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	)	**ORDER: (1) ESTABLISHING THE NATURAL SHORELINE; (2) GRANTING ADDITIONAL RELIEF ON COUNT I; (3) EXTENDING CLASS CERTIFICATION TO COUNT II; AND (4) DECLARING PREVAILING PARTY**
vs.	)	
STATE OF OHIO DEPARTMENT OF NATURAL RESOURCES, *et al.*	)	
Defendants-Respondents	)	

INTRODUCTION

{¶1} This case is before me on remand from the order of the Supreme Court of Ohio issued on September 14, 2011 in *State ex rel. Merrill v. Ohio Dept. of Natural Resources*.[1]

ORDER ESTABLISHING THE NATURAL SHORELINE

{¶2} On December 11, 2007, I ruled that the territory of Lake Erie held in trust by the state of Ohio for the people of the state of Ohio extends to the water's edge, which means the most landward place where the lake water actually touches the land at any given time. On August 21, 2009, the Eleventh District Court of Appeals held that the territory extends to the natural shoreline, which is the actual water's edge. The Ohio Supreme Court held that the territory extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes; this boundary does not change from moment to moment as the water rises and falls; rather, it is at the location where the water usually stands when free from disturbing causes.

Proceedings in the Supreme Court

{¶3} In *State ex rel. Merrill v. Ohio Department of Natural Resources*, the territory of the public trust of Lake Erie in Ohio, including its southern boundary, was the issue directly before the Supreme Court of Ohio.

{¶4} The state (ODNR), the National Wildlife Federation (NWF), and the Ohio Environmental Council (OEC) all argued that the boundary of the territory is the ordinary high-water mark,[2]

[1] 2011-Ohio-4612, 130 Ohio St.3d 30, 955 N.E.2d 935.

which they claimed that case law has construed to mean the "natural shoreline," as well as "the line where the water usually stands when free from disturbing causes."

{¶5} The Taft and Duncan plaintiffs contended that the landward boundary of the public trust territory is the "natural shoreline," that is, the low-water mark, as modified by accretion, reliction, or erosion.[3]

{¶6} The *Merrill* class plaintiffs asserted that the boundary is the "natural shoreline," which it claimed is the line at which the water meets the shore wherever that may be at any given time.[4]

{¶7} The Supreme Court said it already decided the issue[5] presented in this case over 130 years ago and that this case was not one of first impression as the lower court opined. In *Sloan v. Biemiller*,[6] the Supreme Court of Ohio determined that when a real estate conveyance calls for Lake Erie as the boundary, the littoral owner's property interest "extends to the line at which the water usually stands when free from disturbing causes."[7]

{¶8} In its analysis in *Sloan*, the Supreme Court of Ohio adopted the position taken by the Supreme Court of Illinois in *Seaman v. Smith*[8] in the syllabus where the court determined that "[t]he line at which the water usually stands when free from disturbing causes, is the boundary of land in a conveyance calling for Lake Michigan as a line."

{¶9} The Ohio Supreme Court in *Merrill* equated "the usual high-water mark," with "the ordinary high-water mark," and stated that neither *Sloan* nor *Seaman* adopted that as the boundary or defined "the line at which the water usually stands when free from disturbing causes" to mean "the usual high-water mark." The court pointed out, as a subsequent case from the Supreme Court of Illinois explained, "[i]t is clear from the reasoning and conclusion in [*Seaman*], in the light of the judgment entered, that it was not the high-water mark that was taken as the true limit of the boundary line, but the line where the water usually stood when unaffected by storms or other disturbing causes."[9] The Ohio court added, "[i]n addition to a storm, a drought *may* constitute a disturbing cause."[10] (Emphasis added.)

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[2] *Merrill*, *Id.*, at 32, 40.
[3] *Merrill*, *Id.* at 32, 40.
[4] *Merrill*, *Id.* at 40.
[5] *Merrill*, *Id.* at 35.
[6] *Sloan v. Biemiller* (1878) 34 Ohio St. 492.
[7] *Sloan*, *Id.* at paragraph four of the syllabus.
[8] *Seaman v. Smith* (1860), 24 Ill. 521, 14 Peck (IL) 521.
[9] *Brundage v. Knox* (1917), 279 Ill. 450, 471, 117 N.E. 123.
[10] See *Appeal of York Haven Water & Power Co.* (1905), 212 Pa. 622, 631, 62 A. 97.

{¶10} Thus, in *Merrill*, the Ohio Supreme Court ruled out the ordinary or usual high-water mark as the landward boundary of the territory, declining to adopt the contentions of the state, the National Wildlife Federation, and the Ohio Environmental Council.

{¶11} The Ohio Supreme Court further expounded:

> Subsequent to our decision in *Sloan*, in *State v. Cleveland & Pittsburgh RR. Co*. (citation omitted)[11], we held that "the state holds the title to the subaqueous land [of Lake Erie within the boundaries of Ohio] as trustee for the protection of public rights." In so holding, we followed our decision in *Sloan*, among other cases, and concluded that "[t]he littoral owner is entitled to access to navigable water on the front of which his land lies, and, subject to regulation and control by the federal and state governments, has, for purposes of navigation, the right to wharf out to navigable water." *Id*. at paragraph five of the syllabus. In that case, we also urged the General Assembly to pass legislation that would "appropriately provide for the performance by the state of its duty as trustee for the purposes stated; that [would] determine and define what constitutes an interference with public rights, and that [would] likewise, in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners." *Id*. at 84. The General Assembly did so the following year when it enacted the Fleming Act.[12]

{¶12} The court held further[13] that "The Fleming Act clarified the public policy of the state of Ohio with respect to the waters of Lake Erie, and its pronouncement conformed to decisions of this court dating from 1878 (*Sloan*).[14] The current version of the statute is substantially similar to the original statute, and notably, both refer to the "natural shore line."

{¶13} R.C. 1506.10 provides:

> 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, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. Any artificial encroachments by public or private littoral

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[11] *State v. Cleveland & Pittsburgh RR. Co*. (1916), 94 Ohio St. 61, 79, 113 N.E. 677, L.R.A. 1917A, 1007, 1916 Ohio LEXIS 164.
[12] *Merrill*, *Id.* at 41.
[13] *Merrill*, *Id.* at 41.
[14] See 948 G.C. 3699–a, Am.H.B. No. 255, 107 Ohio Laws 587, recodified as R.C. 123.03, and now renumbered as R.C. 1506.10.

> owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the ***natural shoreline*** of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 1506.11 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby. (Emphasis added.)

{¶14} The court continued:

> Subsequently, in *State ex rel. Squire v. Cleveland* (citation omitted)[15] we held that the Fleming Act did "not change the concept of the declaration of the state's title as [declared in *Cleveland & Pittsburgh RR. Co.*[16]]." Instead, the act merely reiterated this court's pronouncement in that case. Thus, we reaffirmed that "littoral owners of the upland have no title beyond the **natural shore line**; they have only the right of access and wharfing out to navigable waters." *Squire* at 337. From that holding, it follows that the converse is also true: if a littoral owner has no property rights lakeward of the natural shoreline, then the territory of the public trust does not extend landward beyond the natural shoreline. (Emphasis added.)[17]

{¶15} Accordingly, the Ohio Supreme Court ruled out the low-water mark as the landward boundary of the territory by refusing to adopt the contention of the Taft and Duncan plaintiffs. It further reiterated its holding that the territory of the public trust and the private title of the littoral landowner are not coextensive; where one begins, the other ends.[18]

{¶16} Hence, the Supreme Court's review necessarily had to "center"[19] on the term "natural shoreline."

> Not long after (the court's) opinion in *Squire*, the General Assembly, in 1955, enacted R.C. 123.031 in Am.Sub.S.B. No. 187, 126 Ohio Laws 137, 138, which has since been amended and renumbered as R.C. 1506.11. R.C. 123.031 defined the 'territory' of the public trust with reference to the 'natural shore line.' The current version of the statute also includes that reference point, defining the term 'territory' to mean 'the waters and the lands presently underlying the waters of Lake Erie and the lands formerly underlying the waters of Lake Erie and now

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[15] *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 337, 38 O.O. 161, 82 N.E.2d 709.
[16] *Cleveland & Pittsburgh RR. Co.* (1916), 94 Ohio St. 61, 113 N.E. 677, L.R.A. 1917A, 1007, 1916 Ohio LEXIS 164.
[17] *Merrill, Id.* at 42.
[18] *Merrill, Id.* at 42.
[19] *Merrill, Id*. at 42.

> artificially filled, between the ***natural shoreline*** and the international boundary line with Canada.'[20,21] (Emphasis added.)

{¶17} The court noted further that:

> [T]he General Assembly enacted the Fleming Act a year after this court urged it to pass legislation defining what constitutes an interference with public rights, and, therefore, we presume it did so mindful of the common law. We likewise presume that the General Assembly acted with full knowledge of the common law when it subsequently amended and added sections to the Fleming Act. Accordingly, we conclude that when the General Assembly defined the boundary of the 'territory' of the public trust as the 'natural shoreline,' it ascribed a meaning to that term consistent with the meaning set forth in this court's decisions, including *Sloan*.[22]

{¶18} The Ohio Supreme Court drew a line of consistency from the English common law transported to America, *Sloan v. Biemiller* (1878), *State v. Cleveland & Pittsburgh RR. Co*. (1916), the Fleming Act of 1917 (now R.C. 1506.10), *State ex rel. Squire v. Cleveland* (1948), R.C. 1506.11 (1955), and now *Merrill* (2011).

{¶19} It appears that it would be logical for the parties to brief the issue or ask the court to define what is the "natural shoreline" so that anyone can physically locate the line at which the water *usually* stands when free from *disturbing causes*; it would be expected that the parties would ask the court to at least define or list the competent disturbing causes or characterize disturbing causes beyond the 1860 and 1878 references. The parties did not brief this precise issue or ask the Ohio Supreme Court to define the words "usually" or "disturbing causes."

{¶20} Accordingly, the Supreme Court further elucidated only:

> The boundary of the public trust does not, however, as the court of appeals concluded in affirming the trial court, change from moment to moment as the water rises and falls; rather, it is at the location where the water usually stands when free from disturbing causes. That is what we stated in *Sloan*, that is what has been understood for more than a century in Ohio, that is what the General Assembly meant by "natural shore line" when it enacted G.C. 3699–a in 1917, and that is what the law was when ODNR began to enforce the leasing policy, which it has since abandoned, having recognized the presumptive validity of the owners' deeds. **We see no reason to modify that law now**. . . . Accordingly, the territory of Lake Erie held in trust by the state of Ohio for the people of the state

[20] *Merrill, Id.* at 42.
[21] R.C. 1506.11.
[22] *Merrill, Id.* at 42-43.

> extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes.[23] (Emphasis added.)

{¶21} Therefore, the Ohio Supreme Court ruled out the natural shoreline being the line at which the water meets the shore wherever that may be at any given time – it is not the water's edge as it changes from moment to moment – overruling the contention of the *Merrill* class plaintiffs.

{¶22} By the time the case reached the Ohio Supreme Court, all of the parties knew the *Sloan* case, *Cleveland & Pittsburgh RR. Co.*, R.C. 1506.10, *State ex rel. Squire*, and R.C. 1506.11, and the existence of the language employed, namely the "natural shoreline" being the line where the water usually is when undisturbed. However, the parties all had a different definition or interpretation of what that phrase meant. In the 130 years since *Sloan*, no court in Ohio has ever "defined" the "natural shoreline" in terms of what are disturbing causes; no court has characterized what are "disturbing causes."

The December 2, 2011 Hearing

{¶23} The state of Ohio advised me, in a hearing conducted on December 2, 2011 to chart out my mandate from the higher court, that the *Merrill* decision of the Ohio Supreme Court, while giving some resolution or direction to them on the issue of the public trust boundary, did not give them "the clarity, the certainty, and the closure that all the parties" to the controversy sought. The state's attorney said that they "all knew that *Sloan* said the line where the water usually stands when free from disturbing causes is the boundary of title (and they) all knew that (going into the Supreme Court). But all of us were interpreting it differently."[24] The Supreme Court said what the boundary line is not; "you're all wrong… It's not the low water mark, it's not the historic low water mark, it's not the momentary water's edge. … And it's not the usual or high water mark…. We know what it's not. … But they didn't tell us what it is."[25] The Supreme Court did not determine factually what the boundary line is, what are the competent disturbing causes, where or how the line can be physically located, who or what entity should locate the line, or how the members of the public and the littoral property owners can discern it. The state of Ohio further advised me, "Where the water usually stands when free from disturbing causes … is not a helpful phrase, and it has never been,"[26] without a definition of "disturbing cause."

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[23] *Merrill*, *Id.* at 43.
[24] Transcript of proceedings of December 2, 2011, at page 31, line 6 to page 33, line 9.
[25] *Id.*
[26] Transcript of proceedings of December 2, 2011, at page 34, line 10.

And if none of the parties, or for that matter, the trial and appellate courts, had the correct interpretation, then what is the correct interpretation? Lake Erie is neither a pond nor does the water ever "stand" if, in fact, it could ever be free of any disturbing causes.[27] Obviously, there are numerous "disturbing causes" of various types.

{¶24} As a result of the expressed dissatisfaction with the Supreme Court's lack of clarity, certainty, or closure of the issue of what are the "disturbing causes(s)" contemplated by the Supreme Court, the parties advised me that the Supreme Court's holding that the natural shoreline is the line at which the water usually stands when free from disturbing causes could mean, and the parties still so maintain it is, the ordinary high water mark (as claimed by the state defendants, the National Wildlife Federation, and the Ohio Environmental Council),[28] the ordinary low water mark (as claimed by the Taft and Duncan plaintiffs),[29] or the water's edge as it exists at any given time (as claimed by the class plaintiffs).[30] In fact, all parties claimed victory in the Ohio Supreme Court's *Merrill* decision.[31] Further, the ODNR and intervening defendants contend that the ODNR now has the responsibility of determining where the territory is, based upon its interpretation of the Supreme Court's ruling.[32] All of this brings us back to where we began with this controversy: Where is the line of delineation between public trust territory and private upland littoral ownership, that is, where is the natural shoreline?

{¶25} I wonder, with all that the parties stated on December 2, 2011 in the aftermath of the Supreme Court's ruling, why did the parties not ask the Supreme Court for clarification, or re-argument, re-briefing, or some other re-consideration. I can surmise only that each party was satisfied it possessed the correct interpretation of the boundary or that it could use its interpretation of the holding of the Supreme Court to buttress its position with me to reargue the same issue on remand.

{¶26} I also note that this precise issue was never presented to me when I considered the motion for summary judgment and ruled on it in 2007. The question was always presented to me as being whether the state could use the ordinary high water mark as the boundary of the public

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[27] *Id*.
[28] Transcript of proceedings of December 2, 2011, at page 43, line 8 to page 45, line 2.
[29] Transcript of proceedings of December 2, 2011, at pages 56-57.
[30] Transcript of proceedings of December 2, 2011, at pages 19-20.
[31] I raised this unanimous claim of victory at the hearing, and attach as Exhibit "A" to this order just a sampling of the media coverage of the *Merrill* decision and the parties' mutual claims of victory or their confusion in the court's ruling, as well as the media portrayal to the people of Ohio of the court's ruling.
[32] Transcript of proceedings of December 2, 2011, at page 43, line 8 to page 45, line 2.

trust, since that was the boundary line that the ODNR chose to use. I ruled that the state could not use it as the boundary, but that the boundary was the water's edge. No one ever asked me to define the meaning of "the line at which the water usually stands when free from disturbing causes." The parties did not appear to focus in on that phrase.

