete, and balanced description of the common law concept known as the “moveable freehold,” under which all water level changes must be long-term in order to affect a change in the boundary, and the State again respectfully directs the attention of

⁷ The State renews and continues its objections to Edward Herdendorf’s testimony as provided at footnote 6 on pages 29-30 and throughout the State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, and hereby incorporates them by reference as if fully re-written.

the Court to that analysis in opposition to that presented by Plaintiffs. State's Motion for Summary Judgment, pgs. 24-31.

Under this section of Plaintiffs' Brief in Opposition they also make two flatly erroneous claims. First, Plaintiffs allege that the law presented by the State under the Second Question of Law before the Court contradicts its response to an admission request served upon the State during discovery. Plaintiffs' Brief in Opposition, pg. 17, Exhibit C, Request to Admit 14. This allegation is false, as the Court will see when it reads the State's response to the request. Second, Plaintiffs claim that "[a]s recently as eleven months ago, the State's lead counsel in this litigation prepared and signed a submerged land lease with a private party that expressly defined the landward boundary of the state's leaseable interest as the low water mark." Plaintiffs' Brief in Opposition, pg. 17, Exhibit D. This claim is also incorrect.

Pursuant to R.C. 109.15, the Attorney General's Office prepares contracts and other instruments, such as leases. However, the Attorney General's Office does not review or approve legal descriptions attached to Leases issued under R.C. 1506.11, nor should attorneys be engaged in a practice reserved to licensed surveyors in the State of Ohio. Pursuant to OAC 1501-6-05(A) a Lease under R.C. 1506.11 shall contain "a metes and bounds description of the submerged land to be occupied or an alternate description referenced to the applicant's upland property description that is considered adequate by the director as provided by the applicant." Defendant-Respondent Ohio Department of Natural Resources has reviewed the Biro Lease file referenced by Plaintiffs, and found that a clerical error was made in which an earlier legal description, that had been submitted by the applicant but rejected by the Department because of its reference to the low water mark, was inadvertently attached to the Lease. Appendix B – Affidavit of John Watkins, Chief, Office of Coastal Management, Ohio Department of Natural Resources attaching Final Plat with Metes and Bounds Description as approved for Submerged Land Lease No. SUB-1343-OT. The legal description that was actually approved by the Department for this Lease utilized the Ordinary High Water Mark. *Id.* The Department has informed the Attorney General's Office that it was unaware of this oversight until its attention was directed to page 17 and Exhibit D of Plaintiffs' Brief in Opposition in this case. Moreover, even had such a legal description been approved by the Attorney General's Office, such approval could not change the unequivocal law establishing the State's sovereign rights and responsibilities to hold and manage Lake Erie lands in public trust.

The Second Question of Law before this Court is in need of resolution. The State of Ohio has set forth a legal and consistent solution for this Court's consideration in its Motion for Summary Judgment. As elaborated on in further briefing, this solution, is based upon and honors all of the established common law doctrines and statutory enactments under the existing law, while utilizing the most technically accurate information available. Plaintiffs have failed to show that the State's methodology is not reasonable, accurate and entitled to deference. Rather they continue to assert that the boundary is the low water mark as located by the "Low Water Datum." In so asserting, Plaintiffs offer no alternative supportable by common sense, let alone under the existing law. See Appendix A; See also State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 34, 24-31, Appendix I; State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 38-40. Accordingly, the State's Motion for Summary Judgment on the Second Question of Law should be granted.

3. **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. The littoral rights of upland owners bordering the "territory" do not include a right to exclude others, and the public's rights necessarily include the right of pedestrian travel incidental to recognized public uses.**

Plaintiffs' Brief in Opposition does not oppose the majority of the State's Motion for Summary Judgment under the Third Question of Law before the Court. Plaintiffs do not oppose the longstanding law defining the rights of the United States and the State of Ohio, or the hierarchy of the respective public and private rights in the territory, as set forth in the State's Motion for Summary Judgment. Plaintiffs do not offer any objection to the well-established rights of upland owners provided in the State's Motion for Summary Judgment, both in their upland property and with regard to their littoral rights in the territory, with two exceptions – the common law doctrine of reliction (already discussed in the section above) and Plaintiffs' claimed littoral right to exclude others from any shorelands not covered by water at any given moment. Correspondingly, Plaintiffs do not object to the long established rights of the public in the territory set forth in the State's Motion for Summary Judgment, with one exception – that the public has no right to use any part of the shore of Lake Erie that is not covered by water at any given moment. Therefore, the State is entitled to Summary Judgment on the existing law

presented in the State's Motion under the Third Question of Law that was unopposed by Plaintiffs' Brief in Opposition, and should also be granted Summary Judgment on the remaining issues in dispute for the reasons given in this Reply Brief and the State's prior briefings to the Court.

The dispute under the Third Question of Law certified by the Court has been reduced to a competing question of first impression under state law that is also in need of resolution: Does the public have the right to walk the shore of Lake Erie below its Ordinary High Water Mark or do upland owners have a littoral right to exclude others below that line? The State has already provided the existing law of this State and the law of other Great Lakes States on this question to assist the Court. State's Motion for Summary Judgment, pgs. 31-42; State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 43-49; State's Brief in Opposition to Intervening Plaintiff Motion for Summary Judgment, pgs. 12-17. The cases cited by Plaintiffs have not decided this question and are not applicable to the issues presented.

Plaintiffs begin by asserting that "the Ohio Supreme Court addressed this precise question over one hundred years ago and held that the public has no rights to the shore" and citing to *Sloan*, supra. Again, and contrary to Plaintiffs' assertions, *Sloan* did not hold that upland owners have title to or the right to exclude the public from any part of the "territory." The controversy in *Sloan* was limited to that between *two private parties* and the private agreement they had with each other. The State was not a party, and the only public right mentioned was the right of fishery, which the Court expressly recognized as an ancient public right. *Sloan* was not a public trust doctrine case. It did not adjudicate the respective public and private rights in the "territory." It did not adjudicate the boundary of the public trust, and it does not provide any credence or support for the idea that upland owners have a right to exclude the public from exercising recognized public uses of the "territory" down to "the low water mark" of Lake Erie. State's Motion for Summary Judgment, pgs. 9-10; State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 23-26, 48-49.

