

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

STATE OF OHIO EX REL.,	)	
ROBERT MERRILL, TRUSTEE, et al.,	)	Case No. 04CV001080
	)	Judge Eugene A. Lucci
Plaintiffs-Relators,	)	
	)	
vs.	)	
	)	
STATE OF OHIO, DEPARTMENT	)	
OF NATURAL RESOURCES, et al.,	)	<b>OLG'S REPLY MEMORANDUM IN</b>
	)	<b>SUPPORT OF ITS MOTION FOR</b>
Defendants-Respondents.	)	<b>SUMMARY JUDGMENT</b>

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>I. INTRODUCTION</b> .....	1
<b>II. ARGUMENT IN REPLY</b> .....	2
<b>A. Consistent with the “Equal Footing” Doctrine, Ohio has as a Matter of State Law Set the Boundary between the Public Trust “Territory” and Private Littoral Property at the Low Water Mark.</b> .....	2
<b>1. The “Equal Footing” Doctrine Does Not Fix the Boundary Between the Public “Territory” and Private Littoral Land Either on a Prospective or a Retroactive Basis.</b> .....	3
<b>a. As Recognized By the “Equal Footing” Doctrine, Ohio Common Law Sets the Boundary Between the “Territory” and Private Littoral Lands.</b> .....	4
<b>b. <i>Shively</i> and Other Cases Demonstrate that States Can in Fact Set the Boundary of the Territory After their Admission to the Union, and Can Set it Below the Ordinary High Water Mark.</b> .....	5
<b>2. Ohio Has Set the Boundary of the “Territory” at the Low Water Mark.</b> .....	8
<b>3. <i>Shively</i> Does Not Require a State Like Ohio, which Generally Sets the Boundary of the Territory at Low Water, to Make a Specific Grant If It Intends to Convey Title to the Shore.</b> .....	13
<b>4. The State Cannot Employ Its Understanding of the “Equal Footing” Doctrine as a Baseline Assumption for Interpreting the Terms at Issue, including “Shoreline” and “Territory.”</b> .....	15
<b>5. The State’s Attempts at Distinguishing Plaintiffs’ Cases Demonstrate, to the Contrary, that the Boundary of the “Territory” – the Shoreline – Must be Located at the Low Water Mark.</b> .....	18
<b>B. On Question Two, the State Cannot Show, as the Proponent of Setting the Ordinary High Water Mark at an Elevation of</b>	

<b>573.4 Feet IGLD (1985), That There is No Genuine Issue of Material Fact.</b> .....	24
<b>C. On Question Three, the State’s Assertion of Public Rights to the Shore Is Contrary to Ohio Law.</b> .....	26
<b>III. CONCLUSION</b> .....	27
<b>CERTIFICATE OF SERVICE</b> .....	29

## I. INTRODUCTION

Class Plaintiffs, including the Ohio Lakefront Group, Inc., (“Plaintiffs” or “OLG”) file this reply memorandum to address the misleading and misguided Opposition filed by Defendant State of Ohio (“State”)<sup>1</sup> to Plaintiffs’ Motion for Summary Judgment on the three questions of law certified by the Court in this Rule 23(B)(2) declaratory class action. In their briefs, Plaintiffs have shown through simple and consistent interpretation of Ohio cases, statutes and regulations, along with other supporting evidence, that the boundary between public and private rights on Lake Erie is, and always has been, the low water mark. This demonstration moots the second question of law and precludes the State from attaining its real goal in the third question of establishing a public right to the shore. To support its claim that it cannot abandon Ohio’s public trust, the State, quite hypocritically, chooses to abandon Ohio law. In its stead, the State favors a federal doctrine – the “equal footing” doctrine – which it completely misstates. The State fails to recognize that all of the federal court decisions favored by the State depend upon the common or statutory law of each state to fix the landward boundary of navigable waters. And Ohio law, as the State cannot dispute, sets the furthest landward boundary of the “territory” of Lake Erie at the low water mark.

---

<sup>1</sup> Two named Defendants – the Ohio Department of Natural Resources (“ODNR”) and its Director – filed a Response with this Court on July 16, 2007 stating that they will honor the Class Plaintiffs’ deeds and will not assert ownership (by compelling property owners to lease land) over land contained with Class Plaintiffs’ presumptively valid deeds. However, the “State of Ohio,” as represented by Attorney General Dann, continues to claim public trust title to Class Plaintiffs’ private property, and ODNR awaits the Court’s determination as to whether ODNR’s acceptance of presumptively valid deeds is lawful.

## II. ARGUMENT IN REPLY

### A. **Consistent with the “Equal Footing” Doctrine, Ohio has as a Matter of State Law Set the Boundary between the Public Trust “Territory” and Private Littoral Property at the Low Water Mark.**

The State again, as in its Motion for Summary Judgment (*see* State’s Motion for SJ at pp. 2-9), suggests wrongly that the federal “equal footing” doctrine prohibits Ohio from setting its own boundary for the public trust “territory” and that the doctrine forever, both looking back and forward, sets that boundary, as a matter of federal common law, at the ordinary high water mark. (*See, e.g.*, State’s Opp’n at p. 4 (referring to a “federal constitutional mandate” that sets the boundary of the “territory” at the ordinary high water mark) and also at p. 6 (noting that the Fleming Act “clearly asserts, codifies and re-affirms that what belongs to the State of Ohio is what it received at statehood, which is to say, what the federal government held for it and conveyed to it under the Equal Footing Doctrine.”).) This is the crux of the State’s argument in this dispute and is also, like nearly all of the remaining points in the State’s Opposition, fundamentally flawed. The United States Supreme Court has stated clearly, repeatedly and uniformly over time that the each of the states had the authority to define the limits of its public trust “territory.”

And more importantly, as Plaintiffs amply demonstrated in their opening brief, Ohio has exercised that authority, both in common and statutory law, by setting the boundary of its Lake Erie “territory” at the low water mark. (*See* Plaintiffs’ Motion for SJ at pp. 9-21.) Thus, the State’s claim to the contrary – that federal common law has throughout time set the boundary navigable waters nationwide, including Ohio, at ordinary high water – lacks any basis in the holdings or history of the United States Supreme Court.

**1. The “Equal Footing” Doctrine Does Not Fix the Boundary Between the Public “Territory” and Private Littoral Land Either on a Prospective or a Retroactive Basis.**

The State claims that the “equal footing” doctrine both sets the boundary of the “territory” at ordinary high water at the time of Ohio’s “admission to the Union” (*see, e.g.,* State’s Opp’n at heading II.A.1.) and also prohibited Ohio (and all other states) after the *Shively* decision in 1892 from adopting a contrary boundary (*see* State’s Opp’n at p. 15). The “equal footing” doctrine does neither and in fact recognizes the rights of states, both before and after 1892, to define the boundary of the “territory” and private rights on their own, and at a line different from the State’s purportedly universal ordinary high water mark.<sup>2</sup>