{¶27} In carrying out the Supreme Court's mandate to conduct further proceedings on pending claims consistent with the Supreme Court's opinion, I must determine, *inter alia*, who prevailed in the case, which is dependent upon whose claims or contentions in the case come closest to the judicially-determined outcome on the main issue. Accordingly, I must use the Supreme Court's opinion to attempt to elucidate the common law definition of "disturbing cause," which I believe is an issue of first impression in Ohio. I undertake my duty to decide that question with temerity and humility, understanding that the Supreme Court of Ohio will have the last word on this issue and correct any errors I may make.

The Waterline Moves, But the Boundary Remains Stationary

{¶28} The Ohio Supreme Court in *Merrill* stated: "The boundary of the public trust does not, however, as the court of appeals concluded in affirming the trial court, *change from moment to moment as the water rises and falls*; rather, it is at the location where the *water usually stands when free from disturbing causes*. That is what is meant by 'natural shore line.'"[33] (Emphasis added.) Thus, the Ohio Supreme Court seems to have interpreted the natural shoreline principle as creating a universal, static line, rather than a dynamic boundary that moves as the waters of Lake Erie move, as the delineation between the public trust and private littoral ownership of the upland. The Supreme Court seems to have not made any provision for a boundary that is moveable, even though the *Merrill* class plaintiffs were proponents of one. On the other hand, the Supreme Court must have allowed some provision for a moveable boundary because it acknowledged the agreement of the parties that the natural processes of accretion, reliction, and erosion may increase or decrease the property of a littoral owner, and said the court need not further comment on or clarify the effect of these processes on the property line because the parties generally have no dispute regarding them.[34]

{¶29} The problem with the court's holding (if it held that the boundary line is static) is that the water never "stands" and there are numerous, complex, unpredictable, and incalculable

[33] See *Merrill Id.* at 43.
[34] See *Merrill Id.* at 43.

"disturbing causes" from which the water can never be free. As a result, there are both factual and legal difficulties with the Supreme Court's decision, if it is construed to require a universal, static boundary line.[35] Again, I attribute these difficulties to the parties, and primarily the state of Ohio and the ODNR, who should have focused the court's attention not on what they all knew and agreed upon, but on what they all did not know and did not agree upon; that is, the nature of disturbing causes and its effect upon where the water usually stands.

The Court Must Define "Disturbing Causes"

{¶30} No Ohio court has yet defined, characterized, limited, or quantified in any way what are the disturbing causes contemplated by the court in *Merrill* or *Sloan*; yet the court in both cases relied exclusively on the Illinois Supreme Court in *Seaman* for the operative language.

{¶31} The *Seaman* court's 1860 decision, in substantially its entirety, says:

> This record presents the question as to what answers the call for Lake Michigan, as a boundary line, in the various deeds in a chain of title, held by the plaintiff below. If high water mark is the point at which his land terminates, then this judgment should be reversed; but if, on the contrary, the line where the water usually stands when unaffected by **storms and other disturbing causes**, is the boundary, then the judgment must be affirmed. The question of which was the true line, was alone discussed upon the argument. The great lakes of the north, present questions affecting riparian rights, that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, **nor are they affected, like running streams, by rises and falls produced by a wet or dry season**. Yet the rules that govern boundaries on the ocean, govern this case.
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> A grant giving the ocean or a bay as the boundary, by the common law, carries it down to ordinary high water mark. *Cortelyou v. Brundt*, 2 J. R. 357. The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regular recurring periods, to the same points, a portion of the shore is regularly and alternately sea and dry land. This being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high water mark indicated by the usual rise of the tide, is his boundary.

[35] In deference to the Ohio Supreme Court, the parties did not focus the justices on the issue of disturbing causes, including references to the factual materials submitted to the trial court. These factual materials highlighted and detailed extensively the behavior of the waters of Lake Erie and the other Great Lakes, including lake hydrology and the variations in water level. These materials are attached to the class plaintiffs' motion for summary judgment.

> 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. Here, as there, the highest point to which **storms or other extraordinary disturbing causes** may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it not be extended to the lowest point to which it may recede from like disturbing causes, (sic) But it should be at that line where the water usually stands when unaffected by **any disturbing cause**. The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes. And the line at which it usually stands unaffected by **storms and other causes**, represents the ordinary high water mark on the ocean, and the point between the highest and lowest water marks produced by the tides.
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> Again, where is the lake, as called for by the deed? A fair and reasonable construction of the language, running to the lake and with the lake, would mean to that place where its outer edge is usually found. The mind would not understand that the highest point on the shore to which it had ever attained, or the lowest to which it had receded, was understood by the parties. Nor do we perceive any public necessity for adopting any other rule of construction, than the language naturally and reasonably imports.
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> These great bodies of water, having no currents, like rivers and other running streams, cannot present the same reasons why the boundary should be extended beyond the water's edge, where it is ordinarily found, that apply to running bodies of water. Where such streams are called for as a boundary, the thread of the current is held to be the line, from each side. Such a rule could not, for the want of a current, be adopted in this case. It would not be sanctioned either by analogy to the rule, or by reason. And if the outer edge of the water be passed, owing to the approximation of these bodies to a circular shape, it would be found exceedingly difficult, if not impossible, to ascertain where the boundary should be fixed, or the shape it should assume.
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> We are therefore clearly of the opinion, that the line at which the water usually stands, when free from **disturbing causes**, is the boundary of land in a conveyance calling for the lake as a line. This was the rule upon which the court below acted, and the judgment must be affirmed. (Emphasis added.)

{¶32} The disturbing causes mentioned by the Illinois Supreme Court are "storms and other disturbing causes," "extraordinary disturbing causes," and "any disturbing cause" which can convey the idea that the disturbing causes contemplated by that court are essentially limitless. The Ohio Supreme Court mentions "storms or other disturbing causes" and adds "droughts,"

based upon a 1905 Pennsylvania case, as possibly constituting a disturbing cause.[36] If the court really meant to classify drought[37] as a disturbing cause, this would seem to include long-term conditions, or conditions that could prevail over a period of years. I would not include drought as a disturbing cause because the movement of the water's edge is not perceptible as a result of drought, a point I will explain below.

{¶33} Notably, the Illinois court's decision was made in 1860, which is the first year that systematic water level measurements were taken on the Great Lakes,[38] so there was little scientific or historical experience – or certainly much less than we possess today – with lake levels at that time, or, especially, with the dynamic nature of, and what causes disturbances in, water levels of the Great Lakes.[39]

{¶34} As evidence[40] of the limited knowledge about the Great Lakes at the time, the reader could review the work entitled, "History of the Great Lakes," written at about 1899-1900.[41] In that lengthy exposition chronicling the history of the lakes, the authors state: "The amount of fresh water in all these lakes has been estimated at about 11,000 cubic miles, and is more than half of the entire amount of fresh water on the globe." The facts are that the volume is half that, namely 5,500 cubic miles, and the amount is one-fifth of the world's fresh water. The authors relate the scientific studies of lake statistics: Lake Superior is 401 feet below sea level (it actually is 732 feet below sea level), Lake Michigan is 287 feet below sea level (it actually is 348 feet

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[36] The *Merrill* court's inclusion of drought as a possible disturbing cause seems to contradict the *Seaman* court's exclusion, factually, of "dry season" as a possible disturbing cause, as the Illinois court in 1860 held the opinion that dry and wet seasons had no impact on lake levels.

[37] Webster's New World Dictionary, Third College Edition, defines "drought" as "a prolonged period of dry weather; lack of rain."

[38] Lake level records have been kept for "Lake Michigan/Huron" at various gauge stations around these lakes since 1860. http://www.in.gov/dnr/water/3661.htm (Last visited March 21, 2012). Although water-level recording began in the 1840s, systematic records from all lakes began in 1860. The current network of multiple gauges on each lake has been in operation since 1918. http://pubs.usgs.gov/circ/2007/1311/pdf/circ1311_web.pdf at p. 6 (Last visited March 21, 2012).

[39] Lake Michigan-Huron's seasonal variations are less than Lake Erie's and usually are less than one foot. See Appendix, Figure 3.

[40] I make reference throughout my opinion to many public records, reports, and learned treatises, most of which are promulgated by governmental agencies such as the department of natural resources of Ohio and other Great Lakes states, the U.S. Army Corps of Engineers, and the U.S. Geological Survey, in addition to the evidentiary materials attached to the plaintiff's motion for summary judgment filed on May 30, 2007 and Dr. Herdendorf's affidavit, all of which I take judicial notice.

[41] http://www.maritimehistoryofthegreatlakes.ca/documents/hgl/ (Last visited March 21, 2012).

below sea level), Lake Huron is 221 feet below sea level (it actually is 173 feet below sea level), and Lake Ontario is 359 feet below sea level (it is 559 feet below sea level).[42]

{¶35} Further, it appears that the Illinois court may have made an erroneous assumption when it said: "The great lakes of the north, present questions affecting riparian rights, that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, **nor are they affected, like running streams, by rises and falls produced by a wet or dry season**."[43] (Emphasis added.)

{¶36} Accordingly, the basis for the language holding, "[t]he line at which the water usually stands when free from disturbing causes, is the boundary of land in a conveyance calling for Lake Michigan as a line," perhaps is erroneously premised on the assumption that lake levels are not affected by changes in precipitation, or flood, drought, evaporation, and other climatic changes.[44]

{¶37} We now know as scientific fact:

> A lake of any size is a dynamic system, subject to constant change. Sometimes slightly more water comes in than goes out, or vice versa, and the lake level changes in response. The Great Lakes are no different, only much more complex. … **Changes in precipitation (rain and snow) are a main cause of lake level fluctuations.** Precipitation anywhere in the Great Lakes basin, whether over the water or somewhere inland, will end up in the Great Lakes. Sufficient precipitation will raise their levels. To complicate things, **there is usually a time lag** so that increased rainfall or snowfall may not manifest itself as a higher lake level **until as much as a year later**. …
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> With almost 100,000 square miles of surface area, the Great Lakes **lose a significant amount of water to evaporation**. If Lake Erie's inputs and outlets were blocked off, evaporation alone would cause its level to drop 36 inches in one year. Evaporation is greatest not when the weather is warmest, but when the temperature difference between the water and the air is greatest. Such conditions occur in the fall, when the air has cooled but the water still retains some of the heat gained during the summer. Evaporation can continue throughout the winter as well. Lake Erie, the shallowest and southernmost lake, is also the warmest and

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[42] See Figure 12, and compare it with Figure 2, in the Appendix.

[43] *Seaman v. Smith*, 24 Ill. 521, 523, 14 Peck (IL) 521 (1860); see also *Brundage v. Knox*, 279 Ill. 450, 471, 117 N.E. 123, 130 (1917).

[44] At intermediate timescales ranging from annual to millennial, climate is the primary cause of Great Lakes water-level fluctuations. Understanding relations between climate and lake-level variability, as well as the mechanisms underlying wet and dry extremes, is critically important in light of ongoing and future climate changes. http://pubs.usgs.gov/circ/2007/1311/pdf/circ1311_web.pdf at p. 9 (Last visited March 21, 2012).

does not always freeze over. If ice cover is not significant, the open water continues to lose vapor to the dry winter air, dropping water levels.

Precipitation and evaporation together tend to create seasonal cycles in lake levels. Water levels tend to be higher in the spring and summer — a response to winter snowmelt and spring runoff — and lowest in the winter due to summer and fall evaporation. … **Changes in precipitation and evaporation can have long-lasting effects.** In the late 1990s, a pattern of mild winters, with less precipitation and reduced ice cover, resulted in a dramatic lowering of Great Lakes levels that lasted into the early 2000s.

Precipitation and evaporation are the most obvious and most significant factors in changing lake levels. …

We have shown how lake levels can change over hours because of winds and how they vary seasonally because of precipitation. What about even longer terms? Geological evidence shows that over the millennia since Lake Erie was formed, its level has varied widely. About 5,000 years ago, the lake stood about 46 feet lower, which would have put the Ohio shoreline 2 to 3 miles farther out than it is today. The other Great Lakes experienced similar "lowstands," evidence for which includes submerged tree trunks — an indicator that forests once stood where water is today. The reasons for these lowstands are not clearly known, but **climate was probably responsible**.[45] (Emphasis added.)

{¶38} Further:

[T]he water level in the lake system is highly sensitive to climate changes. . . . The last time lake levels fell dramatically – down to 20 meters below the basin overflow outlets – it was due to dry climate conditions. . . . People . . . thought of the Great Lakes in the same way, that the system is too large to be sensitive to climate variations. But now we know that to be untrue. We've demonstrated that at least once in the last 10,000 years, climate drove the lake levels down pretty substantially. . . . Ancient shorelines, submerged beaches, and tree stumps on the floor of some lakes indicate that the water line had been as much as 20 meters below the present lake level. . . . The climate and water levels in the Great Lakes region are determined by the interplay of three air masses: dry, cold Arctic air from the North, dry warm Pacific air from the West, and warm, moist tropical air from the Gulf of Mexico. The scientists found that during the period when lake levels receded significantly, the dry air from the Arctic and Pacific was dominant. Later, when precipitation from the tropical air mass

[45] "Lake Erie Water Levels" by D. Mark Jones, http://www.ohiodnr.com/geosurvey/lakeerie/lefact1/tabid/7829/Default.aspx (Last visited March 21, 2012). See also "Lake-Level Variability and Water Availability in the Great Lakes," by Douglas A. Wilcox, Todd A. Thompson, Robert K. Booth, and J.R. Nicholas, Circular 1311, U.S. Department of the Interior, U.S. Geological Survey, http://pubs.usgs.gov/circ/2007/1311/pdf/circ1311_web.pdf (Last visited March 21, 2012).

> became more frequent, the Great Lakes began to flow from one to another as they do today. . . . **The range of lake-level changes that are likely to happen in the next 100 years is probably larger than the range of levels observed during the last century**.[46] (Emphasis added.)

{¶39} Since *Merrill* reaffirmed the court's decision in *Sloan*, and *Sloan* depended upon *Seaman* for the operative language, it follows that the reference in the *Seaman* case to "any disturbing cause" is applicable to the Ohio decisions.

{¶40} I should note that the court in *Sloan* was not concerned with a precise definition of the location of the shoreline, because it was addressing the boundary of the area from which a littoral owner could exclude fishermen and whether the offshore fishing grounds were owned by the littoral owner. The issue in *Sloan* is not identical to the issue in *Merrill*, where the issue is the precise location of the natural shoreline.

{¶41} What are the competent disturbing causes in Ohio if not "any" or "every" disturbing cause? The lake's water level changes daily, monthly, seasonally, yearly, decadally, millennially, and epochally. It is affected by the short-term effects of storm, dry spell, wind, barometric pressure, waves, and seiche.[47] It is affected by seasonal fluctuations of drought, deluge, and plant growth and ice development (particularly in the channels feeding the lake). It is also affected by long-term processes, such as changes in precipitation, evaporation, and climate change, crustal rebound, percolation, transpiration, runoff, dredging and diversions, flood control, power generation, salt-mining, subsidence, and artificial or other human activities.[48]

{¶42} The disturbing causes have added to and subtracted from or otherwise affected the waters of Lake Erie so that the level of Lake Erie between 1860 and the present varied between 568.2 feet above sea level in 1934-36 and 574.3 feet above sea level in 1985-87, a difference of 6.1 feet. The lake's higher highs have occurred in and around 1877, 1929, 1953, 1973, and 1997; the lower lows have occurred in and around 1926 and 1965.[49]

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[46] http://www.sciencedaily.com/releases/2009/01/090113101122.htm (Last visited March 21, 2012).

[47] Seiche is a natural, standing wave in the lake caused by changes in atmospheric pressure, seismic disturbances, winds, waves, or tides, and it continues after the generating force stops. Webster's New World Dictionary of the American Language (1968).