The remaining cases relied upon by Plaintiffs in their Brief in Opposition are inapposite to this question because they involved purely private property or federal law inapplicable to the determination of the public and private rights recognized by states after statehood. Plaintiffs' Brief in Opposition, pg. 18. As set forth above, *Massachusetts v. New York*, supra, involves the federal boundary law uniquely applicable to a dispute between two sovereign states, and is inapplicable to the issues presented in this case. Further, as agreed between the parties to this

action, it is a question of state law, not federal law, as to what public and private rights will be recognized in the shores of the navigable bodies of water within their territorial boundaries. *Massachusetts v. New York* did not, and could not, bind the State of Ohio on a matter of Ohio law that was not at issue in that case.

None of the state cases Plaintiffs cite in support of their argument under the third question of law before the Court address the issues presented here. *State v. Cleveland & P.R. Co.* (1914), 21 Ohio C.A. 1, and *Cleveland v. Cleveland C.C. & St. L. R. Co.* (1909), 19 Ohio Dec. 372, both mention that there is no public right of access across private upland property to reach the shore of Lake Erie, though *Cleveland C.C. & St. L. R. Co.* held that the upland property in dispute was public upland property, and therefore there was a public right of perpendicular access across it down to the Lake. At any rate, the State has never asserted in this case that there is a public right to access private upland property – fast land above the Ordinary High Water Mark – and has expressly stated that there is no public right of perpendicular access across upland property down to the shore of Lake Erie. State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pg. 48. The question of public access across private upland property is not a question presented in this case, and is not in dispute between the parties. This case seeks a declaration of the public and private rights and interests that have been recognized or granted by the State of Ohio in its public trust lands below the Ordinary High Water Mark of Lake Erie.

Likewise, the remaining state case cited by Plaintiffs, *Miller v. Foos* (1980), 1980 Ohio App. LEXIS 12470), involves a claim of access across what was found to be private upland property and a private structure, rather than public upland property. *Miller* was an adverse possession case in which the defendants were able to demonstrate that they had obtained title by adverse possession to a portion of a road, against the claims of plaintiffs. The plaintiffs argued that the road should remain public upland property allowing perpendicular public access down to the shore of Lake Erie. The court also found that the defendants had built a structure described as a “breakwall” and “bulkhead” at the lakeward end of the road, which was found by the court to have been constructed by defendants “with private funds for their exclusive use.” *Miller*, supra, at 8. The court found that “no evidence was presented by [plaintiffs] that the bulkhead at issue reclaimed submerged lands beyond the littoral owner’s property.” *Miller*, supra, at 9. On the basis of the evidence presented, the Court held that the public had no right of access across the upland road, because it had never been dedicated to public use within the subdivision. As such, the defendants were able to acquire private title to it by adverse possession. *Id.*

Again, the question of access across private upland property is not a question presented in this case, and is not in dispute between the parties. This case seeks a declaration of the public and private rights and interests that have been recognized or granted by the State of Ohio in its “territory,” consisting of the natural lands, waters and contents of Lake Erie below its Ordinary High Water Mark. The State does not and has not asserted an ownership interest in private upland property or in private improvements in the “territory,” but only its title in trust and sovereign authority over the territory itself, to which both the rights of littoral owners and the public are subject.

As well established in federal and Ohio law, Plaintiffs are not the owners of the “territory.” The shore of Lake Erie is not their private property. Plaintiffs have no title below the Ordinary High Water Mark of Lake Erie under the existing law, and even if Plaintiffs were able to obtain a valid grant of the *jus privatum* to the lands between the ordinary high and low water marks of Lake Erie from the Ohio General Assembly with the approval of the Governor, that title would not be the “fee simple” title they hold in their upland above the Ordinary High Water Mark. These lands are forever infused with the public trust, regardless of whether the State keeps or grants its *jus privatum*. Any definition, clarification, or limitation of the rights of the public below the Ordinary High Water Mark of Lake Erie are necessarily made by the State as the public’s Trustee under its sovereign, dominant and inalienable *jus publicum* interest in those lands. State’s Motion for Summary Judgment, pgs. 14-19, 42-47; State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs. 5-29, 47-50; See *Shively*, supra; *Illinois Central*, supra; *Cleveland & P.R. Co.*, supra; 2000 Op. Att’y Gen. No. 2000-047.

Plaintiffs have spoken often of the State’s “position” on these issues, and what they perceive that “position” to be. The only “position” that the State of Ohio advocates through its Attorney General is to defend and preserve the existing law. The Public Trust Doctrine has been the law of Ohio since its creation, and the Equal Footing Doctrine was the law of this nation even earlier. Both of these doctrines have always respected and incorporated the recognition of private property rights, but always in the balance necessary to insure the freedom necessary for navigation, commerce, fishery, and other recognized public uses to endure. As perhaps best stated in the venerable case of *Illinois Central*:

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney, in *Martin v. Waddell*, 16 Pet. 367, 410: “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.” In *Arnold v. Mundy*, 1 Halsted, 1, which is cited by this court in *Martin v. Waddell*, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made “with great deliberation and research,” the Supreme Court of New Jersey comments upon the rights of the State in the bed of navigable waters, and, after observing that the power exercised by the State over the lands and waters is nothing more than what is called the *jus regium*, the right of regulating, improving and securing them for the benefit of every individual citizen, adds: “The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.”

“The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right.”

Illinois Central, supra at 456-458.

There is nothing new about the Attorney General’s “position” or “guidance” on these issues. It has been the same guidance provided by the Attorney General’s Office, and adopted by the Ohio Supreme Court in 1948, in the last public trust doctrine case accepted for review by that Court – *State ex rel. Squire*. See Appendix C – **Brief of the State of Ohio, Amicus Curiae**, filed on February 16, 1948 in *State ex rel. Squire v. City of Cleveland*, Ohio Supreme Court Case No. 31135, by the Ohio Attorney General stating at page 6 that:

(1) the state holds title in fee to the lands below high water mark, adjacent to and under the navigable waters located within the boundaries of the state;

(2) this title is subject only to the paramount right of the Federal Government to regulate navigation on the navigable waters of the United States;

(3) any water front improvements in the nature of docks, wharves, etc., placed on the land so owned by the state, may be preserved by the owner of the upland against the claims of all the world except as against the state or federal government, in the event the federal government desires to make a change or changes in the water front to effectuate its proper promotion and regulation of navigation, or in the event the state of Ohio desires to make such change in the status of the water front to effectuate any public purpose;

(4) as between the upland owner and the state of Ohio, such water front improvements may be preserved as a matter of sufferance, until such time as the state shall declare a policy with respect to such water front inconsistent with the maintenance of such improvements.