---

<sup>2</sup> The Court should take note of what could be described as a gambler’s “tell” on the State’s part – each time the State makes a declaration that is disingenuous, it either lists a long string of cases with no pinpoint cites or lists only a case name followed by *supra*. (*See, e.g.,* State’s Opp’n at pp. 3 (no pinpoints), 7, 11 and 48 (*supra* references), and 13 (string cite of *supras*). As one example, on page 11 of its Opposition, the State relies on *Beach Cliff v. Ferchill*, with only a bare cite to “*supra*” as support for the propositions that it has recently stipulated that beaches exist above the ordinary high water mark and that the court there found that there was an upland beach in existence above the ordinary high water mark. The *Beach Cliff* decision refers to no such stipulation and the court makes no such holding. *See Beach Cliff Board of Trustees v. Ferchill*, 2003-Ohio-2300 (Cuyahoga Cty. App. May 8, 2003). The State’s reference to *Beach Cliff* is doubly remarkable, however, because both the appellate court and the trial court rejected the State’s position in that case that “submerged” lands for purposes of R.C. 1506.10 are those lands lakeward of the elevation level of 573.4 feet. *Id.* at ¶¶ 19-20. The trial court specifically determined that ODNR’s proposed elevation line was not determinative and that, to the contrary, “the definition of submerged land is based upon the location of the natural shoreline.” *Id.* at ¶ 19. The court of appeals determined that a genuine issue of material fact existed as to whether the property at issue was submerged – *i.e.*, actually beneath the waters of Lake Erie – because ODNR’s own report showed that “Now the year of 2000 . . . the lake levels are low compared the last 30 years . . . [and] many beaches and old structures are exposed now[.]” *Id.* at ¶¶ 20-22; *see* Exhibit A in State’s Appendix (showing Lake Erie water levels in the year 2000 fluctuating between 570 and 572 feet IGLD (1985)). Although the State’s current position is that “submerged” lands are all those lands lakeward of a line of elevation of 573.4 feet regardless of whether those lands actually lie under the waters of Lake Erie, both the trial court and court of appeals in *Beach Cliff* determined, correctly, that R.C. 1506.10 means what it says – “soil beneath” the “waters of Lake Erie” includes only subaqueous lands and excludes beaches that have formed adjacent to the waters of Lake Erie but below 573.4 feet.

**a. As Recognized By the “Equal Footing” Doctrine, Ohio Common Law Sets the Boundary Between the “Territory” and Private Littoral Lands.**

Contrary to the State’s assertion, the United States Supreme Court has always recognized that the states, including Ohio, each received upon their admission to the Union the full authority to define the dividing line between the public trust “territory” and private littoral land. Going back to *Shively*, the Supreme Court understood that the federal government has “acted upon the policy . . . of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, *when organized and admitted into the Union.*” *Shively*, 152 U.S. at 58 (emphasis added). The same sentiment carries through to modern times, as *Phillips* proclaims “it has been *long established* that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.” *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988). Before *Shively* and on through to *Phillips*, the United States Supreme Court has spoken with one voice on this topic.

For example, in 1877, the Supreme Court stated that “[i]f [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.” *Barney v. Keokuk*, 94 U.S. 324, 338 (1877). In 1891, the U.S. Supreme Court issued the first of three consistent, contemporaneous opinions on the states’ definitional authority, noting “but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised.” *Hardin v. Jordan*, 140 U.S. 371, 382 (1891). In 1894, in *Shively* – an oft-discussed case herein – the U.S. Supreme Court stated, “the later judgments of this Court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several states[.]” *Shively*, 152 U.S. 1, 41 (1894). And in 1900,

the Supreme Court, with regard to the definition of the territory that states hold in the public trust, stated that “this, too, is a question of local law with regard to which the decisions of state courts are conclusive.” *Illinois Central Railroad Co. v. Chicago*, 176 U.S. 646, 659 (1900).

Later, in 1935, the United States Supreme Court, citing to *Barney, Shively* and *Hardin*, stated that the “rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law.” *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935). In 1977, the Supreme Court cited with favor the ruling of *Shively* above and stated that to apply the “equal footing” doctrine as forcing a federal common law boundary – the application urged by the State here – would be “perverse” and “may result in property law determinations antithetical to the desires of that State.” *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375, 378 (1977). The quotation from Phillips, above, is but only a recent decision in this long stream of authority confirming that, under the “equal footing” doctrine, each state’s common law defines the boundaries of navigable waters.

The State’s contention that the “equal footing” doctrine prohibits Ohio, or any other state, from setting its own boundaries, either before or after 1892, has no basis in law.

**b. *Shively* and Other Cases Demonstrate that States Can in Fact Set the Boundary of the Territory After their Admission to the Union, and Can Set it Below the Ordinary High Water Mark.**

By repeatedly recognizing that states have the authority, even well-after their admission to the Union, to define the boundary of navigable waters at a line below the ordinary high water mark, the Supreme Court has both in practice and by force of outcome rejected the State’s contention that Ohio could not decide that the boundary of the Lake Erie “territory” lay below ordinary high water. (See, e.g., State’s Opp’n at p. 6.) In *St. Louis v. Rutz*, the Supreme Court recognized that Illinois, unlike some other states bounding on the Mississippi River, had decided that riparian owners on that river held title to the center of the water, and not the low or high

water marks on the bank. *St. Louis v. Rutz*, 138 U.S. 226, 250 (1891) (citing to *Middleton v. Pritchard*, 3 Scammon 510, which was decided in 1842). Thus, though Illinois was admitted to statehood in 1818 and the first Illinois case declaring the rights of riparian owners to the center of the Mississippi River was not decided until twenty-four years later in 1842, the United States Supreme Court still followed the later dictates of the Illinois supreme court in deciding the extent of its public trust “territory” in the bed of the Mississippi River. Other cases reach the same result. See, e.g., *Massachusetts v. New York*, 271 U.S. 65 (1926)<sup>3</sup>, and cases collected in *Hardin v. Jordan*, 140 U.S. at 382 *et seq.*

The State simply misreads *Shively* by suggesting that it also “resolved the issue for future state application.” (State’s Opp’n at p. 15.) *Shively* does not prohibit individual states from adopting a different line after their admission to the Union, but instead holds the opposite – that the “equal footing” doctrine “leave[s] the question of the use of the shores by the owners of the uplands to the sovereign control of each State[.]” *Shively*, 152 U.S. at 58. The State’s argument, which depends upon the issuance of a state decision after *Shively* was issued (State’s Opp’n at pp. 15-16), ignores that Ohio law and the expectations of Ohio property owners became fixed long before *Shively* was decided. See, e.g., *Sloan v. Biemiller*, 34 Ohio St. 492 (1878); see also *Cleveland v. Cleveland C.C. & St. Ry.*, 19 Ohio Dec. 372, 376-77, 8 Ohio N.P. (n.s.) 457 (1909) (describing the platting of lots along Lake Erie in the City of Cleveland by the Connecticut Land Company in 1796 and again in 1800 “to the low wave mark at the lake”).

---

<sup>3</sup> It is interesting to note that in *Massachusetts v. New York* the Court was dealing with the interpretation of Massachusetts’ grant of land in 1788 to Messrs. Phelps and Gorham. Messr. Phelps was also the largest purchaser, in 1795, in the Connecticut Land Company. As the United States Supreme Court recognized that the grant from Massachusetts to him to the “shores of Lake Ontario” extended to the low water mark, this Court should do the same for the grant from Connecticut to him and others only seven years later of the lands of the Western Reserve, exclusive of the waters of Lake Erie.

The State’s reference to a “federal constitutional mandate” is telling, in that the “equal footing” doctrine is derived implicitly from the 10th Amendment to the United States Constitution, which reserves to the States all powers not delegated to the United States. *See Pollard’s Lessee v. Hagan*, 44 U.S. 212, 229 (1845). The “equal footing” doctrine protects state’s rights; it does not create a federal common law of property. Moreover, in the State’s references to what is required by the Constitution, the State fails to mention the Fifth Amendment, which expressly prohibits the taking of private property for public use without just compensation being paid. Protection of private property was a bedrock principle of our country’s founders, and was also included in the Ohio Constitution. Although the State insists on ignoring the property rights actually developed in Ohio over the last 200+ years, Plaintiffs suggest that a proper legal analysis should take into account the expectations of property owners as formed by Ohio property law (as ODNR recently announced it would do) *and* all relevant constitutional provisions.