[48] http://pubs.usgs.gov/circ/2007/1311/pdf/circ1311_web.pdf (Last visited March 21, 2012); http://www.dnr.state.oh.us/Portals/13/Atlas_Maps_GIS/coastalatlas2/CH6_lake_science.pdf (Last visited March 21, 2012); http://www.glc.org/living/pdf/natural.pdf (Last visited March 21, 2012); http://www.kalkaskacounty.net/planningeduc0026.asp (Last visited March 21, 2012).

[49] Water levels on Lake Erie have been measured since 1865. From 1865 to 1918, only one gauge was used, leading to varied and inconsistent readings caused primarily by wind action blowing parallel to the

{¶43} Attached in the appendix are several figures: (1) drawing of the Great Lakes and the watershed; (2) drawing of the Great Lakes system profile; (3) graphs showing the seasonal fluctuations in water level for all of the Great Lakes; (4) hydrographs of all of the Great Lakes from 1918-2010 showing monthly mean water levels and the long-term annual averages; (5) hydrograph showing water levels of Lake Erie in terms of average monthly data from 1865 to 1998; (6) graph showing the long-term monthly means and record water levels for Lake Erie for 1918 to 2008, and more recent water levels for January 1 to February 20, 2012; (7) Lake Erie hydrograph showing the mean long-term water level for 1860-2010, and the mean annual water level for that period; (8) graph showing the rates of crustal rebound for all of the Great Lakes region; (9) depiction of Lake Erie bathymetry (underwater topography of the lake, based on IGLD 1955); (10) graph of Lake Erie water levels taken at Buffalo and Toledo over a six-day period in November 2005; (11) an illustration of wind set-up and set-down; and (12) profile of the Great Lakes in 1899-1900.

{¶44} It is as impossible to point to a line on a hydrograph or a figure in a table and call it the level where the water stands when free from any and all disturbing causes, as it is to go out to the beach and draw that line on the shore.

{¶45} In Figure 5, one can see from the hydrograph depicting average monthly data, that the difference in lake water level, for instance, in 1935 and 1930 was five feet, and in 1935 and 1987 was six feet.

{¶46} The six foot difference in water level is significant. For example, if the beach has a grade of ten percent, for each vertical change in water level of one foot, the horizontal change on the beach is slightly over ten feet; the six foot difference in lake level represents a little over 60 feet of beach (at that grade).[50] Some areas of the shore surrounding Lake Erie, particularly at the western basin, are nearly flat. A variation vertically of a couple of feet in the water level can mean the difference horizontally along the beach of a hundred feet.

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long axis of the lake, setting up and setting down water levels at the southwest and northeast ends of the lake. After 1918, water levels have been measured by a network of gauges around the lake.

[50] Slope is calculated as "rise divided by run." The Pythagorean Theorem is used to calculate the hypotenuse or the amount of beach, being the square root of the sum of rise squared and run squared.

More Questions than Answers

{¶47} The water level constantly changes; therefore the water's edge is always in a different place than where it just was. The water is constantly in motion. Lake Erie is a large body of water, and does not behave as a single mass or as water in a pond.

{¶48} Exactly where is the line at which the lake water usually stands when it is free from disturbing causes? Is it a static or universal line? Did the court mean free of only short-term or seasonal disturbances,[51] or does it include long-term disturbances? Would the court differentiate between man-made or natural disturbances? What rationale would differentiate the treatment or consideration of any categories of disturbances? Did the court mean the average water level, and if so, averaged over what period of time? Since the lake's waters fluctuate with the seasons and the years, depending upon shifting climate patterns, different temporal assessments of the lake water levels will result in varied mean levels. How often would the mean level be readjusted? If so, why did the court not just say so? I posit that it is practically impossible to establish factually where the waters of Lake Erie would stand if they could be free from any or all disturbing causes.

{¶49} What is our benchmark or point of reference? Is it where the water stood at the ratification of the U.S. Constitution, or at Ohio's statehood, on March 1, 1803, or at some other date and time?

{¶50} How can anyone know if any change in water level is long-standing or permanent, rather than short-term, temporary, or seasonal? How can someone know when a disturbing cause is underway if it is imperceptible and the effects not manifested or measurable until a year or more later? How can anyone know, since some variations are seasonal, at the beginning of a long-term change that the lake is in a long-term change? And, with the court's holding the line static, does it even matter?

{¶51} Who makes those factual determinations of the location of the natural shoreline?[52] Who will do it for all 15,500 parcels of land along the lakeshore? Will the natural shoreline ever be readjusted; when and what circumstances would trigger the readjustment?

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[51] In illustration of seasonal variations in water level, see Figure 3, where it is shown that the levels in June and July are frequently, but not always, more than a foot higher than levels measured in December and January.

[52] See syllabus of Ohio Attorney General Opinion No. 93-025, 1993 Ohio Op. Atty. Gen. 2-128, 1993 Ohio Op. Atty. Gen. No. 93-025, 1993 WL 465002:

{¶52} Is there room in the *Sloan* and *Merrill* decisions to determine that the location of the water when free from disturbing causes is the ordinary high water mark or the low water mark,[53] even though the Supreme Court specifically held that it is not, because the court did not define all of the disturbing causes, or the benchmark for establishing the natural shoreline, and over what period of time disturbing causes are to be considered? Although the court said the boundary line does not change from "moment to moment" with the movement of the water, does that language by implication mean that the boundary line can change – but just not from "moment to moment?"[54] If so, over what period of time does the natural shoreline change?

{¶53} How does one know which of many causes is a disturbing cause?

{¶54} How will a universal, static line on the shore be discernible to the public users and private landowners? How can littoral landowners know they are properly using their properties and enjoying their littoral rights, and enforce against encroachments on those rights? How can the public know they are within the public trust? How can law enforcement authorities enforce criminal laws, such as those proscribing trespass and breaking and entering?

{¶55} These are questions spawned by the lack of clarity, certainty, and closure that will plague the executive, legislative, and judicial branches of this state for years to come, especially since all of the parties have claimed they prevailed in the *Merrill* decision.

{¶56} If the line separating the public trust in the lake from upland private ownership, that is, the "natural shoreline," does not ever move or change with the water level, how does the law reconcile the interface of the water's edge along the shore with well-established common law principles of property law, and specifically, the concepts of public trust, littoral ownership, and water processes that change title?

"1. The determination of the natural shoreline of Lake Erie is a question of fact.
2. A littoral owner along Lake Erie has no title beyond the natural shoreline.
3. A littoral owner along Lake Erie is the beneficiary of a grant pursuant to 43 U.S.C.S. § 1311 (1980) of land above the natural shoreline of Lake Erie."

[53] Some of the parties to *Merrill* apparently do, as all of them claimed victory in the decision.

[54] I agree that the boundary line does not change from "moment to moment." When under disturbance, the water's edge does not change title or the boundary line. However, the gradual and imperceptible changes over the long-term may result in the advance or retreat of the water's edge and result in a change of title or the boundary line, and would not be considered to be under "disturbance." When the water is free from disturbance, the natural movement of the water's edge changes the boundary; *i.e.* it is a moveable freehold. In other words, a "moment to moment" change indicates the water's edge is not free from a "disturbing cause."

Separate Littoral Land From the Water / Abdicate the Public Trust

{¶57} As insurers of the public trust, the state has the responsibility of protecting the public's right to use state bodies of water for navigation, water commerce, and fishery. That is Ohio law.[55] If the water level happens to be below any supposed static line on the shore demarcating the public trust from littoral land ownership, how does the static line serve the purposes of the public trust, where dry land is not conducive to any navigation, water commerce, or fishing, and the state's public trust responsibility should not encompass dry land? Plainly, it does not. Submersion defines the boundary of the public trust.

{¶58} Also, such a scenario effectively cuts the littoral owner off from the water, thereby destroying the very characteristic that defines property as "littoral," *i.e*. its contact with the water,[56] requiring the upland owner to trespass over public trust land that is unsubmerged or dry, or land that can be stated to be without ownership at the time, to exercise his rights to make reasonable use of the water or to wharf out to navigable water. The "littoral" landowner would have no more rights in unsubmerged trust property than any other member of the public. Such a scenario is inconsistent with the concepts of public trust and littoral ownership – if the natural shoreline is static.

{¶59} Obviously, a property owner is only a littoral owner if the deed gives title to the water's edge, however the "water's edge" may be described. Should it be to the "water's edge," there would be nothing implied about being free from disturbing causes in that language. An ordinary person would understand that the property goes to the line on the shore wherever the water intersects the land. Should the deed describe title to the "meander line" of Lake Erie, rather than to the water's edge or waterline, "the meander line" is only a line of description and not one of boundary. "Meander lines, as shown by government surveys of land bounded by a lake or river, are merely for the purpose of ascertaining the quantity of land to be conveyed, and do not constitute its boundary. The water is the real boundary."[57]

{¶60} If the water level is above the supposed static line on the shore demarcating the public trust territory from littoral land ownership, how does a user of the public trust waters know not to

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[55] 92 Ohio Jur. 3d Water § 21.

[56] The littoral owners of the upland have no title beyond the natural shore line; they have only the right of access and wharfing out to navigable waters. *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 337, 82 N.E.2d 709, 725.

[57] *Hardin v. Jordan* (1891), 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed. 428.

navigate, engage in water commerce, or fish landward of some invisible boundary line that happens to be situated in the subaqueous soil? From all appearances, the public is confronted with a situation where it cannot enjoy the full extent of the water, the public trust is thereby diminished, and the state has abdicated its duty to preserve the public trust in the waters of the lake.

The Water Itself Changes Title

{¶61} If the boundary line of the territory never moves, the static nature of the natural shoreline allegedly delineated by *Merrill* would also be inconsistent with the natural water processes that change title between the public trust and littoral ownership.[58]

{¶62} Not only does the changing level at which the waters of Lake Erie are situated at any given time determine where the water's edge meets dry land, but the constant movement of the water through natural processes shapes and defines the boundary between the public trust and littoral ownership.

{¶63} Accretion, reliction, erosion, submersion, and avulsion describe the effect of lake water movement on the title to littoral lands.[59] The common law rules are: (1) alluvion forming upon a shore through accretion belongs to the owner of the shore, as does land created by the slow retreat of water, *i.e*. reliction; (2) title is lost through erosion and submersion; and (3) avulsive changes do not work a change of title.[60] Two of these processes – accretion and erosion – describe the situation where land is gradually and imperceptibly added and subtracted; two of these processes – submersion and reliction – describe the situation where water is gradually and

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[58] As I stated earlier in my opinion, although the Supreme Court said that the natural shoreline/public trust territory does not change as the water rises and falls or from moment to moment, that does not necessarily imply that the court holds that the natural shoreline is not a moveable freehold. In fact, the Supreme Court acknowledges and allows for the movement of the natural shoreline in its use of the following language, at *State ex rel. Merrill v. Ohio Dept. of Natural Res.*, 2011-Ohio-4612, 130 Ohio St. 3d 30, 43, 955 N.E.2d 935, 949: "According to representations in their briefs, the parties generally agree that artificial fill cannot extend a littoral owner's property, except where a littoral owner reclaims land stripped away because of sudden changes caused by avulsion. Additionally, the parties acknowledge that while accretion may increase the property of a littoral owner, erosion may decrease it. Cf. *State ex rel. Duffy v. Lakefront E. Fifty–Fifth St. Corp.* (1940), 137 Ohio St. 8, 11, 17 O.O. 301, 27 N.E.2d 485; *United States v. 461.42 Acres of Land in Lucas Cty., Ohio* (N.D.Ohio 1963), 222 F.Supp. 55, 56. Thus, we need not further comment on or clarify the effect of these processes on the property line because the parties generally have no dispute regarding them."

[59] *State ex rel. Duffy v. Lakefront E. Fifty-Fifth St. Corp.* (1940), 137 Ohio St. 8, 27 N.E.2d 485.

[60] *Baumhart v. McClure* (1926), 21 Ohio App. 491, 153 N.E. 211; Phillip Wm. Lear, Accretion, Reliction, Erosion, and Avulsion: A Survey of Riparian and Littoral Title Problems, 11 J. Energy Nat. Resources & Envtl. L. 265, 275 (1991).

imperceptibly added and subtracted; the fifth – avulsion – describes the situation where land is suddenly and perceptibly subtracted. These common law rules have been adopted in nearly all of the states, including Ohio, either through codification or through judicial decision. The rules also have been adopted by federal courts as federal common law.[61]

{¶64} "Accretion" is the gradual and imperceptible enlargement of land through the accumulation of sediment or the deposition of sand upon a beach; it is increase of real estate by gradual deposit by water of solid material, so as to create dry land of that previously submerged. The deposit itself is called "alluvion." Alluvion forming upon the shore through accretion belongs to the owner of the shore.[62]

{¶65} "Reliction" is the exposure of the bed of the lake due to the slow retreat of water. It is increase of land by retreat or recession of water, and is the process whereby land previously covered by water becomes dry land as a result of the gradual and imperceptible withdrawal of the water from natural causes. Any reliction due to the gradual actions of nature become lands lost by the public trust and gained by the littoral owner. It has been noted that relictions are occasionally difficult to factually distinguish from accretions because both result from a gradual, imperceptible increase to littoral lands. Accordingly, a littoral owner may gain land by reliction as well as accretion.[63]

{¶66} "Submersion" is the gradual and imperceptible inundation of land by adjoining waters, and in this context, is the opposite of reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, whereupon ownership temporarily lost may be restored.[64]

{¶67} "Erosion" is the process by which the soil is worn, lost, or carried away gradually and imperceptibly by the encroachment of water. It is the gradual and imperceptible washing away of the land along the lake by natural causes, such as waves, ice, rainfall, wind, or running water. In this context, erosion is the opposite of accretion. The term "erosion" is also sometimes used

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[61] *Omaha Indian Tribe, Treaty of 1854 with U.S. v. Wilson* (1980), 614 F.2d 1153 (8th Cir.); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.* (2010), 130 S. Ct. 2592, 2594, 177 L. Ed. 2d 184, 70 ERC 1505.

[62] *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 17 O.O. 301, 27 N.E.2d 485; *St. Clair County v. Lovingston* (1874), 90 U.S. 46, 23 L.Ed. 59.

[63] 92 Ohio Jur. 3d Water § 10.

[64] *Mulry v. Norton* (1885), 100 N.Y. 424, 3 N.E. 581, 55 Sickels 424; *Stockley v. Cissna* (1902), 119 F. 812, 56 C.C.A. 324 (6th Cir.); *Michelsen v. Leskowicz* (1945), 55 N.Y.S.2d 831 (Sup. Ct.) *aff'd*, 270 A.D. 1042, 63 N.Y.S.2d 191 (App. Div. 1946).

where there has been submergence of the land due to permanent encroachment of the waters. The statement of the rule seems to be that the owner who loses the soil loses ownership even if the eroded soils are deposited on another's land. The deposited soils then become accretions, and the rules of accretion apply.[65]

{¶68} "Avulsion" is the process by which the action of water causes a sudden, perceptible loss of or addition to land; it is the loss of land bordering the lake by sudden or violent and perceptible action of the elements. This is usually due to floods, storms, or violent wave action. Title does not shift as the result of avulsion; avulsive changes do not affect the boundaries of littoral lands. The former boundary remains in place even if the littoral owner is now cut off from access to the water.[66] The owner may reclaim or restore the land to its state existing just prior to the avulsive event.