Plaintiffs' mischaracterization of the State's Motion for Summary Judgment as "bold and inappropriate" is insupportable in fact, in law and in principle. The State's Motion for Summary Judgment in this action aggressively and accurately defends the existing law of this state, and indeed, this country. It is not "bold and inappropriate" for an Attorney General to do so when such laws correctly establish the rights of the citizens of the State. Moreover, the State is a trustee to hold and defend a trust for its beneficiaries. It is neither "bold" nor "inappropriate" for a trustee to assert its clear fiduciary responsibility.

For the reasons stated in this Reply Brief, for those provided in the State's Motion for Summary Judgment, and for those provided in the State's Briefs in Opposition to Plaintiffs' and Intervening Plaintiffs' Motions for Summary Judgment, the State's Motion for Summary Judgment on the Third Question of Law before the Court should be granted.

B. INTERVENING PLAINTIFFS TAFT & DUNCAN'S BRIEF IN OPPOSITION TO THE STATE'S MOTION FOR SUMMARY JUDGMENT ALSO FAILS ON ALL THREE QUESTIONS OF LAW BEFORE THE COURT, AND THE STATE'S MOTION FOR SUMMARY JUDGMENT MUST BE GRANTED.

Just as in their Motion for Summary Judgment, many of the arguments made by Taft & Duncan in their Brief in Opposition are redundant to those already made in Plaintiffs' Motion for Summary Judgment. Taft & Duncan, as Intervening Plaintiffs, were instructed by the Court to file briefs that would supplement Plaintiffs' briefs. Taft and Duncan's Brief in Opposition, again, does not comply with that instruction. In the interest of minimizing any further repetition, the State will only address those arguments which are unique to Taft & Duncan's Brief in Opposition. As to all other claims raised by Taft & Duncan that have already been raised by Plaintiffs' Brief in Opposition and responded to above, those responses are hereby incorporated as if fully rewritten.

1. **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 of Lake Erie, and the State of Ohio holds both sovereign authority as Trustee over the "territory," and title as proprietor in trust for the people of the state to the "territory." The boundary of the "territory" is not and never has been "The Historic Low Water Mark."**

Taft & Duncan, either because of their misunderstanding or because they lack any other means, try to discredit longstanding Lake Erie public trust jurisprudence by their continued mixing of public trust law with the boundary law between two nations or two sovereign states. As established previously, there is a separate and unique body of law that deals exclusively with water boundaries between two nations or two states. These cases which Taft & Duncan attempt to meld into public trust law, such as *Handly's Lessee v. Anthony* (1820), 18 U.S. 374; *Howard v. Ingersoll* (1851), 54 U.S. 381; *Vermont v. New Hampshire* (1933), 289 U.S. 593; *Ohio v. Kentucky* (1973), 410 U.S. 641; and *Massachusetts v. New York*, supra, all deal with the settlement of boundaries between two states, not with the public trust issue here – the federal Equal Footing Doctrine that determines the initial boundary of the lands beneath navigable waters within the state's territory granted to each state at statehood to hold in trust for its citizens.

These boundary cases between sovereign states make clear that the legal issues involved are entirely different. One need only to look at the syllabi of *Handly's Lessee*, supra, to see how unsuited these cases are to resolving the issues that are before this Court:

The boundary of the State of Kentucky extends only to low water mark on the western or northwestern side of the river Ohio; and does not include a peninsula, or island, on the western or northwestern bank, separated from the main land by a channel or bayou, which is filled with water only when the river rises above its banks, and is, at other times, dry.

When a river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly erected State extends to the river only, and the low water mark is its boundary.

Such boundary cases between sovereign states make clear that the legal issues involved and the law to be applied are entirely different. When a sovereign cites a river as its boundary, the law of nations treats the entire river up to the low-water mark on the other side, as within its territory. If the entire river is within one state's territorial boundaries (such as the Ohio River which was found to be entirely within the territorial boundaries of Kentucky in *Ohio v. Kentucky*, supra), then the territorial boundary of the other state is set at the low water mark on the other state's side. If it were otherwise, another private owner could have been interposed between the upland owner and the water, or other unusual complications could arise such as those presented and avoided in *Massachusetts v. New York*, supra. But these cases only apply where the line is

drawn between two sovereignties, not the line demarcating the upper boundary of a state's public trust interest in the lands beneath navigable waters within its territorial boundaries or the line to which upland owners' rights or title may extend.

Taft & Duncan claim that the "boundary law of the Ohio River should also apply to Lake Erie." However, this case does not involve a dispute over the boundary between Ohio and the states or the nation that borders it on Lake Erie (Pennsylvania, Michigan or Canada). Those boundaries are not in dispute, in this case or otherwise. This case involves the sovereign rights of the State of Ohio over the navigable body of water known as Lake Erie indisputably within its own territorial boundaries. Further, as set forth in this Reply Brief and in the State's prior briefings, the law of navigable rivers in Ohio is different than the law of Ohio's Great Lake. State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 13-22.

It is evident that, in resolving the issues presented in this case, these state boundary cases have nothing whatever to do with the traditional sovereign rights of sovereign states in their navigable waters and the shore lands beneath them; nor do they have anything to do with the rights in such lands that states as sovereigns obtain upon statehood under the Equal Footing Doctrine. The cases cited by the State in its Briefings before the Court properly regard what this case is about – the rights and duties of a sovereign state to its citizens as Trustee – not who the sovereign is going to be. Taft & Duncan's cases do not. They are not relevant and are in no way dispositive of the issues before this Court.

Likewise, Taft & Duncan chide the State for failing to explain why the law of ownership of navigable river and stream beds can be different from the law pertaining the Great Lakes, and in particular, Lake Erie. Given the clear direction from the Ohio Supreme Court that such law is different, and has been declared to be so for nearly a century and a half, the State had no need to address this settled point of law in its Motion for Summary Judgment. However, to lay this contention to rest once and for all, in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, the Ohio Supreme Court held that the law previously found applicable by Ohio courts regarding the title of riparian owners to the lands of rivers and streams (i.e. title to the center of the bed) ***was not*** applicable to upland adjacent to Lake Erie:

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. See State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs. 13-22, for summary of the Ohio law applicable to rivers and streams.

Taft & Duncan return to their preoccupation with the Western Reserve, with the astonishing claim that “the state’s assertion that the Quieting Act either never happened or was unconstitutional, if true, would put at risk the property titles of the 3.3 million Ohioans currently living in the Western Reserve.” Taft & Duncan’s Brief in Opposition, pg. 3. The State has never asserted that the Quieting Act never happened. The State has stated that the Quieting Act did not convey any title to the lands below the Ordinary High Water Mark of Lake Erie into private ownership prior to Ohio’s statehood, and that the State of Ohio received the lands, waters and contents of Lake Erie up to that mark within its territorial boundaries at statehood.