To accept the State’s position that the “equal footing” doctrine forever fixed the boundary of all navigable waters at ordinary high water is to reject the holdings and outcomes of all relevant United States Supreme Court decisions. Worse, it is to declare that the United States Supreme Court in so deferring to and analyzing the respective laws of each state mistakenly engaged, time and again, in futile analyses of irrelevant law. Plaintiffs are not so bold or foolhardy. Plaintiffs instead follow the guidance of the United States Supreme Court and defer to the well-established law of Ohio – as set out in the rulings of Ohio courts and in the language of Ohio statutes and administrative rules<sup>4</sup> – which sets the boundary of Lake Erie’s “territory” at the low water mark. (*See infra* and Plaintiffs’ Motion for SJ at pp. 9-21.)

---

<sup>4</sup> Remarkably, although ODNR has through administrative regulation defined many of the terms at issue, the State finds those rules have absolutely no bearing here because they interpret terms set out in R.C.

## 2. Ohio Has Set the Boundary of the “Territory” at the Low Water Mark.

As Plaintiffs demonstrated in their opening brief, Ohio consistently has recognized that the boundary of the public trust “territory” in Lake Erie is the low water mark. For example, the Ohio Supreme Court has interpreted the language found in the Fleming Act, then codified as R.C. 123.03, as setting the boundary at the “low water line.” *Mitchell v. Cleveland Elec. Ill. Co.*, 30 Ohio St. 3d 92, 94 (1987). State agencies have also recognized the boundary of the “territory” as being set at the low water mark. (See Plaintiffs’ Motion for SJ at Exhibit 2 and 3.) The best example of Ohio’s long-standing position on this issue is the Ohio Supreme Court’s decision in *Sloan* where the Court, in outlining the boundary of the public trust at the “line at which the water usually stands when free from disturbing causes,” acknowledged that private persons could own the shore on Cedar Point and could, by deed, permit and exclude certain persons from his shore. *Sloan*, 34 Ohio St. at syllabus para. 4 and 515-17.

In reaching its conclusion, the Court relied upon the reasoning of an Illinois decision, *Seaman v. Smith*, 24 Ill. 521 (1860), which determined the boundary line of private property along Lake Michigan. The Illinois court also had determined that the Great Lakes presented different questions from those arising under boundaries on the sea and had noted that Lake Michigan had no appreciable tides. *Id.* at 524-25. Thus, the court modified the English common law rule to account for the fact that no tidal “seashore” exists on the Great Lakes to which title could be held by the sovereign. As discussed in *Shively v. Bowlby*, *supra*, the reason private ownership along tidal waters ends at the ordinary high-water line is that the land below this line

---

1506.06, not R.C. 1506.10 or 1506.11. ODNR has by statute been given the authority to administer the “territory” and, thus, should be bound by its interpretations of the same words in similar contexts. While it is true that R.C. 1506.06 deals with Ohio’s regulatory authority over the lands bordering Lake Erie and not the more geographically limited ownership rights Ohio has in the “territory,” this distinction does not provide a rational basis for the State’s insistence that the terms “shoreline,” “shore” and “beach” as defined in O.A.C. 1501-6-01 should have one meaning under R.C. 1506.06 and another, conflicting meaning under R.C. 1506.10 and 1506.11.

is considered to have no economic value to a private proprietor. However, the Illinois court observed that the same is not true on the Great Lakes: “The portion of the soil which is seldom covered by water may be valuable for cultivation or other private purposes.” *Seaman*, 24 Ill. at 525. Lands lakeward of ordinary high water mark as defined by the State here are “seldom covered by water” and, thus, should not be included in the public trust. Thus, the Illinois court applied the same economic principle requiring that the ordinary high-water mark be the boundary of a sea, and it reached a result as to the boundary of Lake Michigan that takes into account that the Great Lakes are non-tidal. *Id.* at 524-25.

The State misunderstands *Seaman v. Smith* as standing for the proposition that the property boundary along Lake Michigan is the ordinary high-water mark and *Sloan v. Biemiller’s* citation to it as suggesting that the Ohio Supreme Court adopted the ordinary high water mark as Ohio law. (See State’s Opp’n at pp. 25-26, citing the 1993 Opinion of Attorney General.) In fact, the Illinois Supreme Court and Ohio Supreme Court did not apply the same *rule* applicable to tidal oceans and seas but, instead, applied the same economic *principle* underlying that rule to different facts and reached a different result. That result — which fixes the boundary as the natural shoreline unaffected by winds or storms — was adopted by the courts of other states bordering the Great Lakes, although they often refer to the boundary as *the low water mark* or *usual low water mark*. *Stewart v. Turney*, 142 N.E. 437, 441 (N.Y. 1923) (low water mark); *Sprague v. Nelson*, 6 Pa. D. & C. 493, 494 (Erie Common Pleas 1924) (property boundary extends to low water mark of Lake Erie); *Delaplaine v. Chicago & N. R. Co.*, 42 Wis. 214, 225-26 (Wis. 1877) (citing, among others, *Seaman v. Smith* and describing as “sound and correct” the decisions “which hold, in reference to such bodies of water, that the riparian proprietor takes only to the edge of the water in its ordinary condition, when unaffected by winds or other

disturbing causes . . . , the proprietorship of the bed of the lake being in the state”). Indeed, the Pennsylvania court cited above relied upon the Ohio Supreme Court’s decision in *Sloan v. Biemiller* in holding as a matter of law that “the low water-mark of Lake Erie is ‘where the water usually stands when free from disturbing causes.’” *Sprague*, 6 Pa. D. & C. at 494, 495-96.

Although the State cites generally to *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303 (1948), for the proposition that the Fleming Act codified the common law boundary of Lake Erie at the ordinary high water mark ((*See State’s Opp’n* at pp. 6-7), the facts of that case are to the contrary. *Squire* involved the respective rights of littoral property owners and the city of Cleveland to use artificial fill placed in the shallow waters of Lake Erie beyond the natural shoreline as it existed in 1914. *See id.* at 317, 318-19. The trial court’s judgment entry in that litigation specifically determined that the shoreline of Lake Erie as located in 1914 was the natural shoreline, that the land extending southerly therefrom was the plaintiffs’ upland, and “that the land which then extended northerly therefrom was submerged and covered by the waters of Lake Erie.” *See Journal Entry* at pp. 3-4, ¶ 5; pp. 5, ¶ 7; p. 13, ¶ 2-A, attached hereto as Exhibit A. These findings were not challenged and were not at issue on appeal. The monthly mean elevation of Lake Erie in 1914, as measured at Cleveland, was two to three feet below 573.4 feet, as shown by Exhibit A to the State’s Appendix. Yet the court in *Squire* clearly understood that the public trust as codified by the Fleming Act – and the “natural shore line” – extended no further than the water’s edge and, in any case, did not extend several feet above the natural shore line to the State’s favored ordinary high water mark.