{¶69} The courts and commentators have pointed out several public policy and other considerations in support of the rules of accretion and avulsion. First, one of the rationales advanced in support of the rule of accretion derives from the Roman theory of accessions, whereby just as the owner of a tree that produces fruit becomes the owner of the fruit, the owner of littoral land owns accreted land. Second, is that when a body of water is a boundary between landowners, that body should remain the legal boundary even though it has changed its location. All land should have an owner, and it only makes sense that "insensible additions to the shore" should accrue to the owner of the shore itself. Third, when land is gained from a body of water by incremental and imperceptible degrees, as distinguished from sudden changes, the new land should go to the owner of the adjoining land under the maxim "*de minimis non curat lex*," or "the law is not concerned with trifling matters." Fourth, is the "productivity theory," which holds that the law, as a matter of policy, should favor productive uses of land, and that the littoral owner is in a better position than others to use accreted land. Small slivers or bands of land formed by accretion are of little use to anyone else but the owner whose land originally was next to the water. Fifth is the "compensation theory" which recognizes that because a littoral owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control. The landowner who risks losses caused by moving waters (through erosion and submersion) should also be able to reap

[65] 92 Ohio Jur. 3d Water § 11.
[66] 92 Ohio Jur. 3d Water § 9.

any benefits caused by moving waters (through accretion or reliction).[67] Sixth is the preservation of the littoral quality of the upland. Courts and commentators have recognized that the quality of being littoral may be the land's most valuable feature and is part and parcel of the ownership of the land itself. Since the littoral owner probably paid more for the land than he would have if the land had not been bordered by water, the owner should enjoy continued access to the water even if the water body shifts its location away from the owner's land. Finally, the rule of accretion is easy for both layman and jurist to understand and to apply.[68]

{¶70} "Gradual" and "imperceptible" are the key words applied to accretions, reliction, erosions, and submersion. Similarly, avulsion is not the deposit or loss of deposit, so much as it is the process whereby land is accreted, relicted, eroded, or submerged suddenly. "Rapid" and "dramatic" are the key words for avulsions.[69] A littoral owner may gain land slowly by accretion or reliction, or lose it by slow erosion or submersion, but not by sudden avulsion as result of storm or other rapid and dramatic event. Accretion, reliction, erosion, and submersion result in an ever-changing boundary – they act as agents of title change. Avulsion does not change the boundary or title. The character of the stream or body of water as tidal, nontidal, navigable, or nonnavigable is immaterial as respects the application of the foregoing rules relating to accretion, reliction, erosion, submersion, and avulsion.[70]

{¶71} Any allegation that the boundary line separating public trust territory and private littoral ownership does not move ignores, and is inconsistent with, these long-standing common law property concepts.[71]

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[67] Real property in Ohio is taxed upon its appraised value. It is the duty of the county auditor to see that every parcel of land and the buildings thereon are fairly and uniformly appraised and then assessed for tax purposes. A general reappraisal is mandated by Ohio law every six years and an update every three years. Tax rates are determined by the budgetary requests of each governmental unit, as authorized by vote of the people, and are computed in strict accordance with procedures required by the State Department of Tax Equalization. Annually, the county auditor prepares the general tax list and duplicate. The tax on any particular parcel of real estate is based on the tax rate multiplied by the real estate valuation on the duplicate. Should the water's edge recede though accretion or reliction, the value of the property may increase because of the increase in land area. Conversely, property values may decrease due to a loss of land through erosion and submersion. *See* RC. Chapter 5713.

[68] See 73 Am. Jur. Proof of Facts 3d 167 (originally published in 2003).

[69] *Omaha Indian Tribe, Treaty of 1854 with U.S. v. Wilson* (1980), 614 F.2d 1153 (8th Cir.); *United States v. Wilson* (1977), 433 F. Supp. 57 (N.D. Iowa); 78 Am. Jur. 2d Waters § 311.

[70] 78 Am. Jur. 2d Waters § 315.

[71] "Primarily due to changes in annual weather conditions, the levels of the Great Lakes also vary year to year; for example, the average levels of the lakes one year may be a foot higher or lower than the average levels the next year. As a result, the high *10 water mark, low water mark, and water's edge are not

{¶72} Thus, in an area of the law, that is, property law and public trust law, in which stability and clarity are paramount, the law must offer a rule that is not vague or impossible to decipher or that will be subject to evolving definition by environmental regulatory agencies. The court would miss the point raised by the parties in their quest to physically discern or establish the natural shoreline if the court merely reiterated the *Sloan* holding that the parties agree upon as to its existence, but not as to its interpretation and application; the court must go farther and define what is meant by "disturbing causes," characterize what is a "disturbance," and hold that the water's edge when undisturbed is, in fact, a moveable boundary because the water's edge does move.

A Common Law Definition of Disturbing Causes

{¶73} It is critical, in deciding the question of establishing the delineation of the public trust territory of Lake Erie in Ohio, to determine what causes affect, and what causes do not affect, the natural shoreline, that is, the boundary between the public trust and private littoral ownership. In gleaning the common law on this specific issue, it is important that the court's decision not violate the common law of the state's public trust doctrine (now codified in Ohio by statute), private property ownership of littoral lands, and other common law concepts pertaining to title to littoral lands and the adjoining waters, all the while acknowledging the dynamic nature of the waters of Lake Erie, and being practical in its application.

{¶74} The state's public trust is in the waters of Lake Erie and its subaqueous soil. Therefore, in divining Ohio law, it is as critical that the public be never separated from the water, as it is that the littoral private property always touch, but not invade, the waters of Lake Erie, except for the common law rights of littoral ownership, such as, to make reasonable use of the water going past the land and wharfing out to navigable water. Any severance of the littoral upland from the

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permanent locations on the shore, but rather may move landward or lakeward. At common law, the general rule is that gradual and imperceptible changes to the shoreline result in the boundary moving with those changes. That is, the boundary is a movable freehold. Certain changes benefit the state and move the boundary landward: erosion is the gradual process of material being eroded from the shore, causing the shoreline to recede and water to invade the former upland, and submergence is the gradual disappearance of upland due to rising water. Other changes benefit the littoral owner and move the boundary lakeward: reliction (land that was once submerged becomes exposed through the gradual recession of water) and accretion (uplands enlarge through the gradual deposit of material by the water). By contrast, sudden changes in the shoreline (*e.g.*, due to a major storm) are considered avulsion, and the property boundary does not move with such avulsive changes. In general, a littoral owner cannot benefit from her own acts that result in artificial changes to the shoreline." Kenneth K. Kilbert, The Public Trust Doctrine and the Great Lakes Shores, 58 Clev. St. L. Rev. 1, 9-10 (2010).

water's edge would destroy the nature of that privately-owned land as "littoral" and would diminish its value. Any legislation, rule, or decision made by any of the branches of the government that would precipitate the taking of private property for public use without just compensation could constitute a violation of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, to the U.S. Constitution, for which compensation would be due the owner. It could also violate Ohio Constitution, Article I, Section 19, pertaining to eminent domain.

{¶75} The waters of Lake Erie are always in motion. Water enters Lake Erie primarily from the upper Great Lakes through the Detroit River, from the watershed surrounding the lake, and from direct precipitation on the lake. Water leaves the lake primarily through the Niagara River, through evaporation, and through the Welland Canal. The water level rises and falls constantly. The action of the wind moves the water around, and in the process of moving, the waters change the landscape of the beach. Erosion wears the beach away. Accretion adds to the beach. Submersion inundates the beach with its encroachment. Reliction bares the formerly subaqueous soil and reveals dry land. All of these processes gradually and imperceptibly change title between the public trust territory and littoral upland, and the law by which disturbing causes is determined must account for all of this activity and be fully consonant with the common law and centuries-old principles of property law.

{¶76} Many natural actions or processes alter the level of the waters of Lake Erie and the shoreline. Some actions or processes can be termed "disturbing causes" because they do not alter or change title between the public trust and littoral lands – they are considered sudden, perceptible, extraordinary, dramatic, and relatively short-term, such as the process of avulsion. Other actions or processes cannot be termed or considered to be disturbing causes, simply because they have always been, under common law, considered as title-changers. These are the gradual, imperceptible, ordinary, and relatively long-term actions and processes, and include accretion-erosion and reliction-submersion.

{¶77} The actions or processes that do not change title would be considered "disturbing causes." It may seem oxymoronic that a "disturbing cause" does not affect title (*i.e.*, it leaves title undisturbed), while a cause not considered "disturbing" would change (or disturb) title. However, another way of looking at it, in the context of Ohio law, is: where the water usually stands when free from disturbing causes is the natural shoreline; the result is that the disturbing

cause does not change title, that is, the water's edge under disturbance is not considered to be the boundary line. On the other hand, where the water usually stands as a result of actions or processes that are not considered "disturbing" is the natural shoreline, and the boundary line is the water's edge, wherever it may be – it is a moveable boundary. If the water's edge is changing from moment-to-moment, the natural shoreline obviously is under disturbance. This is the import of the Supreme Court's decisions in *Sloan* and *Merrill*.

{¶78} To determine what causes are deemed disturbing and what are not considered disturbing, one must look at the nature, quality, and characteristics of the cause, including its onset, duration, behavior, and perceptibility of the action or process underway.

{¶79} The *Seaman* court said that storms or other extraordinary or unusual causes are "disturbing causes." The *Sloan* court takes the phrase from the *Seaman* court, but does not further elucidate on the characteristics of disturbing causes. *Merrill* refers to storms as disturbing causes. Storms, extraordinary causes, and unusual causes are not the norm – they are not usual by implication.

{¶80} The well-established (and well-respected) common law pertaining to accretion-reliction, erosion-submersion, and avulsion, is helpful in understanding what the common law would say about the nature of disturbing causes. Avulsion would not cause a change in title, because it is sudden and perceptible, and property owners may reclaim the land lost to avulsion in order to restore the boundary line. The Ohio Supreme Court, and the General Assembly in its statutes, refer to the natural shoreline as the boundary of the public trust territory. Natural shoreline conveys the idea of the water's edge when undisturbed.

{¶81} A disturbance has significance only when it is sudden in onset as opposed to gradual. Storms, wind, and waves are unusual and exceptional on Lake Erie (certainly, they are prevalent less than fifty percent of the time). A disturbance is significant only if it is short-term in duration as opposed to long-term. Long-term action or process is usual; short-term is the exception. A disturbance is significant only if it is dramatic, unusual, unstable, violent, or extraordinary in behavior, as opposed to calm, stable, usual, or ordinary in behavior. Disturbances are not calm, stable, usual, or ordinary; disturbances are the exceptions. Moreover, a disturbance is significant only if it is perceptible while underway, rather than imperceptible. If the action or process is imperceptible while underway, one cannot detect that the waters are being disturbed, and, therefore, the water's edge is not under disturbance.

{¶82} Perceptibility *while underway* is a critical feature to discerning disturbing causes.

> It is not enough that the change (in the shoreline) may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. (Citations omitted.) The district court found as a fact that the average person would not have observed the movement of the shoreline as it was occurring. California . . . attempts to replace the perceptibility test with a measurability test. Since the shoreline migrations were measurable over relatively short periods of time, California argues that they were not "gradual and imperceptible."[72]

{¶83} Further, as the U.S. Supreme Court has held:

> The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim 'qui sentit onus debet sentire commodum' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not overflow their banks, and where dykes and other defences are, and where they are not, necessary to keep the water within its proper limits. In England the rule which is applied to gradual accretions on the shores of fresh waters is applied also to such accretions on the shores of the sea.[73]

{¶84} Measurability over time is not determinative of disturbance.[74] Perceptibility at the present time is determinative. If one can perceive the action or process as it is underway, for instance, the movement of the shoreline, then the action or process can generally be classified as a "disturbance."

{¶85} Actions or processes that are sudden in onset, relatively short-term in duration, dramatic, unusual, unstable, violent, or extraordinary in behavior, and perceptible while underway, are considered to be "disturbing causes." Such actions or processes as storms, storm surge, flood,

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[72] *State of Cal. ex rel. State Lands Comm'n v. United States* (1986), 805 F.2d 857, 864-65 (9th Cir.).
[73] *St. Clair County v. Lovingston* (1874), 90 U.S. 46, 68-69, 23 L. Ed. 59.
[74] The concept is much the same as watching a blade of grass grow. You know it is growing, but you cannot perceive its growth as it is occurring (accordingly, it would not be considered to be affected by disturbing causes). You can measure the growth, though, a day or two later and notice the difference.

wind, wind tide, barometric pressure, waves, harbor resonance, seiche, or avulsion are examples of disturbing causes, and as such, would not cause a change in title.

{¶86} Other actions or processes are not considered "disturbing" because they are gradual in onset, relatively long-term in duration, calm, stable, usual, or ordinary in behavior, and imperceptible while underway. Such actions or processes as climate change, wet and dry spells, seasonal reliction or submergence, drought,[75] volumetric changes, crustal rebound, evaporation, percolation, plant growth and ice development in the channels, accretion, reliction, erosion, and submersion are examples, and would cause a change in title. Title, or the boundary between the public trust territory and littoral uplands, follows the water's edge, wherever it may be, so long as a disturbing cause is not acting on the waters of Lake Erie.

{¶87} Accordingly, in the absence of a disturbing cause (a disturbance), the natural shoreline is the water's edge, wherever it may be. The natural shoreline is the line of demarcation separating the public trust in the waters of Lake Erie and the subaqueous soil beneath the waters, and the private littoral ownership of the upland. Because a disturbance is perceptible, and because the water's edge is the boundary line, it is readily discernible by the public, the littoral owner, and the state of Ohio.

{¶88} The definition of "disturbing cause" or "disturbance" is consonant with property concepts of littoral ownership, processes that change and do not change its title or boundaries, and the moveable freehold of the boundary to reflect the dynamic nature of the lake. It is a question of fact, but should not require experts to discern when disturbing causes are affecting the waters of Lake Erie and where the water's edge is when the water is disencumbered from such disturbance.

Conclusion

{¶89} The Supreme Court of Ohio has concluded and held, for over 130 years, that the line of delineation separating the public trust territory in the waters of Lake Erie from private littoral ownership of the upland is the natural shoreline, and that the natural shoreline is the line at which the water usually stands when free from disturbing causes. This means that it is the water's edge when undisturbed, wherever it may be. Although the line may not change from moment to

[75] Although the Ohio Supreme Court in *Merrill*, at ¶ 50, stated in dicta that drought may be a disturbing cause, that language does not convey the definiteness of inclusion in the category; it was taken from a Pennsylvania case, *Appeal of York Haven Water & Power Co.* (1905), 212 Pa. 622, 631, 62 A. 97.

moment, it is a moveable freehold;[76,77] each owner of Ohio real estate that touches Lake Erie owns title lakeward as far as the water's edge when undisturbed.

{¶90} The state of Ohio has ownership in trust of the waters of Lake Erie and the lands beneath those waters landward as far as the water's edge when undisturbed, but no farther. With respect to Lake Erie, this is the boundary of the "territory" that is subject to the regulatory authority of the State of Ohio Department of Natural Resources; and the lakeside landowner also has littoral rights, such as the right to wharf out to navigable waters, and those littoral rights extend into the lake as an incident of titled ownership of property adjoining the lake. Nothing in my opinion affects the presumptively valid deeds of owners of littoral upland.

{¶91} Limiting the public's right of access to the "water's edge when undisturbed," *i.e.*, the point at which wet sands give way to dry sands, addresses all of the various forces at work on Lake Erie, is consistent with the common law concepts of accretion, reliction, erosion, submersion, and avulsion[78] and the ordinary high water mark, and affords a practical, common sense solution as to littoral ownership of the beach of Lake Erie in Ohio.

{¶92} The "water's edge when undisturbed" principle reflects the dynamic natural forces at work on the Great Lakes. As the waters of the Great Lakes gradually and imperceptibly move

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[76] "The most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly. In such cases it is the general, possibly universal, rule, except for the Kavanaugh Cases, and except in a few states where riparian rights have been extinguished by constitution or **166 statute, that the title of the riparian owner follows the shore line under what has been graphically called 'a movable freehold.' 28 Hallsbury, Laws of England, 361. It remained for this court to put the Great Lakes in a legal strait-jacket." *Hilt v. Weber* (1930), 252 Mich. 198, 219, 233 N.W. 159, 165-66. See also *Peterman v. State Dept. of Natural Res.* (1994), 446 Mich. 177, 190, 521 N.W.2d 499, 506.