This case already involves the private property rights of a class composed of the approximate 14,000 upland owners bordering Lake Erie, and the public rights of every Ohioan in the “territory” of Lake Erie. Taft & Duncan’s insinuation that the State’s position will widen the rights affected by this case to all property owners in the former Western Reserve is disingenuous. The fact remains that the legal issues presented in this case do not affect either of these groups of persons as Taft & Duncan and the Plaintiffs have alleged, and the State has made none of the claims against them that Taft & Duncan and the Plaintiffs claim.⁸

Also, Taft & Duncan curiously assert the pending Native Americans’ rights cases in federal court as somehow applicable. To the extent Taft & Duncan discussed matters in those cases in their depositions in this case, such matters are not part of the record before the Court. No depositions were filed in this case, pursuant to Civ. R. 32.⁹

⁸ Likewise, the case of *Alabama v. Texas*, (1954), 347 U.S. 272, inexplicably cited by Taft & Duncan in the midst of their argument on the Western Reserve, is not relevant to the Western Reserve or the case at bar. That case merely recognized that in disposing of federal lands, the United States is not bound to grant the same acreage to every state. The case had nothing to do with the definition of the upper boundary of the lands beneath navigable waters required be held for disposition to the states upon statehood under the Equal Footing Doctrine. The U.S. Supreme Court expressly distinguished that doctrine as not germane to the case before it. *Alabama v. Texas*, supra, at 275.

⁹ Nevertheless, a brief response to a deposition matter raised by Taft & Duncan is in order. The State’s position in its litigation with the Ottawa Tribe of Oklahoma in federal court is not contrary to or inconsistent with the State’s position in this case. While litigation with sovereign Native American nations, such the Ottawa Tribe of Oklahoma, has its own unique set of historical facts and its own highly specialized and unique body of law, there is one constant feature in both cases. That is the constitutional supremacy of the federal government.

Taft & Duncan’s reliance upon and allegations against the State of Ohio in reference to *Fletcher v. Peck* (1810), 10 U.S. 87, has nothing to do with this case, as its rule is completely inapplicable to grants by state legislatures of lands beneath navigable waters. *Illinois Central*, supra. *Fletcher* held that a grant of lands (that were not lands beneath navigable waters) by act of the Georgia legislature could not be voided thereafter on the basis of alleged corruption of certain members of the legislature. However, that is not the rule applicable to attempted grants by a state legislature of public trust lands, whether corruption has been alleged or not. *Illinois Central R. Co. v. Illinois* (1892), 146 U.S. 387 (hereinafter “*Illinois Central*”).

Illinois Central 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.**

Idaho v. Coeur d’Alene Tribe (1997), 521 U.S. 261, 285 (emphasis added).

Following the precedent set in *Illinois Central*, 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

The parties in this case are bound by federal doctrines, such as the Equal Footing Doctrine in this case. Likewise, parties such as individual states, persons and private entities had no authority whatsoever to contract or deal directly with sovereign Native American nations on land issues, unless under a treaty or convention entered into under the Constitution of the United States and made and duly executed under the authority of the United States. To do so was a criminal offense under the Trade and Non-Intercourse Act of 1790. In recognizing and actually relying upon federal supremacy in both areas of law - public trust and Native American sovereignty - the State’s position in each case is consistent and complementary.

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*, supra.

Not surprisingly, the law of *Illinois Central* has been adopted by the Supreme Court of every Great Lakes State. The Ohio Supreme Court adopted it as the law of Ohio in its landmark public trust decision in *Cleveland & P.R. Co.* in 1916, and again quoted from and recognized *Illinois Central* with the highest praise as a “scholarly and persuasive opinion” in its second, and only other public trust case in 1948 in *State ex rel. Squire*. *Illinois Central* has been extended nothing less than reverence over the past century by the jurists of the Great Lakes region, 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.

Taft & Duncan’s discounting of *Illinois Central*, is in harsh contrast to the U.S. Supreme Court’s and the Great Lakes States’ supreme courts’ consistent view of our nation’s landmark Great Lakes public trust case. Taft & Duncan refer to *Illinois Central* only as an “important case

in defining the limits of at least Illinois' authority under Illinois law to transfer the submerged bed of Lake Michigan into private ownership..." Taft & Duncan's Brief in Opposition, pg. 4. Regardless of Taft & Duncan's myopic view, there can be no resolution of any case involving any Great Lakes lands and waters in any state or federal court that does not give full consideration to the wisdom and wealth of law found in *Illinois Central* and its progeny. Taft & Duncan can not avoid the significance of these cases in the resolution of the issues before this Court.¹⁰

However, since Taft & Duncan cannot avoid the most recent link in the unbroken chain of cases following *Illinois Central*, which also happens to address many of the issues in this case, they unwisely choose to attack it. Taft & Duncan announce that they "must commence any discussion of Michigan law and *Glass* in particular by stating that *Glass* is poorly decided, an aberration in the decisional law of Michigan, and constitutes little more than an improper judicial taking of privately owned lands for a public highway or easement without compensation." Taft & Duncan's Brief in Opposition, pg. 10. Indeed, they pronounce *Glass* an "aberration" three separate times in their Brief in Opposition. Taft & Duncan's Brief in Opposition, pgs. 10, 29.

To the contrary, public trust law has been well settled in this nation for more than one hundred years. The Michigan Supreme Court could have issued no other decision in the *Glass* case than the ringing re-affirmation of the ancient and venerated public trust doctrine that it did. The opinion was written to be quoted for generations to come, just as those of the *Illinois Central*

¹⁰ Also contrary to Taft & Duncan's assertion that *Illinois Central* "is based upon law of ownership below the high water mark" due to its mention of *Seaman v. Smith* is *Illinois Central Railroad v. Chicago* (1900), 176 U.S. 646, the successor case to *Illinois Central*, which expressly held that "[i]t 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." citing, among others, its predecessor case, *Illinois Central*, supra, *Shively*, supra, and *Seaman v. Smith* (1860), 24 Ill. 521 which was subsequently quoted by the Ohio Supreme Court in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, in its reference to the "ordinary high water mark" and "usual high water mark" as the lakeward boundary of upland property bordering Lake Michigan in Illinois. *Illinois Central Railroad v. Chicago*, supra, at 660. Similarly, a Pennsylvania Court of Common Pleas decision (*Sprague v. Nelson* (1924), 6 Pa. D. & C. 493), relied upon by Taft & Duncan, which cited to, among others, the Ohio Supreme Court case of *Sloan*, supra, for the proposition that the "low water-mark is where the water usually stands when free from disturbing causes," is quite at odds with the "usual high water mark"/"ordinary high water mark" interpretation attributed to those words by of the Supreme Courts of Illinois, Ohio and the U.S. Supreme Court in *Illinois Central Railroad v. Chicago*, supra, at 660.