In all cases the principle promoted by the courts is the same: to the extent that soil is covered by the waters of the Great Lakes only at times of disturbance, that soil is useful private property and is classified as such. This understanding appears to date to the earliest period of

Ohio's settlement, as evidenced by the platting of the City of Cleveland by the Connecticut Land Company in 1796 and again in 1800, which platted lots along Lake Erie "to the low wave mark at the lake." *Cleveland v. Cleveland C.C. & St. Ry.*, 19 Ohio Dec. 372, 376-77, 8 Ohio N.P. (n.s.) 457 (1909).<sup>5</sup> The platting of Cleveland came only thirteen months after the State of Connecticut sold the whole of the Western Reserve to the Connecticut Land Company and to the lesser known Excess Company, which was so named because it acquired so much of those lands of the Western Reserve (minus the Firelands) "as is over and above Three Millions of Acres, exclusive of the waters of Lake Erie." See Trust Indenture at p. 3 (emphasis added), attached hereto at Exhibit C; *Early History of Cleveland, Ohio*, at 166.<sup>6</sup> As described in *Cleveland C.C.*

---

<sup>5</sup> The first plat of Cleveland done on October 1, 1796, which shows lots running north from Lake Street and Federal Street to Lake Erie and shows Bath Street as providing access to Lake Erie (presumably for bathing), is set forth at pages 238-40 in the *Early History of Cleveland, Ohio*, published in 1867 by Colonel Charles Whittlesey, which is attached hereto as Exhibit B.

Historically, platting of lands was not restricted to parcels above ordinary high water mark and was not limited to dry ground. In 1818, for example, the city of Sandusky platted "water lots" located mostly north of the shoreline of Sandusky Bay and, thus, in the water. See *State ex rel. Crabbe v. The Sandusky & Mansfield & Newark RR Co.*, 111 Ohio St. 512, 518-20 (1924) (noting at 526 that the Court "concur[s] in the suggestion that a situation thus existing for substantially 70 years should not be disturbed by a writ such as sought in this proceeding").

<sup>6</sup> The Western Reserve was defined in 1786 when, at the urging of the newly-formed United States, Connecticut relinquished part of its claim to the Old Northwest by ceding to the United States "certain western lands, beginning at the completion of the forty-first degree of north latitude, one hundred and twenty miles west of the western boundary line of the Commonwealth of Pennsylvania, as now claimed by said Commonwealth; and from thence by a line to be drawn north parallel to, and one hundred and twenty miles west of the said west line of Pennsylvania, and to continue north until it comes to 42° and 2' north latitude." See Committee Report to Congress at pp. 86-87 (Mar. 21, 1800), attached hereto as Exhibit D. Connecticut reserved to its own use those lands lying west of the western boundary of Pennsylvania and extending from that line 120 miles west in length and in breadth from 41° north latitude on the south to 42° 2' north latitude on the north. *Id.* at p. 87. This territory, which was referred to as the Western Reserve, included a large portion of Lake Erie and its islands, including the Bass islands and Kelley's Island. In 1792, Connecticut transferred the western-most 500,000 acres of the Western Reserve to individuals whose properties had been burned the Revolutionary War, which territory became known as the Firelands. *Id.* In 1795, Connecticut transferred *all* its remaining interest in the Western Reserve to the Connecticut Land Company, which then, for ease of management, placed all lands received in a trust as set forth in the Indenture attached as Exhibit C. None of these transfers was limited by the ordinary high water mark of Lake Erie. Unfortunately for the investors in the Excess Company, surveys of the lands included in the Western Reserve and Firelands determined that the Western Reserve contained less than 3,000,000 acres. *Early History of Cleveland, Ohio*, at pp. 257-58.

& St. Ry., the “lots along Lake Street butted in the lake, so that the only place that access to the lake was had was at the confluence of the Cuyahoga river with the lake, along this sandy strip of land called Bath street.” *Cleveland C.C. & St. Ry.*, 19 Ohio Dec. at 376. In 1801, President John Adams issued letters patent confirming title in the grantees and purchasers to the soil of the Western Reserve. See Act of Congress dated April 28, 1800 and Letters Patent dated March 2, 1801, attached hereto as Exhibit E.<sup>7</sup> The letters patent confirmed private ownership of *all* of the soil of the Western Reserve and Firelands transferred into private ownership and is not limited to those lands above the ordinary high water mark. *Id.* There was no confusion in the minds of the first surveyors of the Western Reserve that all lands of economic value under private ownership – *i.e.*, all lands not below the low wave or low water mark of Lake Erie – should be placed in private ownership and that public access to the Lake for bathing and other valuable uses would need to be provided at designated public access points.

Thus, in Ohio, the overwhelming evidence shows a common understanding throughout time, *i.e.* in 1796, 1800, 1818, 1878, 1970, 1979 and 1987, that the boundary of the public trust “territory” was the low water mark of Lake Erie.

---

<sup>7</sup> The State asserts at page 7 of its Brief in Opposition to Intervening Plaintiffs’-Relators’ Supplemental Motion for Summary Judgment that the “Connecticut land grant theory” was fully briefed to the Ohio Supreme Court and twice rejected in *State v. Cleveland & Pittsburgh R.R. Co.*, 94 Ohio St. 61 (1916), and *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303 (1948). Neither the Court’s opinions nor the trial court’s judgment entry in *Squire* show any evidence of this, which is not surprising given that the location of the shoreline was not in dispute in either case. Regardless, Plaintiffs are not claiming for purposes of this class action that they own all of the lands beneath the waters of Lake Erie within the boundaries of the Western Reserve, which appears to be what the State refers to as the “Connecticut land grant theory.” Instead, Plaintiffs wish to emphasize that the history of the land grants of the Western Reserve, which excluded only the waters of Lake Erie, is consistent with Ohio common law as it developed in the 1800s. Indeed, there is no suggestion in the history of the Connecticut Land Company that its members took ownership of lands abutting Lake Erie only to ordinary high water mark, which would have been a laughable concept to General Cleaveland and Augustus Porter as they surveyed the Land Company’s holdings. The State has produced no evidence that ownership of littoral property along Lake Erie was limited by the ordinary high water mark now retroactively proposed by the State.

**3. *Shively* Does Not Require a State Like Ohio, which Generally Sets the Boundary of the Territory at Low Water, to Make a Specific Grant If It Intends to Convey Title to the Shore.**

The State further perverts the “equal footing” doctrine by arguing that the doctrine only permits private ownership of the lands between ordinary high and low water if a state such as Ohio expressly grants such lands to private interests. (*See, e.g.*, State’s Opp’n at pp. 4, 5 11-13 (“the overarching question never asked . . . is: whether the Ohio legislature intended to convey, grant or give away any title in the lands beneath the navigable waters of Lake Erie . . . by passage of the Fleming Act”).) Presumably, this is based on a misreading of *Shively* which, although noting that Oregon had made an affirmative grant of the tidelands, explained that it did so because it had previously cut off littoral rights at the ordinary high water mark and declared the tidelands part of its trust. *Shively*, 152 U.S. 55-58. The “equal footing” doctrine puts no such general limit on ownership of the tidelands or shore. It simply prohibits the *federal* government from implicitly conveying such rights in conflict with a state’s law as part of a grant of land adjoining navigable waters. Consistent with this principle, the United States Supreme Court has noted repeatedly that the extent of a littoral owner’s rights, much like the extent of the state’s trust, “depends on the law of each State.” *See Hardin v. Jordan*, 140 U.S. 371, 382-83 (1891); *see also St. Louis v. Rutz*, 138 U.S. 226, 242 (1891) (“the question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle of the thread of the stream, or only to the water’s edge, is a question in regard to a rule of property, which is governed by the local law of Illinois”); *Packer v. Bird*, 137 U.S. 661, 669-70 (1891) (“As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high-water mark, or will extend to the middle of the stream”).