[77] I believe that the Michigan Supreme Court's case of *Glass v. Goeckel* (2005), 473 Mich. 667, 703 N.W.2d 58 was poorly decided, and as not disturbing the littoral owner's title to the water's edge, but merely providing beachcombers in Michigan with an easement to walk on the dry portion of the shore as opposed to restricting the rights of beachcombers to the wet sand. I agree with the dissenting opinion by Justice Markman, who called the natural shoreline a moveable freehold. See pages 723-726 and fn 21 of the opinion.

[78] "Like the boundary for title purposes, the common law boundary of the public trust doctrine along the Great Lakes shore is a movable freehold. That is, the OHWM is not forever fixed as of the date of statehood. Rather, the OHWM may move lakeward due to accretion and lower lake levels and may move landward due to erosion and higher lake levels. This ambulatory boundary ensures that the public *36 retains the rights to use the waters and shores of the Great Lakes, and the littoral owner retains her littoral rights, regardless of physical changes to the shore. Sudden avulsive changes to the shore, however, should not result in loss of public trust lands. Neither should artificial changes (*e.g.*, filling submerged lands) deprive the public of the right to use lands protected by the public trust." Kenneth K. Kilbert, The Public Trust Doctrine and the Great Lakes Shores, 58 Clev. St. L. Rev. 1, 35-36 (2010).

over time, so too does the area where wet sands give way to dry sands. The littoral property owner's title, and with it his or her littoral rights, including the right of exclusive possession, follows the movement of the water when free from disturbance. Where the water begins, so too, does the state's public trust title. The water's edge when undisturbed includes the wet sands where the waters of Lake Erie have marked their current and continuous presence. Because by definition such sands are infused with water, the wet sands fall within the definition of "submerged lands." As a result, the "water's edge when undisturbed" is the point at which wet sands give way to dry sands.

{¶93} The water's edge when undisturbed marks the boundary between submerged and unsubmerged lands. It does not matter whether the water stands or moves, or changes in level on a daily, monthly, seasonal, yearly, decadal, millennial, or epochal basis.[79]

{¶94} The "natural shoreline" would not require redetermination. Disturbing causes are apparent and perceptible. If the waters are undisturbed, the water's edge is the natural shoreline, the line of delineation separating public and private. Establishing the benchmark for the natural shoreline, be it at statehood or at any other particular time, is unnecessary.

{¶95} This position is consistent with the position of the *Merrill* class plaintiffs.[80] A member of the public has the right to walk along the wet sands created at the water's edge when undisturbed, the natural shoreline. Because the wet sands are submerged lands, a littoral owner does not have the right to prevent a member of the public from using such lands.

{¶96} The public's use of the *jus publicum*[81] was limited to "water rights," *i.e*. the right of navigation, commerce, and fishing. No matter where one would draw the line on the beach, the public's right to use the lake is limited to the water itself. The public trust is preserved – it is in the water, where it would always stay. The public will enjoy the use of the full extent of the water for the public trust purposes of navigation, water commerce, and fishing. The problem of a strip of land on the beach without an owner is mitigated.

{¶97} Accordingly, as the water level gradually and imperceptibly rises, the public gains the right to use the entire surface and depth of the lake up to the water's edge (when undisturbed) –

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[79] This rule vitiates the factually incorrect assumption that the lake water level is unaffected by wet or dry seasons which underlies the *Seaman – Sloan – Merrill* rule.

[80] The other parties to the *Merrill* case, that is, the state of Ohio, ODNR, and the environmental organizations, could not claim prevailing party status under this ruling. In no sense can the OHWM be deemed the water's edge when free from disturbance.

[81] *Shively v. Bowlby* (1894), 152 U.S. 1, 2, 14 S. Ct. 548, 548, 38 L. Ed. 331.

the point at which wet sands give way to dry sands – for public trust purposes. Likewise, the littoral owner's title follows the gradual and imperceptible rise and fall of the waters when in an undisturbed state. Littoral ownership is preserved – the upland owner is always connected to the water, enabling him to use the water and wharf out to a navigable depth without trespassing on state "public trust" dry land.

{¶98} Thus, the boundary of the littoral owner's title is the most landward of either the "low water mark" or the current location of the water itself when undisturbed. The state's public trust title, then, begins where the water (when undisturbed) is, whether the water be deep or shallow.

{¶99} The "water's edge" principle is consistent with the common law concepts of accretion, reliction, erosion, and submersion. Accretion and reliction add to the property of the upland littoral landowner; erosion and submersion deduct from his property. The water's edge moves lakeward in the former; landward in the latter. Nonetheless, the water's edge is the natural shoreline wherever it may be due to actions or processes that are not considered disturbances, such as accretion, reliction, erosion, and submersion.[82] Any inclination on the part of the littoral landowner to construct permanent or expensive structures relatively near the water's edge to take advantage of land exposed by accretion or reliction must be tempered with the realistic

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[82] "Consider first the case in which the land grows, whether by the gradual deposition of additional materials--accretion--or by a gradual recession of the water--reliction. If the law of boundaries is fixed, the land that is added or that emerges as the water recedes is land that was under the water before. If the boundary does not change, that land was owned by the state while it was covered with water and, because the boundary would not move without the modifying doctrine, remains in state ownership now that it is fast land. Moreover, since the result of the physical accretion or reliction has transformed that area into fast land (*i.e.*, above the ordinary high-water mark), that ownership by the state is ownership of the areas to which the public trust no longer attaches. … Stated slightly differently, absent boundary adjustment, the state would now be the riparian and the former riparian would have lost all the benefits of the parcel's riparian status. The moveable boundary supported by the doctrines of accretion and reliction maintains the status quo ante of relative rights. Although the point of demarcation is in a different physical location on the map, all of the legal relationships--private upland fee ownership, public bed ownership, riparian privileges and usufructs that differ from those of the general public, and public servitudes and usufructs--remain the same. Conversely, in cases in which the land shrinks, whether by the gradual removal of materials--erosion--or by a gradual increase *901 in the level of the water--submergence--the boundary would need to be adjusted in the reverse direction. If that did not occur, the riparian would now be able to claim ownership of a strip of water-covered land as subject to exclusive ownership and could forbid or charge the public for access to that area which is essential to enjoyment of the water as a whole. To prevent this result, under the doctrines of erosion and submergence, the riparian's fee shrinks, the public's beds increase in size, and the relative rights of each near the water's edge, albeit in a different location, remain the same." Robert Haskell Abrams, Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel, 40 U. Mich. J.L. Reform 861, 900-01 (2007).

expectation that the reverse processes of submersion and erosion could inundate and destroy the structures. Just how permanent is "permanent" is anyone's guess.

{¶100} The "water's edge when undisturbed" principle is also consistent with the common law definition of the high water mark.[83] At common law, the area of medium high tide would seldom be dry for more than twelve hours at a time. In other words, the land at or below medium high tide was generally covered by the ocean twice during the daily tidal cycle. Unlike the oceans, where levels vary daily, the levels of the Great Lakes do not vary from day to day in the absence of disturbance, but vary significantly from month to month, year to year, and growing season to growing season. Therefore, this tidal land was considered "waste land" that was "not capable of ordinary cultivation or occupation."[84] Similarly, in the instant controversy, the wet sands are being inundated with water by the current ebb and flow of the waves of Lake Erie. However, when lake levels fluctuate, any land that is no longer subject to the ebb and flow of the waves becomes unsubmerged land, which is suitable for "ordinary occupation" and, therefore, as with lands affected by the spring tides, is not within the scope of the public trust doctrine.

{¶101} The "water's edge when undisturbed wherever it may be" is consonant with the Ohio Supreme Court's holding in *Merrill*. A member of the public can, by simple observation, and without the use of hydrological, climatological, geological, or environmental experts[85] determine whether a disturbance is underway, where the water's edge lies, and where he or she is allowed to use water or land without seeking the littoral owner's permission. When the waters recede without disturbance as I define it, land that is no longer subject to the current ebb and flow of the waves will become unsubmerged land and, therefore, will again be under the exclusive control of the littoral property owner.

{¶102} The standard for delineating between public trust and private lands requires merely that a person be able to distinguish between disturbance or no disturbance, between wetness and dryness, between where there is water and where there is not. The line will be

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[83] *Glass v. Goeckel* (2005), 473 Mich. 667, 744, 703 N.W.2d 58, 100 at Justice Markman's dissenting opinion.

[84] *Shively v. Bowlby* (1894), 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331.

[85] The ODNR, which arguably would be a public agency that would establish the natural shoreline under the *Merrill* rule, would not need to assume such administrative authority. The littoral owners, understandably, have little trust in that agency which has for years claimed state ownership to the ordinary high water mark.

discernible to littoral owners, the public, the ODNR, law enforcement authorities, and anyone who can perceive disturbances, the water's edge and wetness. Even a trial judge should be reasonably able to draw such distinctions.

{¶103} Under this rule, the littoral owner's title follows the natural shoreline, *i.e*. where the wet sands give way to the dry sands, wherever this may be from time to time, barring disturbance. Because the boundary is dependent on the natural condition of the lake, it is easily identifiable, thus, creating a practical and workable rule. The public's legal right to use private property along the beach of Lake Erie should be within this realm.

{¶104} The absence of tides practically makes high and low water mark identical for the purpose of determining boundaries along Lake Erie and the other Great Lakes.[86] The "water's edge when undisturbed" principle recognizes this reality by defining the rights of both the littoral property owner and the public in terms of the actual location of the water. This definition is consistent with the natural forces at work on the Great Lakes; it is consistent with the common law scope of the public trust doctrine; and it creates a public trust area that can readily be identified. Yet, the parties may have missed this opportunity to ask me in my initial ruling, and later on appeal, the Supreme Court, to define and distinguish disturbing causes from all other causes that may make the water's edge move landward or lakeward. The parties now require me to avoid perpetuating an unknowable and unworkable standard that requires littoral property owners and the public to guess where the "water usually stands when free from disturbing causes" and establish an intelligible and practical standard.

{¶105} The *landward* boundary of the public trust territory in Ohio along the Lake Erie shore is not the Ordinary High Water Mark of 573.4 IGLD (1985), as contended by the ODNR, NWF, and OEC. The *lakeward* boundary of the public trust territory in Ohio along the Lake Erie shore is not the Ordinary Low Water Mark, as contended by the Taft and Duncan plaintiffs.[87] I

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[86] "The depth of water upon submerged land is not important in determining the ownership. If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical, for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked." *People v. Warner*, 116 Mich. 228, 239, 74 N.W. 705, 710 (1898).

[87] Although, the Ordinary Low Water Mark would serve as the littoral owner's lakeward boundary under any circumstance, as any deed-holder's expectation could reasonably be said to be that his property terminates at low water mark. It would not be reasonable to conclude, should the lake waters recede to where they were some 4,000 years ago, *i.e*. three or four miles north of where they are today, that the littoral owner's property would follow that water's edge.

am convinced that, in Ohio, the proper definition of the outer boundary line of the public trust territory of Lake Erie is the water's edge when undisturbed, wherever that moveable boundary may be at any given time. That is what is meant by the "natural shoreline."

{¶106} The parties initially cast the issues in this case as: What constitutes the farthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11 and can it be located at 573.4 feet IGLD (1985), and what are the proper interpretations of the terms, "southerly shore," "waters of Lake Erie," "lands presently underlying the waters of Lake Erie," and "natural shoreline" in R.C. 1506.10 and 1506.11? In retrospect, the issue in this case has always been, and should be recast as "Where is the natural shoreline of Lake Erie in Ohio and what are "disturbing causes?"

{¶107} Drawing on an Illinois Supreme Court decision from 1860, the Ohio Supreme Court in 1878 defined the natural shoreline as "where the waters usually stand when free from disturbing causes." In this case, the parties had an opportunity to take the next step and ask the court to define "disturbing cause" and distinguish disturbances from non-disturbances, but they did not. No Ohio court, or to my knowledge, no court anywhere, has defined what are disturbing causes from which the waters of the lake should be free if they could.

Ruling Establishing the Natural Shoreline

{¶108} The questions of law posed by the parties should be answered, in terms of the *Merrill* case, as follows:

{¶109} The farthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11 is the natural shoreline, a moveable boundary located between the ordinary low and high water marks consisting of the water's edge when free from disturbing causes, which means the most landward place where the lake water when undisturbed actually touches the land. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis. This is the southerly shore of Lake Erie and constitutes the waters of Lake Erie. The "lands presently underlying the waters of Lake Erie" in R.C. 1506.11 is all lands currently beneath the lake up to the landward boundary where the lake water in the absence of disturbance actually touches the land at any given time. The proper interpretation of the phrase, "lands formerly underlying the waters of Lake Erie and now artificially filled" in R.C. 1506.11 is all lands formerly beneath the waters of Lake Erie, up to the landward boundary where the lake water in the absence of disturbance actually touches the land,

notwithstanding any subsequent artificial filling of those lands, unless the artificial fill is to remedy an avulsion or reclaim land lost by avulsion. The "natural shoreline" in R.C. 1506.10 and 1506.11 is the moveable boundary on the shore where the lake water in the absence of disturbance touches the land at any given time. The location of this moveable boundary on any particular parcel of littoral property is a question that should be determined on a case-by-case basis. The farthest landward boundary of the "territory" is not the location of the ordinary high water mark as a matter of law because that elevation does not correspond uniformly to the moveable boundary of the place where the lake water in the absence of disturbance actually touches the land at any given time, and the current selection of that elevation as the landward boundary has not been determined by legislative enactment, and if such a uniform elevation were declared by the legislature as the farthest landward boundary of the "territory," it would, in many cases, constitute a "taking" for which reasonable compensation would be due.

{¶110} The line delineating the state's public trust in the waters of Lake Erie and private ownership of the littoral upland is the natural shoreline, that is, the most landward of either the low water mark or the water's edge wherever it may be, when undisturbed by sudden, short-term, dramatic, and perceptible causes.

{¶111} To physically locate the natural shoreline, one would view the water's edge under optimal, normal conditions: on a calm day, with substantially normal barometric pressure, without precipitation, with minimal wave action, and long after any storms or flooding has subsided. The water's edge at the time should be gently oscillating landward and lakeward over a distance of only a few feet. The natural shoreline would be located mid-distance between the farthest points landward and lakeward that the water's edge reaches.[88]

ORDER GRANTING ADDITIONAL RELIEF ON COUNT 1 OF THE FIRST AMENDED COMPLAINT

{¶112} I hereby order the following additional relief on Count I of the First Amended Complaint, pursuant to the request of the plaintiffs:

1. Any current submerged land lease between ODNR and any of the plaintiffs is declared void and invalid as to any land below OHWM and above the natural shoreline owned by the

[88] Under these conditions, this is where beachcombers may walk the beach abutting privately-owned littoral upland, that is, along the natural shoreline, where the walker's feet would be wet.

class plaintiffs. The state opposes this request as being beyond the scope of the class certification. It is not.

2. ODNR lacks authority to compel the plaintiffs, or any one of them, to lease back property already owned by them as specified in their deeds, including without limitation, lands lost due to avulsion and thus subject to reclamation by the owner. The request is unopposed by the state of Ohio.

3. ODNR shall provide notice and guidance to the public and to governmental authorities that the natural shoreline as determined by the Ohio Supreme Court, and not the OHWM, is the boundary of the public trust territory in Lake Erie, through statements on its websites and in printed publications, with the content and manner of distribution to be approved by the class plaintiffs and the court. The request is unopposed by the state of Ohio.