line that preceded it. Far from being aberrational, the decision in *Glass* conforms to centuries of precedent. See Appendix D – “Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in *Glass v. Goeckel*,” Professor Robert Haskell Abrams, University of Michigan Journal of Law Reform, Vol. 40:4 Summer 2007, pgs. 861-906.¹¹

The Michigan Supreme Court unanimously held in *Glass* that public’s rights and the state’s authority as trustee extend to the Ordinary High Water Mark of the Great Lakes, and that “walking along the lakeshore is inherent in the exercise of traditionally protected public rights,” even “where a private landowner ostensibly holds title to the water’s edge.” *Glass*, supra, at 672, 674. This is in full agreement with the law of every Great Lakes State whether they are a “high water mark” or “low water mark” state with regard to their Great Lake, as both public rights and the State’s authority as trustee derive from the *jus publicum* interest of the State that can never be abdicated, even if the *jus privatum* is conveyed. *Glass*, supra, at 688-689. The only disagreement in *Glass*, leading to the concurring/dissenting opinions of two justices, regarded how to locate that boundary, which shall be more properly addressed under the Second Question of Law below. Taft & Duncan’s arguments to this Court in their Brief in Opposition are without merit, and the State’s Motion for Summary Judgment on the First Question of Law before the Court must be granted.

2. **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). The Ordinary High Water Mark of Lake Erie cannot be located using the “Cadastral Surveys” that “are not subject to change with time once the boundaries have been defined.”**

¹¹ Taft & Duncan’s knowledge of the historic foundations of the doctrine are likewise lacking or they would not have made the statement that “[f]ortunately, the State’s reliance upon Justinian law and other ancient source documents has limited relevance to either Federal or Ohio law as it exists today.” Taft & Duncan’s Brief in Opposition, pg. 3. The “last great Roman Emperor” accomplished far more than the codification of the Roman Civil Law, which is the basis of all western law today, but Taft & Duncan should rather consider themselves “fortunate” that he did. The Institutes of Justinian not only recognized the rights of all people to the sea and the seashore, but also the modern concept of private property ownership, the ability to acquire property and the right to exclude others from that private property, as well as what is known today as the doctrine of accretion.

Taft & Duncan begin their discussion under the second question of law by describing their “impression” that this question of law cannot be disposed of on Summary Judgment and that it will require a trial. If that is their impression, it is one that no other party to this action shares, including themselves, as evidenced by their prior Motion for Summary Judgment on this question of law. All three of the questions certified by the Court in this class action were properly certified as questions of law before Taft & Duncan intervened in this case, even though they claim Class Counsel is sufficient to protect the interests of every other littoral owner in the State of Ohio.

As set forth in the State’s prior briefings, there is an existing method for locating the Ordinary High Water Marks for each of the Great Lakes which parallels the tidal formulation of “mean high tide line” approved in *Borax*, supra – the methodology used by the U.S. Army Corps of Engineers for determining the “Ordinary High Water Mark (OHWM)” for each of the Great Lakes, and determined the current OHWM for Lake Erie. See State’s Motion for Summary Judgment, pgs. 23-24; Appendix B; Appendix C; Appendix D; Appendix E; Appendix F. This IGLD Elevation Method, as relied upon and used by the State under its concurrent sovereign authority to manage the uses of its public trust lands pursuant to R.C. 1506.11, not only meets the constitutional Equal Footing requirements of federal law, but also fully accommodates and does not alter the common law doctrines composing the concept of the “moveable freehold.” State’s Motion for Summary Judgment, pgs. 23-31; State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs 38-40.

Taft & Duncan provide a brief argument against the State’s methodology, that contains no contrary authority, but merely asserts that “[t]he term datum, as in International Great Lakes Datum 1985 (IGLD 1985) or International Great Lakes Datum 1955 (IGLD 1955), is not a ‘method’, but rather, a plane of reference for the relative elevation of water level gauges themselves due to crustal movement.” Taft & Duncan’s Brief in Opposition, pg. 21. The State has set forth very clearly how the IGLD is used by the U.S. Army Corps of Engineers as a reference for water level data, and how the federal and state governments use that information to determine the location of the Ordinary High Water Mark of Lake Erie in exercise of their concurrent regulatory authority. State’s Motion for Summary Judgment, pgs. 23-31; State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs 38-40. This is what the State has referred to in this litigation as “the IGLD elevation method,” as opposed to the common law “visual inspection test method” which Taft & Duncan disapprove of even more.

Taft & Duncan also appear to argue that the current Ordinary High Water Mark of Lake Erie using IGLD 1985 is not appropriate because it is not “the MEAN AVERAGE level required for constitutional and cadastral purposes.” Taft & Duncan’s Brief in Opposition, pgs. 23-24. On that basis, Taft & Duncan then assert that the Ordinary High Water Mark of Lake Erie should be calculated under the IGLD at 571.28 feet or 571.26 feet which they claim is the “MEAN AVERAGE of the level of Lake Erie to 2003, roughly tracking the median.” Taft & Duncan’s Brief in Opposition, pg. 23.

As is well established by the State’s briefings in this action, the constitutional boundary of Lake Erie is its Ordinary High Water Mark. It is not its “mean average water mark” or its mean low water mark, it is its mean high water mark – its Ordinary High Water Mark. The graphs supplied by both the State and Taft & Duncan in their respective Briefs in Opposition plot out the monthly mean (the average) water elevations of Lake Erie from 1900-2000.¹² Those graphs do not show the monthly high water elevations for that period, they only show the monthly mean (the average), and the “mean average water level” of Lake Erie cannot be used to locate its Ordinary High Water Mark. State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, Appendix A, B, and C at pgs. 17-18 and Declaration; Taft & Duncan’s Brief in Opposition, Exhibit 7.

Taft and Duncan provide another alternative method of locating the Ordinary High Water Mark of Lake Erie in their Brief in Opposition. However, it is unlawful. Taft & Duncan reiterate their opinion from their Motion for Summary Judgment that the Ordinary High Water Mark should be located via “cadastral surveys” which “are not subject to change with time once the boundaries have been defined.” Taft & Duncan’s Brief in Opposition, pg. 18. This alternative is contrary to the common law doctrines that compose the “moveable freehold” (erosion, accretion, reliction, submergence, and avulsion). The existence of these doctrines is the reason why Taft & Duncan’s fascination with “cadastral surveys” and surveying techniques are irrelevant to the questions of law before the Court, and do not offer a reasonable, or even lawful, methodology to be used to locate the Ordinary High Water Mark of Lake Erie.