In *Hardin*, the Supreme Court was concerned, as all “equal footing” cases are, with “what will pass then by a grant bounded by” water? *Hardin*, 140 U.S. at 383 (citing to *Middleton v. Pritchard*, 3 Scammon 510 (Illinois 1842)). The Court then highlighted Illinois and Mississippi as states that have, by their common law, designated the land between high and low water as part of a riparian owner’s fee and, thus, *not* part of the states’ public trust “territory.” *Hardin*, 140 U.S. at 383. Ultimately, the Court held that Illinois did not recognize public rights in a small lake, despite it being surveyed as “navigable,” and thus grants of land bounded by that lake should be construed, as a matter of Illinois law, as extending to the center. *Id.* at 401-2.

These situations are all to be distinguished from the facts presented in *Shively*, which involved lands “below high-water mark of the Columbia river, where the tide ebbs and flows.” *Shively*, 152 U.S. at 52. Prior to the *Shively* decision, Oregon’s courts had held that tidelands between high and low water were part of the state’s public trust “territory.” *Id.* at 52-55. Oregon had also separately decided that it could grant its public trust lands between high and low water to private interests. *Id.* The United States Supreme Court recognized Oregon’s right, under the equal footing doctrine, both to set the boundary of riparian tidal waters at the high water mark and to convey these public trust lands into private ownership. The State’s mistake here is in believing that Ohio must follow Oregon’s model – thus splitting private and state rights at the ordinary high water mark – in disregard of Ohio’s own common and statutory law delineating littoral rights and the boundary of the “territory.” As *Hardin*, *Shively* and other cases make clear, Ohio is not so limited and has properly chosen a different course.<sup>8</sup>

---

<sup>8</sup> At pages 12-13, and later again at pages 27-32, the State argues in various ways that Plaintiffs have no right to the lands below high water mark because Ohio has not, and cannot, abdicate its interest in the “territory.” Again, the State’s error is in presuming, without foundation, that the lands below the ordinary high water mark are part of Ohio’s public trust “territory.” Plaintiffs have not argued for abdication and do not need to do so. As noted above in the discussion on *Shively*, in Ohio, unlike Oregon, Ohio need

**4. The State Cannot Employ Its Understanding of the “Equal Footing” Doctrine as a Baseline Assumption for Interpreting the Terms at Issue, including “Shoreline” and “Territory.”**

The State relies on its misleading explanation of the “equal footing” doctrine – that the boundary of the “territory” has already been set at the Ordinary High Water Mark – as a baseline assumption for interpreting the terms at issue here. As Plaintiffs noted in their Opposition brief, the State cannot simply assume away the ultimate resolution of this case as a substitute for actual analysis and proof.

For example, through its distorted lens, the State sees the words “do now belong” and “have always belonged” in the Fleming Act as proof that Ohio set the boundary at the ordinary high water mark in 1917 retroactively to 1803. (*See* State’s Opp’n at pp. 5-6.) As the State correctly notes, the Fleming Act merely codified Ohio’s existing common law. (*See* State’s Opp’n at p. 6.) The State’s mistake, carried throughout its briefs, is in assuming that some non-existent federal common law trumps the established common law of Ohio. Here, the State relies on purely superficial grounds – the apparent similarity of the Fleming Act’s description of “do now” and “have always” with the “equal footing” doctrine’s reference to like temporal limits – to argue that the drafters must have intended to adopt the federal common law boundary.<sup>9</sup> Plaintiffs have demonstrated here and in their Opposition brief that the United States Supreme Court has consistently upheld authority of each state to develop its own common law, or statutory, boundary for the “territory.” Ohio has, in *Sloan* and *Lessee of Blanchard*, set the boundary between public and private rights on the navigable waters of its northern and southern/southeastern boundaries – Lake Erie and the Ohio River respectively – at the low water mark. Thus,

---

not, and indeed now cannot, abdicate control over the shore because the shore is not and never has been, under state law, part of Ohio’s “territory.”

<sup>9</sup> Notably, the State used similarly distorted reasoning to attempt to include the United States as a party to this action, but Judge Oliver rejected the State’s claims.

the terms “do now” and “have always” mean what they say, but imply nothing more, and certainly not the wholesale adoption by Ohio of a claimed property boundary that had not been recognized in Ohio at any time prior to 1917.

The State uses even less sophistication in arguing that the terms “shoreline” and “southerly shore” mean the ordinary high water mark. (*See* State’s Opp’n at pp. 10-11.) Without elaboration (or at least reasonable elaboration),<sup>10</sup> the State simply claims that because the “equal footing” doctrine set the boundary of Ohio’s “territory” at the ordinary high water mark in 1803, the terms “shoreline” and “southerly shore” must mean the ordinary high water mark. Plaintiffs presented reasoned analysis, looking at Ohio cases, statutes and administrative regulations, in demonstrating that the terms set the boundary of the “territory” at the low water mark. (Plaintiffs’ Motion for SJ at pp. 9-21.) The State avoids any such analysis, indeed presents no Ohio cases, statutes or regulations mentioning the ordinary high water mark, and simply assumes that the terms at issue mean the ordinary high water mark. Such arguments are neither persuasive nor proper.

In seeking to have this Court focus solely on the “have always belonged” language of R.C. 1506.10, the State avoids any discussion of the language actually used by the General Assembly to describe the “territory.” Indeed, the State carefully paraphrases the Fleming Act’s description of the “territory” by stating that “the statute speaks of the waters and *lands* of Lake Erie” or “describes ‘the territory’ as the *lands*, water and contents of Lake Erie.” (State’s Opp’n at 5 and 6 (emphasis on “lands” added).) Yet the Fleming Act describes the “territory” as “the

---

<sup>10</sup> At one point, the State argues that the “southerly shore” must mean the portion of the shore nearer the high water mark while “northerly shore” must mean that portion nearer the low water mark. (*See* State’s Opp’n at p. 11.) This absurd reading completely miscomprehends the General Assembly’s juxtaposition of the “southerly shore of Lake Erie” against the “international boundary line between the United States and Canada.”

waters of Lake Erie within the boundaries of the state together with *the soil beneath* and their contents[.]” G.C. 3669-a (emphasis added). The State repeatedly and inappropriately omits the word “beneath” for the obvious reason that “beneath” clearly and unambiguously limits the soil of the territory to that actually beneath water, and not land on the shore.

Apparently thinking it has found a smoking gun, the State cites to *State v. Cleveland & Pittsburgh R.R. Co.*, 94 Ohio St. 61 (1916), as proof that the Fleming Act codified the State’s purported federal common law boundary. (State’s Opp’n at p. 7.) However, the State fails to advise this Court that *Cleveland & Pittsburgh R.R. Co.* (i) dealt only with the littoral right of wharfing out to the federally-defined harbor line in aid of navigation and commerce (*see id.* at 79; (ii) did not involve a definition of the landward boundary of the public trust “territory” other than to find that title to the “*subaqueous* soil is held by the state as trustee for the public” (*id.* (emphasis added)); and (iii) the littoral property owners successfully prevented the State from interfering with their exercise of littoral rights (*id.* at 79, 84). Rather than limiting the rights of the littoral property owner as the State implies, and as some other states had done, the Ohio Supreme Court broke rank and gave full effect to those rights. *Id.* Apparently the State did not understand that, while the Ohio Supreme Court did call on the legislature to protect the public trust in that decision, the Court also called on it to “in a spirit of justice and equity, provide for the protection and exercise of *the rights of the shore owners*” – including the right to wharf out. *Id.* at 84 (emphasis added). Thus, far from referring to a non-existent federal common law boundary of ordinary high water, the Ohio Supreme Court both acknowledged the fact that private interests owned the shore and expressed its belief that there was a need for the legislature to protect those private interests in the shore.