4. ODNR shall return all submerged land lease fees between OHWM and the natural shoreline paid between 1998 and the present. ODNR bears responsibility for calculating the total fees collected between 1998 and the present, subject to verification by the class plaintiffs, placing those funds in an interest bearing escrow account, and providing notice approved by the class plaintiffs and the court for class members to submit claims. After one year, the remaining unclaimed fees in the escrow account, along with accrued interest thereon, will be distributed as a cy pres award to an entity or entities chosen by the class plaintiff and approved by the court. The state opposes the request as being a request for monetary relief and beyond the bounds of the class certification order. This request is not for monetary relief; nor is it beyond the scope of the class certification. The state does lack the authority to compel leases between the natural shoreline and the OHWM, and accordingly, any such lease entered into is void and invalid, and the state had no authority to collect these lease fees. If the lease fees unlawfully collected cannot be traceable and returned to a specific littoral landowner, despite reasonable efforts, the state should not profit from its unlawful conduct.

ORDER EXTENDING CLASS CERTIFICATION TO COUNT II

{¶113} The class certified for the purpose of addressing Count 1 of the First Amended Complaint exists and is maintained at least until such time as the state has provided relief to the class as directed by the court. The Ohio Supreme Court's decision did not resolve all of the certified issues as to Count I; I had to make further determinations as to Count I, not the least of

which is using the Supreme Court's definition of the natural shoreline and physically locating it on remand as the parties have requested.

{¶114} To the extent Count II of the First Amended Complaint seeks a declaration that the state's assertion of ownership up to the OHWM constitutes an unconstitutional temporary taking against all owners of littoral property bordering Lake Erie, the class that would be certified for resolution of that issue would have the exact same members as the class currently certified for Count I, *i.e.* all littoral property owners bordering Lake Erie. Thus, the class certified for Count I could be maintained through the conclusion of Count II of the First Amended Complaint. The relief sought in Count II does not change the analysis, as a writ of mandamus is in the nature of an injunction, albeit mandatory rather than prohibitory, and thus subject to certification on a class-wide basis under Civil Rule 23(B)(2).

{¶115} Count II is the mandamus remedy for the state's purported unconstitutional temporary taking of private property. The question presented in Count II of the First Amended Complaint is whether the state's claim of public trust ownership to OHWM, whether made through general public statements, in specific lease negotiations, or by other means in between, took plaintiffs' private property in violation of Article I, Section 19, of the Ohio Constitution and the Fifth Amendment of the U.S. Constitution. This question can be adjudicated on a class-wide basis. If the court determines for the class that the state committed a constitutional violation, then the court would issue a writ of mandamus compelling the state to commence proceedings for each affected property owner to determine the amount of just compensation to be awarded.

{¶116} Count III was pled in the alternative as the remedy if the court had determined that the state was entitled to take plaintiffs' private property to the OHWM. Because the court determined that the state was not so entitled, Count III has been rendered moot.

{¶117} The court will rely on the existing class for resolution of Count II of the First Amended Complaint, as both classes would consist of the same members and focus on relief, either declaratory or injunctive, that fits within the scope of Civil Rule 23(B)(2). No discovery is necessary to resolve the certification issue, as the same factual conditions already exist as to Count I.

{¶118} Accordingly, the class certification entered by the court in 2006 is hereby amended to include Count II. Class notification shall occur for Count II in the same manner as occurred in 2006 for purposes of the Count I class.

ORDER DECLARING THE PREVAILING PARTY

{¶119} The U.S. Supreme Court[89] discussed the issue of "prevailing party" and held:

> A plaintiff who wins nominal damages is a prevailing party under § 1988. A plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Hewitt v. Helms,* 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654; *Rhodes v. Stewart,* 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1; *Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866. . . . The prevailing party inquiry does not turn on the magnitude of the relief obtained, and whether a nominal damages award is a "technical," "insignificant" victory does not affect the plaintiff's prevailing party status. Cf. *Garland, supra,* 489 U.S., at 792, 109 S.Ct. at 1493. Pp. 571-574.

{¶120} The Ohio Fourth District Court of Appeals[90] discussed the issue of "prevailing parties:"

> {¶ 61} We first address the issue of whether Appellees were, in fact, prevailing parties under R.C. 2335.39. The trial court found Appellees to be prevailing parties and awarded them all of their attorney fees, without reduction, at an hourly rate of $165.00. Appellant challenges this finding, arguing Appellees cannot be prevailing parties on counts two and three of their complaint, which were voluntarily dismissed.
>
> ***16** {¶ 62} R.C. 2335.39(A)(5) defines a "prevailing eligible party" as "an eligible party that prevails in an action or appeal involving the state." Here, Appellees' amended complaint included four counts and a request for an injunction. Counts one and four dealt with the issuance of the stop sale order under R.C. 923.52 and ODA's illegal rulemaking, respectively and were the subject of the present appeal. Counts two and three both dealt with ODA's failure to hold an administrative hearing after proposing to revoke Appellees' commercial feed registrations. Counts two and three were voluntarily dismissed by Appellees at the trial court level and have not been addressed on appeal.
>
> {¶ 63} "A party who appeals an order or judgment and prevails to the extent that he obtains a new trial, or a modification of the judgment, is a "prevailing party" within the contemplation of R.C. 2335.39. There is nothing in that section that requires a finding that a prevailing party on an appeal is limited to one who succeeds in having a 'complete victory,' which presumably means having the entire matter determined in his favor without a remand to the tribunal from which the appeal is taken for further proceedings." *Korn v. Ohio State Medical Board,* 71 Ohio App.3d 483, 487, 594 N.E.2d 720. Although Korn

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[89] *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 569, 121 L. Ed. 2d 494 (1992).
[90] *Fagan v. Boggs*, 2011-Ohio-5884.

prevailed in his appeal, he failed to achieve a total victory. *Id.* In response to an argument that attorney fees could not be awarded on a pro rata basis, the Tenth District Court of Appeals reasoned that "the trial court must find the amount of attorney fees that were reasonably expended with respect to the matters as to which Korn was successful on appeal." *Id.* at 489, 594 N.E.2d 720.

{¶ 64} We find the reasoning in *Korn* to be persuasive and instructive on how to handle the issue presently before us. Thus, like the trial court, we find Appellees to be prevailing parties, despite their failure to achieve a complete victory. However, we also find that the trial court should have apportioned the award of attorney fees based upon the counts upon which Appellees were successful and that its failure to do so was an abuse of discretion. Thus, and in light of the determinations made in the within appeal, Appellees were only successful on count four of their amended complaint, as well as their request for an injunction. In so finding, we agree with Appellant that Appellees should not be awarded attorney fees for counts two and three, which they voluntarily dismissed at the trial court level.

{¶121} The Eleventh District Court of Appeals[91] reached a similar conclusion:

In *Woyma v. Johnson* (Oct. 7, 1994), 11th Dist. No. 94-L-004, 1994 Ohio App. Lexis 4583, 1994 WL 638493, this court considered an award of costs pursuant to Civ.R. 54(D). In reversing a denial of costs pursuant to Civ.R. 54(D) to appellant, we adopted the definition of "prevailing party" set forth in Black's Law Dictionary (6 Ed.1990) 1188:

{¶ 14} " 'The party to a suit who successfully prosecutes the action or successfully defends against it, *prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered. Jordan v. Elizabethan Manor*, 181 Mont. 424, 593 P.2d 1049, 1055. This may be the party prevailing in interest, and not necessarily the prevailing person. *To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it.*

***3** {¶ 15} " 'As used in Federal Civil Procedure Rule 54(d), which provides that costs shall be allowed as of course (sic) to prevailing party unless court otherwise directs, "prevailing party" means a party who has obtained some relief in an action, even if that party has not sustained all of his or her claims. *First Commodity Traders, Inc. v. Heinold Commodities, Inc.* C.A. Ill. 766 F.2d 1007, 1015.' (Emphasis added.)" *Woyma* at 4-5.

[91] *J.B.H. Properties, Inc. v. N.E.S. Corp.*, 2007-Ohio-7116.

> {¶ 16} In *Woyma*, we reversed the trial court's denial of Civ.R. 54(D) costs to appellant, since she had obtained some relief in her action, though not as much as the final offer of settlement made by defendant. *Woyma* at 3-5. We held that, in the context of court costs, settlement offers could not be considered when defining whether a party had prevailed. *Id.* at 4. Consequently, we cannot fully agree with the learned trial court's reasoning in this case.
>
> {¶ 17} Further, characterizing "prevailing party" as a legal term of art, the United States Supreme Court has stated that it means " '(a) party in whose favor a judgment is rendered, regardless of the amount of damages awarded * * *.' " *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (2001), 532 U.S. 598, 603, 121 S.Ct. 1835, 149 L.Ed.2d 855. (Citation omitted.) The Supreme Court further held that " 'respect for ordinary language requires that a plaintiff receive at least *some relief* on the merits of his claim before he can be said to prevail.' " *Id.* (Citation omitted.) (Emphasis added.) "[A]n award of nominal damages suffices under this test." *Id.* at 604. (Citation omitted.)

{¶122} In the case before me, the Merrill class plaintiffs, and the intervening plaintiffs, Duncan and Taft, are the prevailing parties. The actual relief on the merits of their claims materially alters the legal relationship between the state of Ohio and the ODNR and the littoral landowners by modifying the defendants' behavior in a way that directly benefits the plaintiffs. The plaintiffs in this case prevailed on the main issue, even though not necessarily to the exact extent of their original contentions. They fought the state and the ODNR in their contentions and actions in claiming ownership to the ordinary high water mark, and the state's untenable claim that the ordinary high water mark *is* the natural shoreline. That the court ultimately ruled that the boundary line is the water's edge when undisturbed, wherever it may be, rather than the water's edge wherever it may be, or the ordinary low water mark, is simply a matter of magnitude. The plaintiffs made a claim against the state and the ODNR and have successfully maintained it, and the court has rendered a decision and a judgment in their favor. The state was substantially unjustified in initiating the controversy in or about 1998, in the light of supreme court decisions and attorney general opinions to the contrary, and its own admission that it knew the boundary line is the natural shoreline (which it irrationally or illogically construed to mean the OHWM), and in its defense of the plaintiffs' claims in this class action lawsuit.

{¶123} I will defer a hearing on the prevailing parties' request for attorneys' fees under R.C. 2335.39 until all issues are finally ruled upon.

{¶124} **IT IS SO ORDERED**.

EUGENE A. LUCCI, JUDGE

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A Win-Win-Win Situation

On September 14, 2011, the Ohio Supreme Court released its decision in *Merrill v. Ohio Department of Natural Resources.* By the next day, ***all*** of the parties claimed victory in the decision. What follows is just a sampling of the media coverage and the statements of the stakeholders in the aftermath of the *Merrill* decision.

A. From the *Toledo Blade*[1] -- "Ohio Supreme Court **rules in favor of public shore access** on Lake Erie:"

> The Ohio Supreme Court has ruled that **beachcombers can legally walk from the water to the "natural shoreline"** along properties bordering Lake Erie.[2]
>
> The court's 7-0 ruling **settles a dispute** between the Ohio Department of Natural Resources and lakefront property owners. (Emphasis added.)

B. From *The Morning Journal*[3] -- "Landowners on Lake Erie claim shore victory:"

> People owning land along Lake Erie claimed a victory in their fight against the state concerning where ownership of land meeting the lake ends.
>
> **"We own to the water's edge,"** Ohio Lakefront Group President, Tony Yankel said.
>
> "As long as it's **wet, that's where the public can be**," he said. (Emphasis added.)

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[1] *ToledoBlade.com*, "Ohio Supreme Court rules in favor of public shore access on Lake Erie," September 14, 2011, http://www.toledoblade.com/Courts/2011/09/14/Ohio-Supreme-Court-rules-in-favor-of-public-shore-access-on-Lake-Erie.html (Last visited March 21, 2012).

[2] The word "walk" never appears in the court's opinion.

[3] *The Morning Journal*, "Landowners on Lake Erie claim shore victory," by Allison Strouse, September 15, 2011, http://www.morningjournal.com/articles/2011/09/15/news/mj5028618.txt?viewmode=fullstory (Last visited March 21, 2012).

C. From *The Plain Dealer*[4] -- "**Opposing sides** in landmark Lake Erie property rights case **claim victory** after Ohio Supreme Court's ruling:"

> **Both environmentalists and private property owners** -- who were pitted against each other in the suit -- **claimed victory** after the court issued its ruling.
>
> The disagreement over property boundaries along the lake arose under former Republican Gov. Bob Taft, who ordered the Ohio Department of Natural Resources to charge lakefront owners a leasing fee to place docks in Lake Erie. The owners sued in 2004, arguing they owned the land under their docks.
>
> **But ODNR officials have said they have exercised authority over dry land close to the water for more than 100 years.**
>
> **"This is not some sort of hammer being dropped," ODNR spokeswoman** Laura Jones said.
>
> The **Ohio Environmental Council**, which opposed the private property owners in the suit, also **celebrated the decision**. "We are claiming a **huge, huge victory**," Dougherty, of the council, said. "There's a recreational and public access issue that we thought was in jeopardy."
>
> The Ohio Lakefront Group, which represented thousands of **property owners** along the lake, said the **court's decision reaffirmed the rights of property owners** throughout the state.
>
> "On behalf of tens of thousands of Ohioans who own property adjacent to lakes, ponds, rivers or canal traces, **we thank the court** for their unanimous decision supporting their property rights and the rights of homeowners everywhere in Ohio," Ohio Lakefront Group president Tony Yankel said in a statement.
>
> But property owners said the high-water mark, based on sea level, is an unreasonable benchmark that in some cases reaches into back yards. They argued that the natural boundary is either the water's edge or even a few feet inside the lake to a "low-water mark." Either way, the 6,000-member Ohio Lakefront Group believes its private land touches water.

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[4] *The Plain Dealer*, "Opposing sides in landmark Lake Erie property rights case claim victory after Ohio Supreme Court's ruling," by Joe Guillen, September 14, 2011, http://www.cleveland.com/open/index.ssf/2011/09/opposing_sides_in_landmark_lak.html (Last visited March 21, 2012).

> By and large, **the effect of the court's decision was open to interpretation** on Wednesday. (Emphasis added.)

D. From *The News-Herald* (Associated Press)[5] -- "Court: Natural shore is Lake Erie property line:"

> The state Department of Natural Resources, with support from the National Wildlife Federation and the Ohio Environmental Council, had argued that the public should have access to the portion of beachfront property that's "sometimes wet, sometimes dry." Property owners countered that trespassers wreaked havoc on their private beaches, with some leaving behind broken beer bottles, setting bonfires, driving trucks and shooting firearms.
>
> The **OEC** on its website called the ruling a "**victory for Ohioans**," saying it preserves the **public's right to access the shoreline**.
>
> The **Ohio Lakefront Group** also claimed victory, calling the **ruling a "big win" for Ohio property owners**. (Emphasis added.)

E. From the *Enviro Law Center*[6] – "VICTORY for Ohioans in Lake Erie Public Trust Case:"

> The Ohio Supreme **Court today returned the shoreline** (and the law) **to status quo**.
>
> In a 7-0 decision authored by Justice Terrence O'Donnell, the Court reversed a ruling by the 11th District Court of Appeals that lakeside owners' property rights extend to whatever point on shore is in contact with the waters of the lake on any given day.
>
> The court reaffirmed it's (sic) over century-old decision, preserving the public trust doctrine as it relates to the state's North Shore. **In fact, on three separate occasions (in 1878, 1916, and 1948), the Ohio Supreme Court has**

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[5] *The News-Herald*, "Court: Natural shore is Lake Erie property line," by JoAnne Viviano, Associated Press, September 15, 2011, http://www.news-herald.com/articles/2011/09/15/news/doc4e717469a3950534109236.txt (Last visited March 21, 2012).