¹² As discussed above, the State submitted this graph to show that even the average mean water levels of Lake Erie (let alone the average high water levels) rarely if ever reach the “Low Water Datum” line, which Plaintiffs falsely suggested to the Court is coincident with the water’s edge through use of their “simple graphic.” State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pg. 34, Exhibit A; Plaintiffs’ Motion for Summary Judgment, pg. 13; See also Appendix A attached hereto.

As already established in the State’s prior briefings, the Equal Footing Doctrine and the Public Trust Doctrine comprise the law that governed what could validly be granted as a matter of law prior to and subsequent to Ohio’s statehood, and the upper boundary of Ohio’s public trust lands of Lake Erie. The actions of a surveyor, grantor or grantee cannot supersede the law or serve to change it. The “moveable freehold” common law doctrines pertaining to the ambulatory nature of the boundary govern when that boundary moves and when it does not as a matter of law. Therefore, even assuming Taft & Duncan’s 1803 survey could be proven entirely accurate, if the boundary has moved as a matter of fact by operation of nature, and as a matter of law under the doctrine that applies to that natural action, then the survey is no longer an accurate representation of the boundary. The only thing that has been constant over the past 200 years on the shore of Lake Erie, or any Great Lakes’ shore, is change. To argue that the boundary should be located in 2007 based on where crude surveys believed it was located in 1803, would be to ignore the common law doctrines of erosion, accretion, reliction, submergence, and avulsion. It would be to ignore reality. The boundary is not where it was in 1803, and 200 years from now, it will not be where it is today. State’s Motion for Summary Judgment, pgs. 24-29; State’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, pgs 38-40; State’s Brief in Opposition to Intervening Plaintiffs’ Motion for Summary Judgment, pgs 9-12, 14-15.

Like Plaintiffs, Taft & Duncan fail to demonstrate that the State’s methodology is unreasonable. Further, Taft & Duncan argue that the common law “visual inspection test,” which they refer to as a “vegetation line test,” that has been adopted by other Great Lakes States (most recently the State of Michigan in *Glass*), and looked upon with approval by state and federal courts,¹³ is “inappropriate on the Great Lakes” and would result in a boundary “well

¹³ As stated above, the only disagreement in *Glass*, leading to the concurring/dissenting opinions of two justices was how to locate the boundary for the exercise of public rights. The majority acknowledged that the State Michigan regulated the lands and waters of the Great Lakes pursuant to the IGLD elevation method (using IGLD 1955) per state statute, but chose to follow the old common law “visual inspection test” method to demarcate the extent of public rights; meanwhile the minority in dissent felt that walking closer to the waters edge on the “wet sand,” but not in the water, was the standard for delineating the extent of public rights on the lakeshore. *Glass*, supra, at 674, 693, 707, 712-713.

Also, the federal district court for the Eastern District of Michigan held in *McKnight v Broedell* (1962), 212 F Supp 45, 50-51, that the common law “ordinary high water mark” enunciated in *Borax* applies to Michigan’s Great Lakes shores. Although the court did not elaborate beyond the *Borax* holding, it did so later in *Miller v United States* (1979), 480 F Supp 612, 619, when it defined the common law ordinary high water mark on the shore of Lake Huron as follows:

above the OHWM.” Taft & Duncan’s Brief in Opposition, pgs. 10-11, 19-20. If, as suggested by Taft & Duncan, the common law “visual inspection test” would result in a location of the Ordinary High Water Mark boundary that would be *further landward* than the State’s methodology, then Taft & Duncan have no basis upon which to oppose the State’s Motion for Summary Judgment on this question of law, and perhaps even reason to support it. Accordingly, the State’s Motion for Summary Judgment on the Second Question of Law before the Court should be granted.

3. **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. The littoral rights of upland owners bordering the “territory” do not include a right to exclude others, a right of “consumptive use” of water, a right to use the “territory” to protect upland property, or a right to fill in the lands of Lake Erie down to its low water mark, and all littoral rights that do exist are subject to regulation and control by the State.**

The final section of Taft & Duncan’s Brief in Opposition contains various misstatements of what the State has said in this case after the next, followed by the same arguments already briefed by Taft & Duncan in their Motion for Summary Judgment and responded to by the State in its Brief in Opposition to that Motion. The State will attempt to address these issues with the least amount of repetition necessary.

Contrary to Taft & Duncan’s claims, the State did not (1) “characterize the State’s interest in ‘public trust’ lands as identical to its ownership of other state property”; (2) “fail to acknowledge upland owners’ ... rights to accretion, reliction ... [or] avulsion” or “deny that these rights are property rights”, or (3) “assert the right to allow watercraft to land upon the shore, people to picnic and lounge on the shore, or to exclude all from the shore altogether, including the upland owner, should they deem it in their interest.” Taft & Duncan’s Brief in Opposition, pgs. 27-30.

“The [ordinary high water mark] line on the shore [is] established by the fluctuations of water and indicated by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation . . . or other appropriate means that consider the characteristics of surrounding areas.”

The State of Ohio's interest in its public trust lands has been thoroughly established in the State's briefing to this Court, and the State will not repeat itself again here. What is clear in all of the State's briefs is that the nature of the State's interest in its public trust lands is very different than the uplands and inlands it holds as public property, and that is exactly why Taft & Duncan can never own or possess the lands of Lake Erie the way they do their upland property. The State could sell and entirely divest itself of all interest in its other public property if necessary, and after conveying the title would have no further rights to that property unless expressly reserved. In that way, the State is like any private property owner. However, the State can never divest itself of Lake Erie. The State holds Lake Erie in perpetual trust for the people of the State, and it is a trust that can never be abdicated. As this Court and all counsel are well aware, a trustee's duty is to exercise a *higher* standard of care over the estate it holds in trust than a reasonable person would exercise with regard to their own property.

The State's briefings have also been replete with references and acknowledgements of the long established property rights and liabilities unique to upland owners, both in their upland property (erosion, accretion, reliction, submergence, and avulsion) and upon the shore of Lake Erie (access to, wharfing out, and reasonable use of the waters of Lake Erie). Likewise, the State has asserted nothing more than the recognized public rights in the territory (navigation, commerce, fishery, and recreation) and a right inherent to those rights (pedestrian travel on the shore). State's Motion for Summary Judgment, pgs. 31-46; State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pgs 43-49; State's Brief in Opposition to Intervening Plaintiffs' Motion for Summary Judgment, pgs 12-17. Taft & Duncan's claims that the State has said otherwise in this action are untrue.