**5. The State’s Attempts at Distinguishing Plaintiffs’ Cases Demonstrate, to the Contrary, that the Boundary of the “Territory” – the Shoreline – Must be Located at the Low Water Mark.**

In a failed effort to distinguish Plaintiffs’ cases on the low water mark, the State provides an overview of Ohio law on public trust rights that shows how internally contradictory and irrational the State’s position is. (State’s Opp’n at pp. 15-19.) For example, by establishing that Ohio common law excludes some waters from the public trust, *e.g.* private streams, the State’s overview shows that Ohio has, as the “equal footing” doctrine allows, decided which waters do, and do not, belong in its public trust “territory.” (*See* State’s Opp’n at pp. 15-18.) In addition, by noting that there are “quasi-public” waters, the State shows that Ohio has, as the “equal footing” doctrine allows, set various boundaries for the “territory” – sometimes limiting the “territory” to the navigable channel and in others to just the waters themselves. *See, e.g. Hogg v. Beerman*, 41 Ohio St. 81 (1884) (limiting the public trust to the navigable channel); *Gavit v. Chambers*, 3 Ohio 495 (1828) (limiting the public trust to just the waters). Thus, this overview shows that Ohio has embraced the freedom recognized in the true “equal footing” doctrine, rejected the rigid “equal footing” myth manufactured here by the State, and endorsed various boundaries for its somewhat limited public trust waters, *none of which* rise to the ordinary high water mark.

The State’s key case, *Pollock v. Cleveland Ship Building Co.*, actually lends more support to Plaintiffs’ position. *See Pollock v. Cleveland Ship Building Co.*, 2 Ohio Dec. 151 (Cuyahoga Cty. Common Pleas 1895). In that case, the common pleas court first noted that the dividing line between land and water is the “bed” of the waterway, not the banks, and that on Lake Erie the public owned only the bed. *Pollock*, 20 Ohio Dec. at 151-152 (citing to *Sloan v. Biemiller*).<sup>11</sup> It

---

<sup>11</sup> Shortly after discussing *Pollock*, the State goes on to note that the *Sloan* decision “applied the very common law principles” later announced in *Shively*, confusingly suggesting that through *Sloan*, Ohio

also noted that “navigation” was “the science or art of conducting a ship from one place to another[.]” *Id.* Applying that definition to the facts before it, the court then held that an adjoining riparian landowner on the Cuyahoga River who was in the business of fixing boats could not moor its boats in front of or on its neighbor’s riparian land under the guise of navigation. *Id.* at 153. The ruling of *Pollock* thus further undermines the State’s ultimate argument that the public has the right, under the guise of navigation, to walk on the shores when this walking has nothing to do with “conducting a ship from one place to another.”

One decision the State neglected to mention in its overview was *Lessee of Blanchard*, in which the Ohio Supreme Court, in its first decision on the public and private boundaries of navigable waters, determined that “[l]and on the Ohio river, lying between high and low water mark, is not common to the public” but privately owned. *Lessee of Blanchard v. Porter*, 11 Ohio 138, 142, 144 & syll. (1841). After determining that the Ohio River was navigable in fact, the Court held that the upland owner held title to the low water mark, and not the high water mark as contended by the defendants. *Id.* at 144. Thus, although the waters of the Ohio River are open to the public, the bank above low water mark is not part of the public trust. If the position espoused here by the State had been accepted in *Lessee of Blanchard*, then the decision would have been for the defendants (who claimed access to the river bank by virtue of owning to the ordinary high water mark) and not the plaintiff.

Indeed, one wonders how many Ohio Supreme Court decisions would have been decided differently had the State’s current public trust theories been adopted as Ohio law. Consider *State*

---

adopted the common law of Oregon which set its boundary at the ordinary high water mark. (State’s Opp’n at p. 18.) *Sloan* is not so expansive, and indeed only states, in relevant part, that Ohio common law does not, unlike it does on some rivers, permit a littoral property owner to own *to the center* of Lake Erie. *Sloan*, 34 Ohio St. at 512. As *Sloan* makes clear, littoral property owners hold title to the “line at which the water usually stands when free from disturbing causes” which, as applied to the facts, stands today as the low water mark. *Id.* at 515-17 (recognizing littoral owner’s right to exclude persons from his shore).

*ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.*, 137 Ohio St. 8 (1940), in which the Court determined that a littoral property owner and not the State held title to land measuring 1,000 feet from north to south and 700 feet from east to west that had formed by accretion between the shorelines of 1898 and 1938. *Id.* at 11-13. Accretion, as we discussed in our opening brief, occurs by the actions of the water that gradually forms land above the waters of Lake Erie. *See id.* at 11 (defining accretion), and the State’s understanding of accretion as put forward in this case is that land only “accretes” to upland if it is above 573.4 feet IGLD (under the State’s theory, all other accreted land between the water’s edge and 573.4 feet IGLD remains “submerged” and owned by the State, not the upland owner). Yet, the 700,000 square feet of accreted land that the State wrongfully attempted to claim in *Duffy* could not have been located above 573.4 feet given the lake’s water levels during the period at issue. The accreted land was described in *Duffy* as containing approximately “200,000 cubic yards of drifted sand and soil” (*id.* at 12), which means that the accreted land was less than four inches in height, on average, above the existing water levels, which at the time were typically at least two feet and occasionally more than four feet below the State’s ordinary high water mark. (*See State’s Appx. Exh. A.*) Indeed, the monthly mean elevations of Lake Erie never reached as high as 573.4 feet IGLD during the entirety of the 40-year period at issue in *Duffy*. (*Id.*) If the ordinary high water mark defined the boundary of the public trust, the State would have succeeded in laying claim to the 700,000 square feet of land – which the State would called “submerged” because below OHWM although not actually submerged – at issue in *Duffy*. Yet the State lost in *Duffy*, and it should lose here.

In further trying to distinguish two cases regarding federal patents to lands bordering Lake Erie, the State fails to understand that these cases reflect the common understanding of the

time in Ohio that the boundary between patentable land and public water made sure to include as much usable land as possible, including at times land under shallow water. (See State’s Opp’n at pp. 19-21 discussing *James v. Howell*, 41 Ohio St. 696, 710 (1885) and *Niles v. Cedar Point Club*, 175 U.S. 300, 308-9 (1899).)<sup>12</sup> Both cases involved the same disputed parcels of land on the shore of Lake Erie near Toledo and the same issues of interpreting the meandered line in surveys. The meandered line in *James* was drawn “along the southerly edge of the so called marsh” or the shore of Lake Erie, which edge the surveyor determined based on the permanent presence of water at low water levels. *James*, 41 Ohio St. at 708-10. Thus, that decision shows that surveyors in the 1800’s viewed the shoreline as being located at the low water mark. The *Niles* decision similarly noted that because the property at issue was “not continuously submerged” and “not permanently covered with water,” it was not part of the public trust territory but was, instead, “swamp and boggy” land that could be separately conveyed. *Niles*, 175 U.S. at 307-8. In comparison, had the United States Supreme Court and lower courts applied the State’s proposed ordinary high water mark to the facts presented in *Niles*, it would have described the boundary of the public trust as lands “submerged only rarely” or “not continuously above water.” See State’s Appx. Exh. A (showing monthly mean elevations of Lake Erie never reached State’s ordinary high water mark for twenty years on either side of 1881 survey relied on in *Niles*). Thus again, the United States Supreme Court, like the Ohio Supreme Court, recognized in *Niles* that surveyors of the time viewed patentable land as that above the low water mark.