[6] Ohio Environmental Law Center, "VICTORY for Ohioans in Lake Erie Public Trust Case, Supreme Court Reaffirms 1878 Decision Holding That State's Trust Over Lake Erie Extends to the 'Natural Shoreline,'" September 14, 2011, http://ohioenvirolawcenter.wordpress.com/2011/09/14/victory-for-ohioans-in-lake-erie-public-trust-case/ (Last visited March 21, 2012).

definitively ruled that the ordinary high water mark is the boundary of Ohio's public trust.[7]

The fourth time **(2011)** will be the charm, and **forever protect the rights of the people** and the quality of our Great Lake. The Ohio Supreme Court has specifically ruled that the state can never abandon the lands of Lake Erie that it holds in trust for the people of Ohio and upland owners have no title beyond that natural shore line.

While the Court rejected OEC, NWF, and the State's argument that the boundary line is "the ordinary high water mark," **the practical effect of the court's rationale is to establish the line as the ordinary high water mark**.

Thus, the Court rejected the lower courts' moment-to-moment water mark, did not endorse low water mark (the line which some of the property owners originally argued), and gave storms and droughts as examples of disturbing causes. **Without adopting the term "ordinary," the Court affirmed the OEC/NWF and the State of Ohio's' (sic) conclusion of where the Public Trust lies**.

The question now is **who defines the line and how**. (Emphasis added.)

F. From the *Akron Beacon Journal* Online[8] -- "**Wins** on Lake Erie:"

Rarely does the Ohio Supreme Court please both sides in a legal conflict. Yet, on Wednesday, the reaction proved as unanimous as the 7-0 court ruling in what had been a most contentious argument over the public trust and private property rights along the shore of Lake Erie. The **Ohio Lakefront Group** representing property owners called the decision a **"big win."** The **Ohio Environmental Council** claimed **"a huge, huge victory."**

How did the court **pull off the feat** . . .?

The appeals court departed from long precedent, joining the view that the boundary changes with the water level of the lake from moment to moment, or month to month.

That hardly is practical.

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[7] This quote from an environmental group poignantly reveals the extent of the misinterpretation of the Supreme Court's decisions and Ohio law.

[8] *Akron Beacon Journal* Online, "Wins on Lake Erie," September 18, 2011, http://www.ohio.com/editorial/editorials/wins-on-lake-erie-1.235788 (Last visited March 21, 2012).

The court did not employ the language of the traditional "high water mark." That is too bad. The concept serves more clearly the public trust. **The court also has left an element of ambiguity** for the lower courts to explore in locating the boundary. (Emphasis added.)

G. From the *ToledoBlade.com*[9] – "Lake Erie's boundary:"

The extent to which people can walk freely along the shoreline of Lake Erie -- the world's 11th largest lake and one of North America's greatest resources -- **remains murky** after an Ohio Supreme Court ruling this week that has **both sides claiming victory.**

To Tony Yankel, president of the 7,000-member **Ohio Lakefront Group**, the court's ruling is simple: **You're on public land if you stand in lake water that abuts private property**. Otherwise, you're trespassing.

National Wildlife Federation's Great Lakes regional office, **claimed victory** for people seeking greater lake access, who were represented by attorneys from his organization, the State of Ohio, and the Ohio Environmental Council. He pointed out that the justices reversed lower-court decisions asserting the boundary shifts with wave action.

Advocates of public access will go back to trial court and reopen their 2004 argument that the line starts at the nebulous "ordinary high-water mark," he said. The state has claimed the public owns the land between the water's edge and that.

After years of litigation and thousands of dollars in court costs, **people still don't know where to stand along the Great Lakes shoreline in Ohio**.

The right to walk unimpeded along the shore of a public body of water has been guaranteed by common law for nearly 15 centuries. That shouldn't change now.

"This is saying no," Mr. Buchsbaum said. **"We're not quite sure what that means, but it's not the water's edge anymore."** (Emphasis added.)

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[9] *ToledoBlade.co*m, "Lake Erie's boundary," Editorial, September 17, 2011, http://www.toledoblade.com/Editorials/2011/09/17/Lake-Eries-boundary.html (Last visited March 21, 2012).

H. From *TheCourier.com*[10] -- "Lake Erie:"

> Justice Terrence O'Donnell wrote that the natural shoreline is "the line at which the water usually stands when free from disturbing causes." **That definition, while murky**, reaffirmed earlier high court decisions dating to 1878 and state law enacted in 1917.
>
> **Interestingly, both sides found merit in the decision.**
>
> The Ohio Environmental Council called the ruling a "victory for Ohioans," saying it preserves the public's right to access the shoreline. The 6,000 member Ohio Lakefront Group, one of the property-owner groups, called it a "big win."
>
> **By drawing a line in the sand somewhere between the lake's low- and high-water marks, the court was able to come up with a resolution where both sides could walk away feeling like they won.**
> (Emphasis added.)

I. From *The Columbus Dispatch*[11] -- "Ohio justices draw line in sand for Lake Erie property owners; Court sides with owners of beachfront homes, declining to expand public access:"

> If you want to stroll along a private Lake Erie beachfront, try to stay in the water.
>
> **Reaction to the ruling was across the board.**
>
> **Lake Erie property owners**, who sued in 2005 after the state tried to force them to obtain leases for docks and other structures along the shore, **declared victory**. But **so did environmental groups**.
>
> Trent Dougherty, legal director of the **Ohio Environmental Council**, said that although the Supreme Court refused to go along with the council's suggested high-water-mark terminology, **the justices basically agreed with what it was asking for**.

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[10] *TheCourier.com*, "Lake Erie," Courier Editorials, The Findlay Publishing Company, September 17, 2011, http://www.thecourier.com/opinion/editoral/2011/Sep/17/ar_ed_091711.asp?d=091711,2011,Sep,17&c=e_0 (Last visited March 21, 2012).

[11] *The Columbus Dispatch*, "Ohio justices draw line in sand for Lake Erie property owners," b**y David Eggert,** September 15, 2011, http://www.dispatch.com/content/stories/local/2011/09/15/ohio-justices-draw-line-in-sand.html (Last visited March 21, 2012).

> He said the court essentially returned things to the status quo — before the lower-court rulings.
>
> "At times it'll be wet, at times it'll be dry," Dougherty said of where the line is. (Emphasis added.)

J. And from The Ohio Environmental Council[12] -- "Lake Erie Shoreline Case Ends – Almost:"

> For seven years, a legal team from government and environmental groups – including the administrations of both Republican and Democrat governors, the **National Wildlife Federation, and the Ohio Environmental Council – drew a legal line in the sand and kept up the good fight for "the ordinary high water mark**" as the Lake's public trust boundary. **Finally in September, the OEC's vigilance paid off. Mostly.**
>
> The problem is, while it is clear that the public's right to the shore is not a moving boundary, **the Court did not define where that "natural shoreline" begins**. (Emphasis added.)

[12] *Green Watch*, "Verdict in—Sort of—for Lake Erie Shoreline Case," Ohio Environmental Council, Winter 2012, at page 5, http://www.theoec.org/Greenwatch/GW_Winter2012.pdf (Last visited March 21, 2012).

APPENDIX

Figure 1

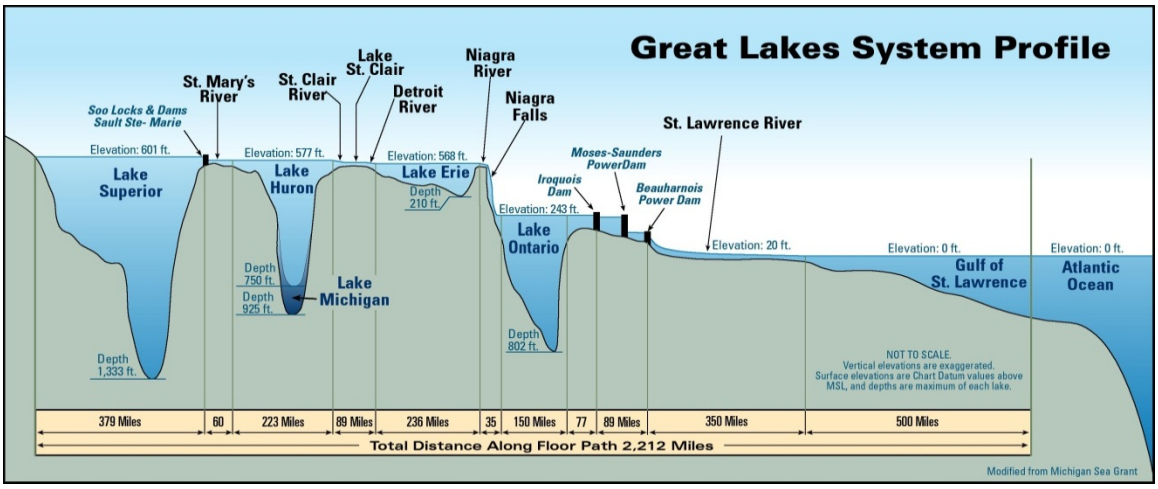


Figure 2

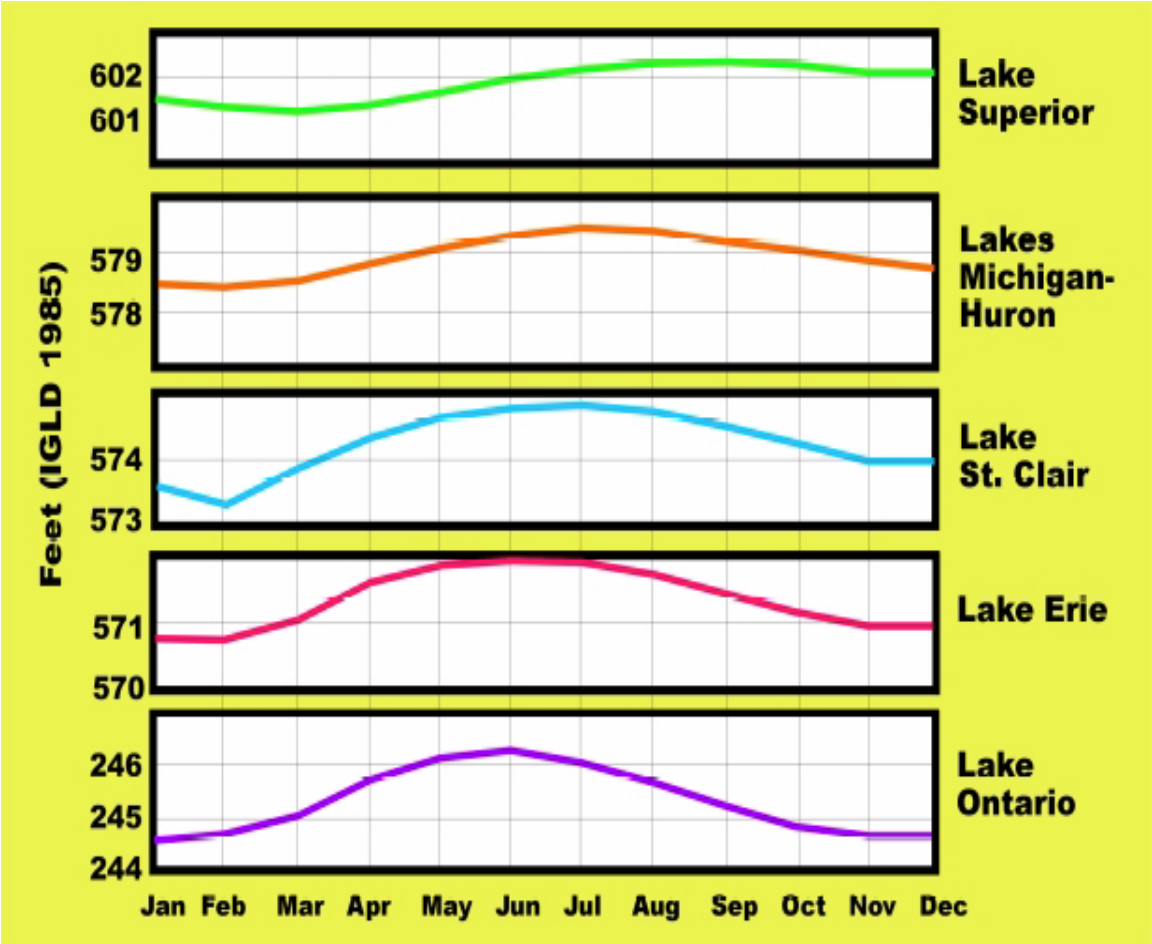

Feet (IGLD 1985)
602
601
Lake Superior
579
578
Lakes Michigan-Huron
574
573
Lake St. Clair
571
570
Lake Erie
246
245
244
Lake Ontario
Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec

Figure 3

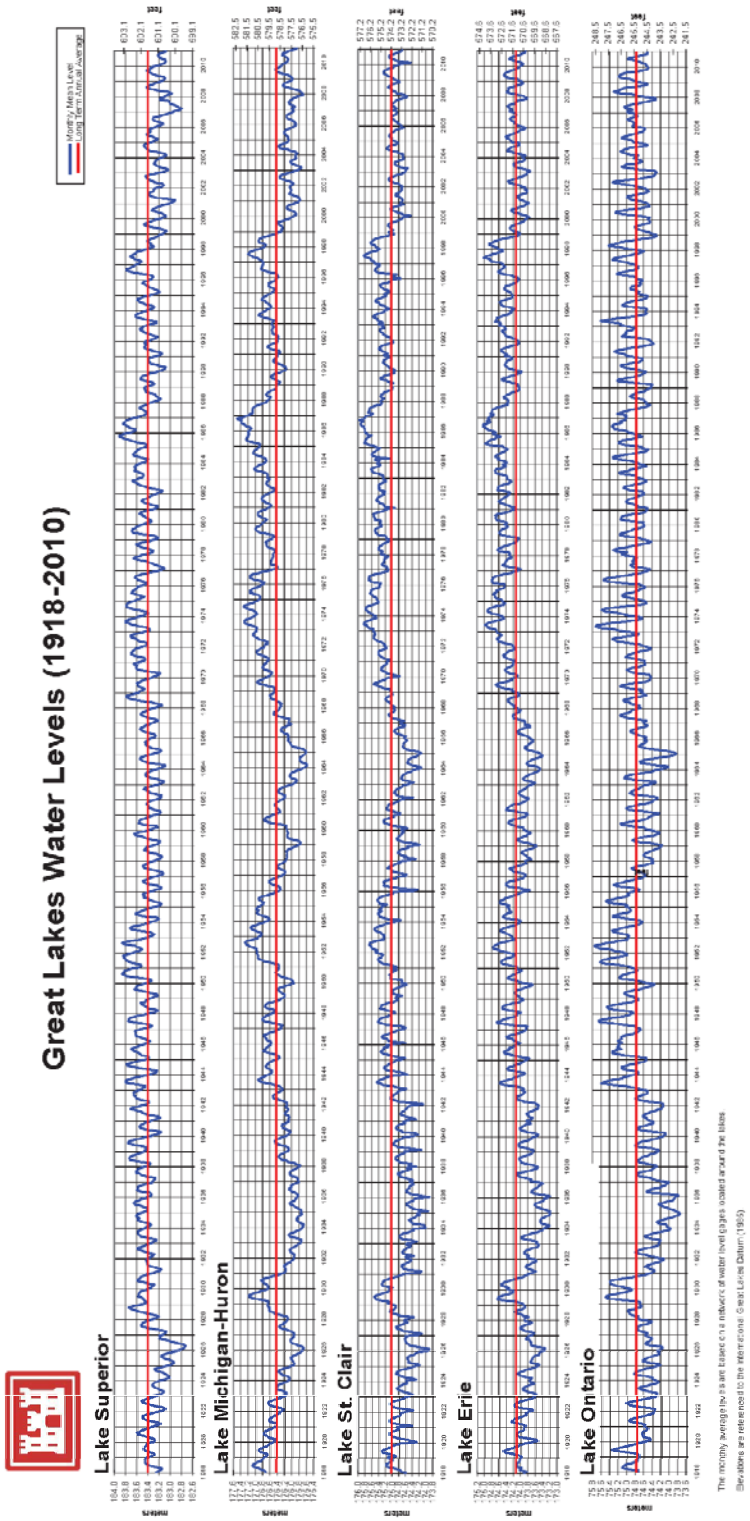

Great Lakes Water Levels (1918-2010)
Monthly Mean Level
Long Term Annual Average
Lake Superior
Lake Michigan-Huron
Lake St. Clair
Lake Erie
Lake Ontario
The monthly average levels are based on a network of water level gages located around the lakes.
Elevations are referenced to the International Great Lakes Datum (1955)