Taft & Duncan agree with the State's Motion for Summary Judgment under this Question of Law with respect to the rights and position in the hierarchy of the United States. Thereafter, they re-assert their disagreements with the established law pertaining to public and private rights in the "territory" and the hierarchy of those rights. Much of what Taft & Duncan argue in this regard is duplicative of what they argued in their Motion for Summary Judgment, which was already responded to by the State's Brief in Opposition to that Motion. Therefore, the State will limit its responses in this Reply Brief accordingly.

Taft & Duncan must acknowledge the Ohio Supreme Court's consistent and emphatic instruction on the hierarchy of governmental and private rights in Lake Erie and its application in Ohio's courts. The law is equally clear that the exercise of littoral rights is entirely subservient

to the State's proprietorship in trust of the lands and waters of Lake Erie. 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.

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 title (*jus privatum*) to Lake Erie, but also its powers and duties (*jus publicum*) 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*, supra, at 325; *Thomas*, supra; *Lemley*, (1995), 104 Ohio App.3d 126, dismissed, appeal not allowed, 74 Ohio St.3d 1417, reconsideration denied 74 Ohio St.3d 1465; *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*, (2003), 8th Dist. No. 81327, 2003 Ohio 2300, unreported, app. denied, 100 Ohio St. 3d 1485, 2003 Ohio 5992.

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*.

Because Taft & Duncan cannot succeed in reversing the hierarchy of rights established under Ohio law, they seek to limit the purposes for which the State may take action under its public trust responsibilities. Taft & Duncan characterize these “restricted purposes” as navigation, water commerce or fishery. Other attempts have been made to so hamstring the State's duties and have been summarily rejected by the Ohio Supreme Court:

In the brief of the state of Ohio, *amicus curiae*, the Attorney General, as have other counsel, quotes at length from the landmark case of *Illinois Central Rd. Co. v. Illinois*, 146 U.S., 387, 36 L. Ed., 1018, 13 S. Ct., 110. We quote a short excerpt from that scholarly and persuasive opinion, at page 452:

“That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the

waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”

The Attorney General urges that there should not be a narrow construction as to the meaning of navigation, for the reason that in the future scientific progress may well render entirely obsolete the types and methods of water navigation heretofore known and our great inland waterways will become largely useful for other and even more beneficial purposes, and if such progress should be made it would be ridiculous that the dead hand of the past has impressed an irrevocable and inalienable trust upon the resources of the state, limited to obsolete and antiquated public uses.

We are in thorough agreement with that view and firmly believe that the law should be flexible enough to be applied to a constantly progressive civilization, and by this opinion we do not mean to express any limitation with reference to situations as they may arise in the future.

State ex rel. Squire, supra, at 346.

Nearly sixty years later, these words still ring true. Taft & Duncan’s latest attempt to narrowly interpret and constrict the State’s Lake Erie trust duties to the public should be rejected now, just as the Supreme Court did the last time it entertained a public trust case in 1948. Today, all Ohioans are the beneficiaries of the foresight demonstrated by the Ohio Supreme Court in 1916 and 1948. In deciding this case, this Court has been given the opportunity to act on behalf of the generations of Ohioans to come.

The remaining misconceptions of Taft & Duncan must again be addressed. Taft & Duncan wish to introduce four additional littoral rights that they believe should be held by Ohio littoral owners in the “territory.” These new rights are now said to include: (1) the right of unrestricted consumptive use of the waters of Lake Erie; (2) the unfettered right to use public trust land in order to protect adjacent upland from inundation, erosion and avulsion; (3) the right to fill in the lands of Lake Erie, and (4) the right to exclude others from the shore. These rights have never been recognized under Ohio law.

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.

Despite these long-standing legal precedents in Ohio, Taft & Duncan believe that they are entitled to additional rights never accorded to a littoral owner in Ohio before. First, they seek an

additional right of unrestricted consumptive use of the waters of Lake Erie. However, the General Assembly already acted on that very issue nearly twenty years ago by enacting R.C. 1521.17, which is entitled “Determination of reasonable use,” and which was already provided to the Court on pages 13-14 of the State’s Brief in Opposition to Taft & Duncan’s Motion for Summary Judgment. With the General Assembly’s enactment of R. C. 1521.17, Taft & Duncan’s advancement of a new littoral right of unrestricted consumptive use of the waters of Lake Erie is without merit.

Taft & Duncan also continue to believe that littoral owners should have an unfettered right to use the adjacent Lake Erie public lands to place fill, structures and improvements for the sole purpose of protecting their upland property from inundation, avulsion, or erosion. Use of public property to protect private property is not a littoral right, nor is it a property right anywhere else in Ohio. The only use of Lake Erie public trust lands in which fill, structures or improvements may be placed upon the “territory” is in the exercise of the littoral right to wharf out to navigable waters. As required by law, the exercise of this right subject to regulation by the state and federal governments. *Cleveland & P. R. Co.*, supra; *State ex rel. Squire*, supra; *Thomas*, supra; *Lemley*, supra; *Schnittker*, supra.; R.C. 1506.11; O.A.C. 1501-6-01 – 1501-6-06.

In making their assertions to this new “right,” Taft & Duncan seem to suggest that the State is trying to alter or derogate the importance of the common law doctrines of erosion, accretion and avulsion. These doctrines concern and touch upon the physical attributes of upland property, and constitute unique property rights and responsibilities in littoral owners. Upland owners, such as Taft & Duncan, possess unique property rights and reciprocal liabilities in their upland property above the Ordinary High Water Mark. These include the right to gain title to land created by the natural, gradual process of accretion. The reciprocal risk or liability that all upland owners bear is the loss of title to land lost to the natural, gradual process of erosion. “Just as a littoral owner may lose land by erosion he may gain it by accretion.” *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 10. Despite Taft & Duncan’s curious suspicions to the contrary, the State has made no attempt to alter or derogate the common law doctrines of erosion, accretion or avulsion through a rule, regulation, or policy.¹⁴

¹⁴ In contrast, Taft & Duncan seek to change and reverse the existing burden of proof pertaining to doctrines of erosion and avulsion as set forth in the State’s Motion for Summary Judgment, without citing any authority for their desired change to that law other than their assertion that it “should” be so. Taft & Duncan’s Brief in Opposition, pg. 28; State’s Motion for Summary Judgment, pgs. 26-27.