---

<sup>12</sup> The State gives a cavalier interpretation of the facts in *Niles*, concluding without basis that the *Niles* decision involved land wholly above the ordinary high water mark and, thus, of no moment to this dispute. (See State’s Opp’n at p. 20.) The Court in *Niles* never found that the land at issue was above the ordinary high water mark, but instead described the land as located between the “excessive high” water line, and the “ordinary stage” water line. *Niles v. Cedar Point Club*, 175 U.S. 300, 307 (1899). The latter line, as noted above, is later equated in the opinion with the line defining the boundary between areas of continued or permanent submergence and partial submergence – the low water line. *Id.* at 307-8.

Further misunderstanding Ohio jurisprudence on the boundary of the “territory,” the State tries to marginalize the Ohio Supreme Court’s *Mitchell* decision despite the fact that it is the only known case where the Ohio Supreme Court has expressly equated the terms in the Fleming Act, then R.C. 123.03, with any water mark – high, low or otherwise – and there set it at the low water mark. *See Mitchell v. Cleveland Electric Illuminating Co.*, 30 Ohio St. 3d 92, 94 (1987) (“The waters of Lake Erie belong to the state of Ohio, and it is undisputed that Avon Lake’s territorial limits extend only to the low water line of Lake Erie. *See R.C. 123.03.*”). Inexplicably, the State makes no mention of the Court’s interpretive citation to the Fleming Act and instead explains that R.C. 721.04 – a statute never even mentioned in the decision – allows a municipality to extend its boundary “beyond the upper boundary of the ‘territory’[.]” (*See State’s Opp’n* at p. 21.) The State cannot imply analyses the Court did not itself apply to avoid interpretations clearly damaging to its position.

The State’s remaining arguments mislead as to Plaintiffs’ positions, misstate the relevant law and are immaterial for purposes of interpreting the terms at issue. For example, the State claims that Plaintiffs rely on the Ohio Attorney General’s 1993 Opinion to establish that the low water mark is the boundary of the “territory.” (*See State’s Opp’n* at pp. 25-29.) In reality, and as the State knows but cannot dispute, Plaintiffs relied on that opinion to show that the Ohio Attorney General had found that the ordinary high water mark was not the boundary of the “territory” and that littoral property owners held title to the land below the ordinary high water mark down to the natural shoreline. (*See Plaintiffs’ Motion for SJ* at pp. 7 and 21.)

Worse still, the State abandons all credibility and actually asks the Court to reject the positions taken throughout history by employees of the State. (*See State’s Opp’n* at pp. 29-32.) Plaintiffs have shown already that the State, acting through its employees, has repeatedly

indicated that the boundary of the “territory” is the low water mark. As examples, Plaintiffs pointed to, among others, an October 12, 1970 letter from R. F. Weisent with the Ohio Department of Public Works, the Herdendorf affidavit describing his instructions from the State in the 1970’s and the Public Review Draft from the Ohio Department of Natural Resources. (*See* Exhs. 1, 2 and 3 to Plaintiffs’ Motion for SJ.) The State does not challenge this evidence factually, as it cannot.<sup>13</sup> Instead, it attacks it collaterally, suggesting that the State’s employees cannot “unilaterally amend the Acts of the General Assembly[.]” (State’s Opp’n at p. 31.) Every time Plaintiffs confront the State with a piece of evidence showing that the boundary of the “territory” as commonly understood has never been fixed at the ordinary high water mark, the State offers excuses instead of appropriate support for its position, either in fact or law. The State also fails to understand the salient point made by this evidence – these state employees and others didn’t change the law to low water mark but, instead, understand what the law has always been. The State cannot simply shut its eyes to reality – Ohio has, through its courts and other employees, set the boundary of the “territory” at the low water mark.

Because the State does little else besides repeat its tired mantra and otherwise ignores informative and binding Ohio precedent in favor of misapplied federal law, it fails to rebut the showing made by Plaintiffs in their opening brief that, as a matter of settled Ohio law, the

---

<sup>13</sup> The State does suggest that portions of Dr. Herdendorf’s report are hearsay that the Court should ignore. Of course, the State neglected to point out to the Court which of Dr. Herdendorf’s statements should be stricken on this basis, perhaps because Dr. Herdendorf’s report simply provides the Court with a scientifically-accurate description of Lake Erie without opining on the ultimate questions presented. Regardless, the Ohio Supreme Court has made clear that an expert witness’s referring to professional literature as being part of the basis for that expert’s opinion is admissible. *Beard v. Meridia Huron Hosp.*, 106 Ohio St. 3d 237, 2005-Ohio-4787, at ¶ 26 (2005). Indeed, Evid.R. 706 was repealed in 2006 and Evid.R. 803(18) adopted to make clear that scientific evidence published in treatises, periodicals and pamphlets and relied upon by an expert is not hearsay. Moreover, public records, records of documents and statements therein affecting an interest in property, and statements in documents more than twenty years old are not hearsay. Evid.R. 803(8), (14), (15), (16). As the State has not challenged any particular part of Dr. Herdendorf’s report as containing inadmissible hearsay, the State has prevented the Court from properly reviewing the State’s objection to determine which of these hearsay exceptions may apply.

boundary of the “territory” for purposes of R.C. 1506.10 and R.C. 1506.11 is the low water mark. Thus, Plaintiffs are entitled to summary judgment on the court’s first question.

**B. On Question Two, the State Cannot Show, as the Proponent of Setting the Ordinary High Water Mark at an Elevation of 573.4 Feet IGLD (1985), That There is No Genuine Issue of Material Fact.**

Though Plaintiffs have established that the ordinary high water mark is not the boundary of the “territory,” and thus that Court’s second question is moot, a quick highlight of the State’s response on this question shows the utter futility of the State’s position.

Rather than explaining that there are no genuine issues of material fact, the State actually raises additional questions of fact, and thus further undermines its ability to achieve summary judgment on its proposed elevation for the ordinary high water mark at 573.4 feet IGLD (1985). For example, as the State correctly notes, Plaintiffs submitted an affidavit showing that the 573.4 feet elevation was based on water levels during the record high years in 1982 through 1988. (*See* Plaintiffs’ Motion for SJ, Exhibit B at p. 3; *see also* Plaintiffs’ Opp’n at p. 16.) The State now claims, contrary both to Plaintiffs’ affidavit and to the State’s own documents attached to its Motion, that the 573.4 feet elevation was based not on the seven referenced years, but on “over 100 years of water level data[.]” (State’s Opp’n at p. 42.) In addition, the State actually concedes that the 573.4 feet elevation is not itself based on observed high water levels, but is instead just a line set at 4.2 feet above the low water datum. (*See* State’s Opp’n at p. 42-43.) Furthermore, it reveals that, contrary to its claims in its Motion that the 573.4 feet elevation is “routinely recalculated” (State’s Motion for SJ at p. 24), this elevation “has not changed since the IGLD 1955 study” and “has remained constant throughout the years[.]” (State’s Opp’n at pp. 42 and 43.) Worse yet, this statement contradicts the one made by the State on p. 23 of the Opposition itself that the IGLD elevations reflect a thirty year time period. These issues of fact,

among others, materially impact the appropriateness of the 573.4 feet elevation and thus preclude the State from obtaining summary judgment on Question Two.