Taft & Duncan's disagreement with the State appears to result from their view of how accretion and reliction should be defined, as opposed to how they have been defined at law. As established in the State's Motion for Summary Judgment, upland owners gain title to newly formed upland under the common law doctrine of accretion. An exception to that rule is that an upland owner in Ohio does not gain title to upland 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. This last part of the rule, the exception to the exception, was the holding in *State ex rel. Duffy*, supra, as was fully acknowledged by the State. State's Motion for Summary Judgment, pgs. 25-26.

However, Taft & Duncan believe that *State ex rel. Duffy* somehow provided a right to fill in the Lake to create artificial land. It did not. In that case the upland owners on either side of the owner in question placed artificial fill and improvements into the Lake. As a result of those improvements, new upland began to form and attach to the existing upland property of the owner in between. This accretion would not have occurred but for the presence of the artificial improvements on either side, and was therefore upland formed by "artificial accretion," which would normally fall under the exception to the rule of accretion above and not become the property of the upland owner. However, in this situation, the artificial accretion was formed due to the acts of the upland owner's neighbors on either side in which he did not participate. Therefore, the situation fell under the exception to the exception. Accordingly, *State ex rel. Duffy* held that once the newly accreted upland had formed and attached to the owner's existing upland property, that owner could treat the newly formed upland as upland because, even though the accretion was caused by artificial actions, those actions were the actions of third persons in which that owner did not participate. This is the existing law as fully acknowledged by the State.

As to the law of reliction, the parties agree that upland owners have property rights under the common law doctrine of reliction, however Taft & Duncan disagree with how the existing law defines the term. As established in the State's Motion for Summary Judgment, 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. Taft & Duncan cite to the well known avulsion case of *Baumhart*

v. McClure (1926), 21 Ohio App. 491, in which upland had been lost in a violent storm and did not reappear for approximately 40 years. The concepts of submergence and reliction are mentioned in the case, but the land was lost to an avulsive event, not a long term increase in water levels.

Likewise, the State has not asserted that submergence or reliction must be permanent. It is true that 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." However, the State clearly submitted that 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." Rather the State established that reliction and submergence are gradual, long term processes, not temporary changes. State's Motion for Summary Judgment, pgs.28-29. Like Plaintiffs, Taft & Duncan do not like the legal definition, but they submit no authority to oppose it.

Finally, Taft & Duncan, like Plaintiffs, assert that they are entitled to recognition of a new littoral right to exclude others from any lands below the Ordinary High Water mark of Lake Erie that is not physically covered with water at any given moment. The State will not repeat its argument on this issue or the inherent right of the public to walk the shore from its Motion for Summary Judgment or subsequent pleadings. They are already submitted to the Court and incorporated herein by reference. However, Taft & Duncan make a statement in their Brief in Opposition that came as quite a surprise to the State – they "would urge the Court's consideration of the dissent in [*Glass*] as the correct law." Taft & Duncan's Brief in Opposition, pg. 29.

As discussed above, the justices of the Michigan Supreme Court unanimously held in *Glass* that public's rights and the state's authority as trustee extend to the Ordinary High Water Mark of the Great Lakes, and that "walking along the lakeshore is inherent in the exercise of traditionally protected public rights," even "where a private landowner ostensibly holds title to the water's edge." *Glass*, supra, at 672, 674. The only disagreement in *Glass*, leading to the concurring/dissenting opinions of two justices regarded how to locate that boundary. The majority acknowledged that Michigan regulates the lands and waters of the Great Lakes pursuant to the IGLD elevation method (using IGLD 1955) per state statute, but chose to follow the old common law "visual inspection test" method to demarcate the extent of public rights; meanwhile the minority in dissent felt that walking closer to the waters edge on the "wet sand," but not in

the water, was the standard for delineating the extent of public rights. *Glass*, supra, at 674, 693, 707, 712-713. Both views are at odds with the claims of Taft & Duncan, and the two concurring/dissenting opinions in *Glass* should not be found any more persuasive by this Court than they were found to be by the majority of the Michigan Supreme Court. The State's Motion for Summary Judgment on the Third Question of Law before the Court should be granted.

III. CONCLUSION

Most of the issues and authorities Plaintiffs and Intervening Plaintiffs raise in their briefings have no application to the three questions of law before the Court. This case is not about boundary disputes between sovereign states, various legal descriptions in deeds to littoral property, opinions and beliefs of state employees, the old Connecticut Western Reserve, surveys and their standards, rivers, streams, or any other body of water in Ohio other than Lake Erie. In the final analysis, this case is only about the three questions of law certified by the Court.

The first question concerns the long settled federal constitutional law of the upper boundary of the lands beneath navigable waters that every state received upon statehood, and the equally clear Ohio law that followed confirming that our state has given nothing away. The second concerns an unsettled issue of federal law in need of resolution, and upon which this Court will have the first chance to offer an opinion based upon its understanding of the controlling federal law, though ultimately this issue will find resolution with the U.S. Supreme Court in this case or some other. The third question of law requires the Court's re-affirmation of the existing state law of public and private rights in Lake Erie, so time honored that it comes as a surprise that Intervening Plaintiffs would dispute it. Any specific future regulation and control of those public and private rights are more properly left for the Legislature.

Upon all three questions of law, the State has provided the Court with the answers based on long standing authority. It is respectfully submitted that the Court adopt and apply this time honored line of authority of our legal forebears.

For all of the above reasons, for the reasons set forth in the State's Motion for Summary Judgment, and for the reasons set forth in both the State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment and the State's Brief in Opposition to Intervening Plaintiffs' Motion for Summary Judgment, the State of Ohio respectfully requests that the Court issue an Order granting summary judgment to the State on the three questions of law before the Court in this action as follows:

- (1) 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 of Lake Erie;
- (2) The Ordinary High Water Mark of Lake Erie may be located at the present time using the elevation of 573.4 feet IGLD (1985), and in full recognition of the existing law pertaining to accretion, erosion, reliction, submergence, and avulsion of uplands, and artificial changes to the “territory,” as set forth in the State’s Briefs filed herein, and;
- (3) The rights and liabilities of littoral owners in their upland property, as well as the respective rights and responsibilities in the “territory” of the United States, the State of Ohio, the public, and the littoral owners, together with the hierarchy of those rights, have long been settled in state and federal law as set forth in the State’s Briefs filed herein.

Respectfully submitted,

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IV. CERTIFICATE OF SERVICE

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

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