Ignoring these factual issues, the State strangely suggests that its 573.4 feet IGLD elevation is appropriate because it's only fair, under the "equal footing" doctrine, that Ohio get as much title in the Lake Erie shore as some of the original states took to the Atlantic Ocean shore. (*See, e.g.*, State's Opp'n at pp. 32, 33 and 40.) Besides having no legal support for this theory, the State offers no explanation for why this should be so other than a simple declaration that the boundaries must be drawn in the same way. Yet it is clear there are physical differences between tidal and non-tidal bodies of water. If the State wants to apply the analysis applied to tidal waters to find the ordinary high water mark – that being the line below which the lands are washed twice daily by the tides (*see Seaman v. Smith*, 24 Ill. 521, 524 (1860)) – then as applied here that methodology would mean that all lands *not* washed twice daily by the tides, including the shores and beaches of non-tidal Lake Erie, must be excluded from the "territory."

Additionally, the State tries here to again attack the low water mark boundary, despite the fact that the Court's second question has nothing to do with the low water mark and despite the fact that Plaintiffs have not, as the State suggests, asked the Court or the State to define the low water mark as equivalent to the current Low Water Datum. (*See State's Opp'n* at pp. 33-38.)<sup>14</sup> In referring to Low Water Datum, Plaintiffs meant only to highlight that LWD defines the boundary of actually navigable waters, which the State concedes. (*See State's Opp'n* at p. 34). As such, the State lacks a legitimate interest in extending the public trust "territory" – which

---

<sup>14</sup> In attacking the LWD, the State claims, without any explanation, that Plaintiffs' "simple graphic" illustrating the lines and property at issue here is misleading. The State does not say that the lines or property shown on the "graphic" are inaccurate. Indeed, Plaintiffs drew the "graphic" based on the definitions as set out in their opening brief (*see Plaintiffs' Motion for SJ* at p. 13), and the State does not contest these definitions. (*see State's Opp'n* at p. 8, stating "Plaintiffs and the State agree that the 'shore' means the lands between ordinary high water mark and the ordinary low water mark of Lake Erie").

“must be only in aid of navigation and commerce”<sup>15</sup> – landward of LWD to a line of elevation that is 4.2 vertical feet above LWD. As such, the State’s challenge to Low Water Datum is further proof that the State’s interest in the private shores of Lake Erie is unrelated to, and thus not justified by, the public trust.

The State’s remaining arguments on this second question are doubly-mooted, do nothing to advance resolution of the same, and thus will not be addressed.

**C. On Question Three, the State’s Assertion of Public Rights to the Shore Is Contrary to Ohio Law.**

The State’s arguments on the Court’s third question – the rights of the parties in the “territory” – have been raised and addressed in other briefs. (*See* State’s Motion for SJ at pp. 31-47; *see also* Plaintiffs’ Opp’n at pp. 18-19.) The State argues almost nothing new. Instead, it mostly repeats *ad nauseam* that Plaintiffs cannot own the shore because the shore is part of the “territory.” This point has been addressed above and deserves no further response.

The only new claim raised by the State is its contention that the Ohio Supreme Court did not hold in *Sloan v. Biemiller* that littoral property owners on Lake Erie could exclude other persons from their shore. (*See* State’s Opp’n at pp. 49.) This is an absolute misstatement of *Sloan* and an indication that the State has no real basis for supporting a public right to the shore. To start, the State amazingly contends that “*Sloan* was not a public trust doctrine case” right after noting that the decision analyzed the public trust right of fishery. (*Id.* at p. 49.)<sup>16</sup> It then tries to

---

<sup>15</sup> *Squires*, 150 Ohio St. at 326.

<sup>16</sup> Earlier in its Opposition, the State went even further and misleadingly claimed that *Sloan* “did not adjudicate the public trust boundary of Lake Erie.” (State’s Opp’n at p. 24.) Compounding its error, the State then wrongly tries to attack the New York state authority referred to in the *Sloan* opinion as suggestive of a low water mark boundary on Lake Erie. The State contends that later New York cases have rejected the low water mark when, in fact, it mistakes the chronology and overlooks the fact that its main case - *People ex rel. Burnham v. Commissioners of the Land Office* - was actually criticized in one of its other cases - *Stewart v. Turney* - which then declared that in New York, the boundary of state grants on New York’s large lakes extends to the low water mark. *See Stewart v. Turney*, 237 N.Y. 117, 129-30

suggest that the decision only addressed the public right of fishery, knowing full well that the Court in *Sloan* also held that, as opposed to the public rights of fishing, which it ruled could not be abridged, there was no public right to use the shore. *See Sloan*, 34 Ohio St. at 515-16. The State then completely overlooks that the Court held that littoral property owners held title to “the bay or lake shore,” and actually confirmed that some “shore rights” had been granted, and others conversely reserved, by the “owner of the premises.” *Id.* at 516. Indeed, in a telling statement of its own thinking, the Court in *Sloan* phrased its final question as “whether there has been such an invasion of his shore rights as to entitle him to a decree for their quiet enjoyment.” *Id.* By claiming that the Ohio Supreme Court did not recognize that littoral property owners can exclude others from the shore, the State shows that it is willing in its blind pursuit to not only ignore, but also misstate, what is binding legal precedent. For these reasons, and those discussed throughout, the State has not rebutted Plaintiffs’ arguments.

### **III. CONCLUSION**

Perhaps thinking that repetition beats clarity, the State tries again and again to force its convoluted, and fundamentally wrong, interpretation of the federal “equal footing” doctrine on to Plaintiffs’ wide-ranging and coherent analysis of Ohio law. Its efforts fail. The Court should grant summary judgment for Plaintiffs as set forth in the proposed Entry.

---

(1923) (“we hold that under the grant from the state the grantee took to low-water mark on Lake Cayuga”).

Respectfully submitted,

---

JAMES F. LANG (0059668)  
FRITZ E. BERCKMUELLER (0081530)  
CALFEE, HALTER & GRISWOLD LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114  
(216) 622-8200  
(216) 241-0816 (fax)  
jlang@calfee.com  
fberckmueller@calfee.com  
*Counsel for Plaintiffs/Relators*

**CERTIFICATE OF SERVICE**

A copy of the foregoing Reply Brief in Support of Plaintiffs' Motion for Summary Judgment was served, via email and regular U.S. mail, upon the following, this 30th day of July, 2007:

Cynthia K. Frazzini, Esq.  
John P. Bartley, Esq.  
Assistant Attorneys General  
Environmental Enforcement Section  
2045 Morse Road, Building D-2  
Columbus, Ohio 43215

Homer S. Taft  
20220 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116

L. Scot Duncan  
1530 Willow Drive  
Sandusky, Ohio 44870

Neil S. Kagan  
National Wildlife Federation  
Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104

Peter A. Precario  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215

Julie A. Blair  
Assistant General Counsel  
Northeast Ohio Regional Sewer District  
3900 Euclid Avenue  
Cleveland, OH 44115

Kathleen M. Trafford  
Porter Wright Morris & Arthur  
41 S. High St.  
Columbus, Ohio 43215

---

One of the Attorneys for Plaintiffs-Relators