Figure 4

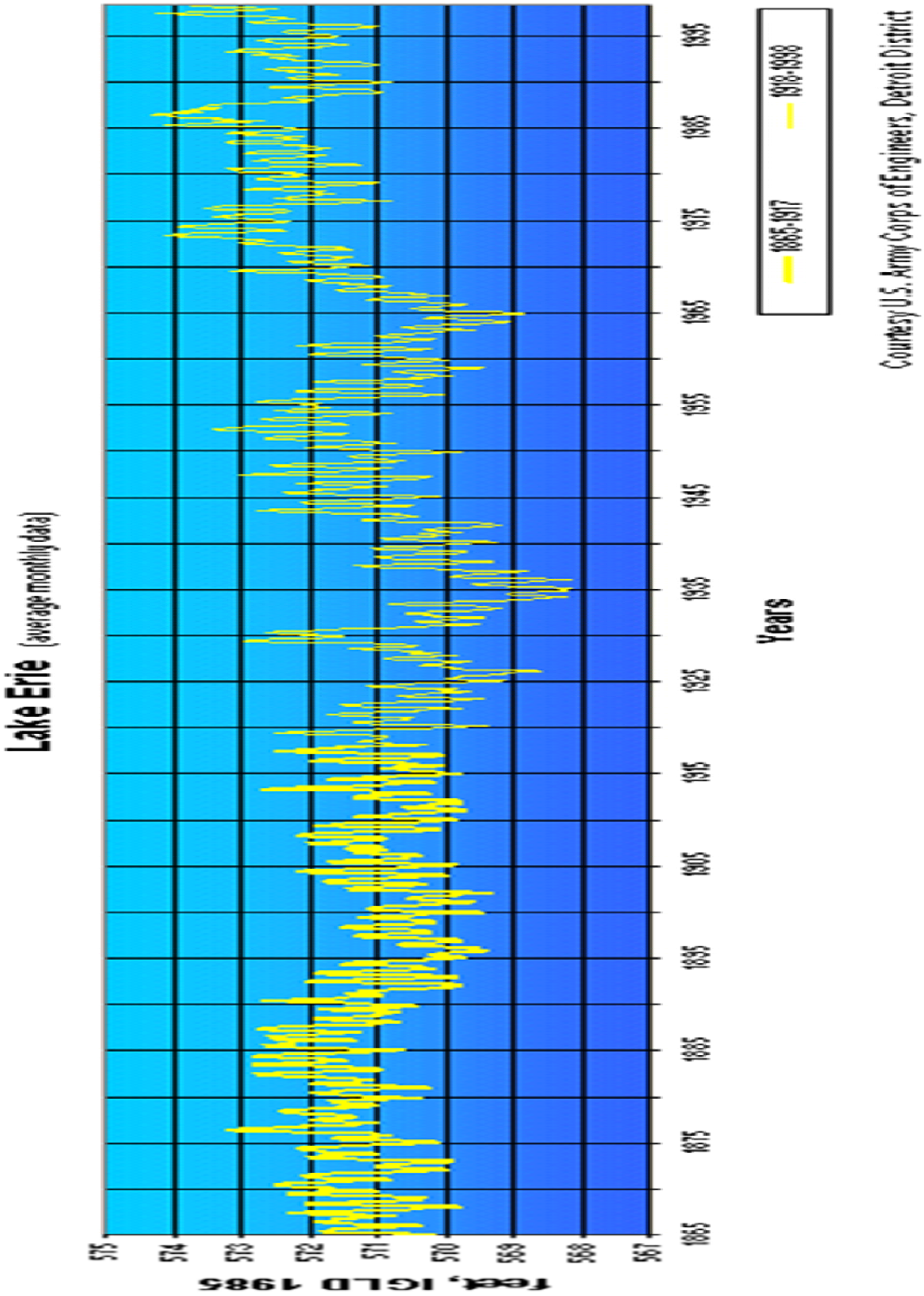

Lake Erie (average monthly data)
feet, IGLD 1985
575
574
573
572
571
570
569
568
567
1865
1875
1885
1895
1905
1915
1925
1935
1945
1955
1965
1975
1985
1995
Years
1865-1917
1918-1998
Courtesy U.S. Army Corps of Engineers, Detroit District

Figure 5

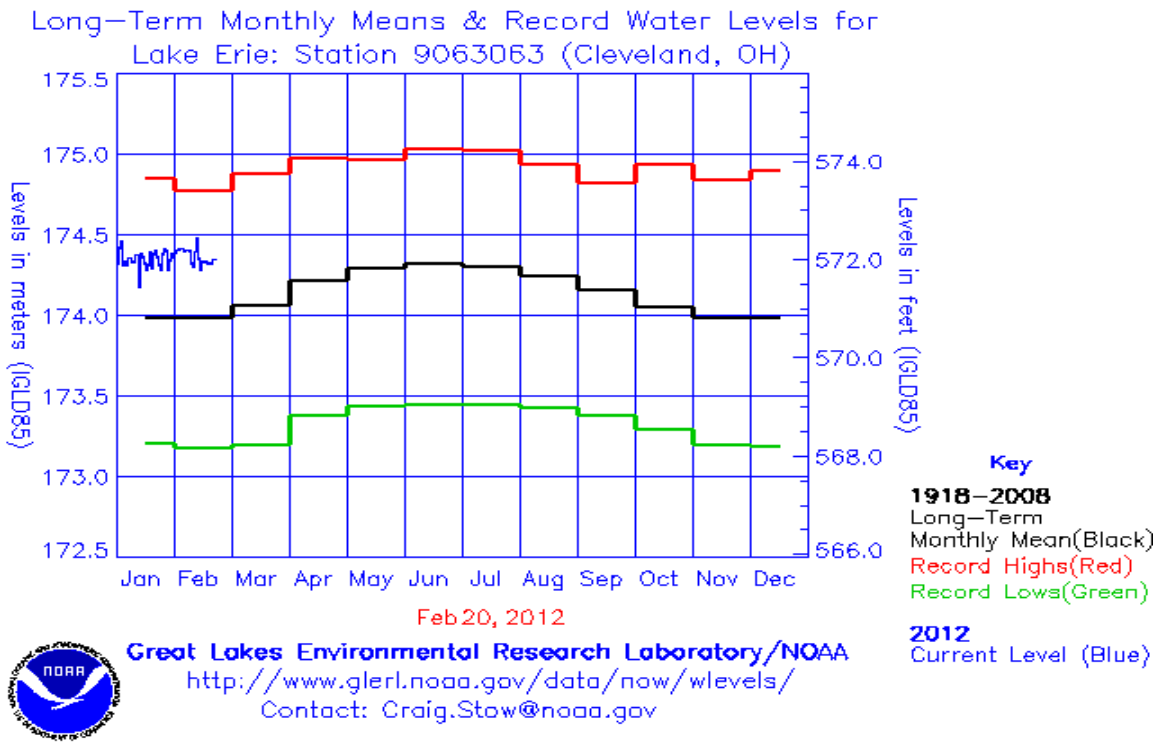


Figure 6

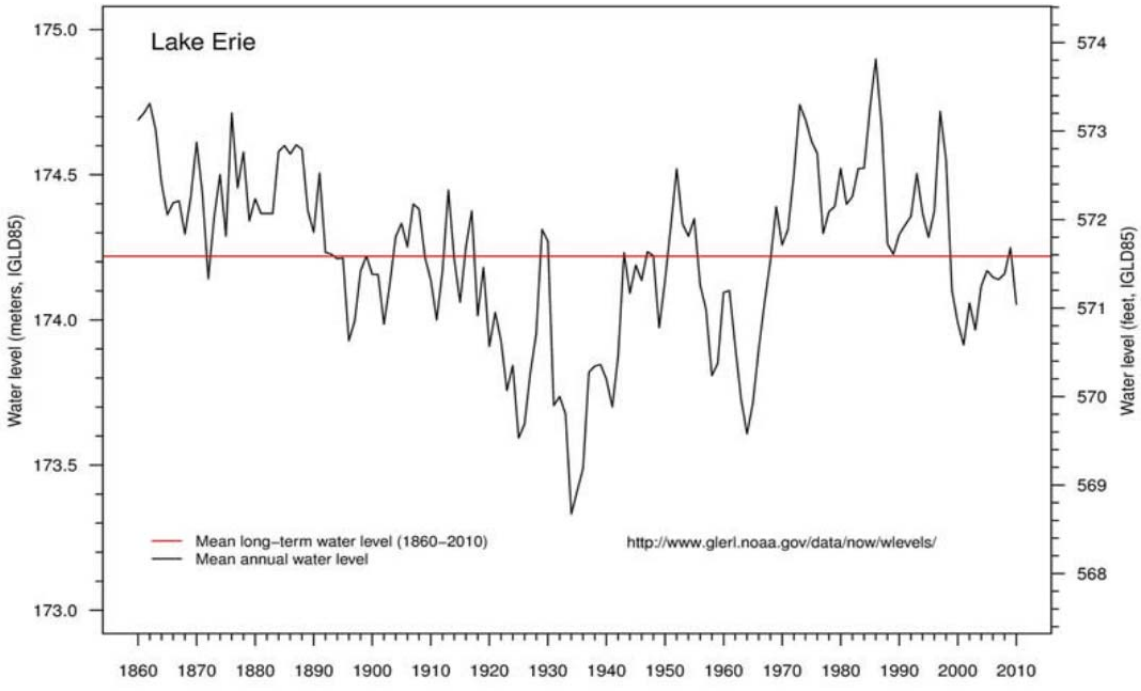


Figure 7

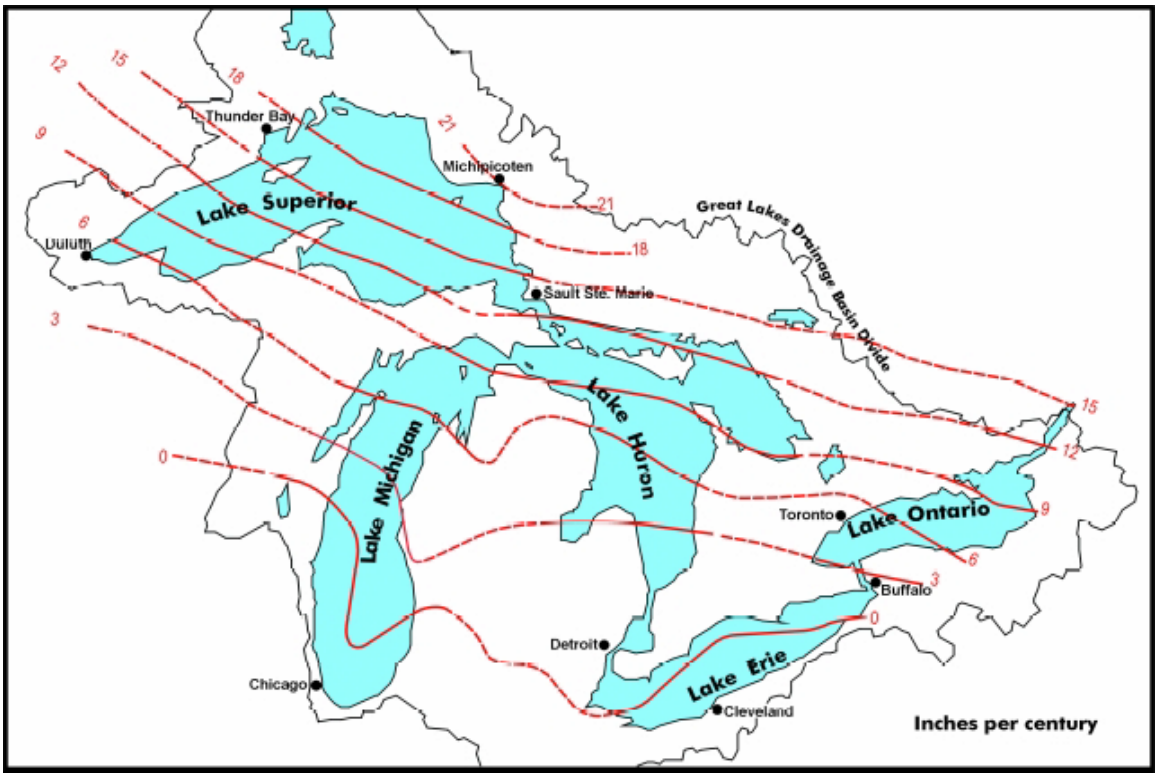


Figure 8

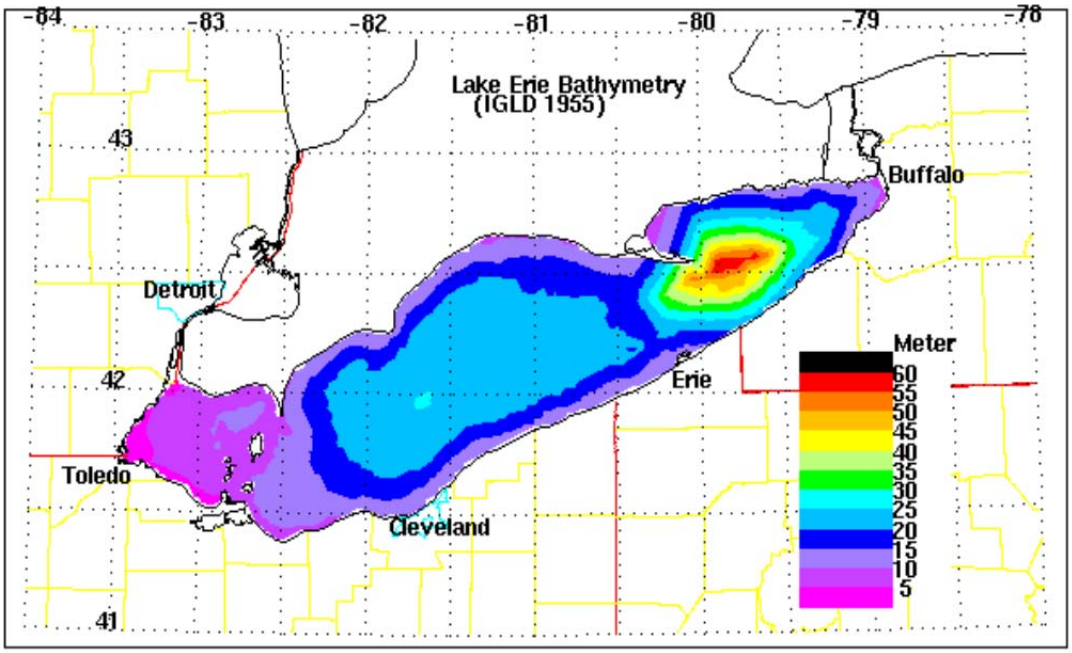


Figure 9

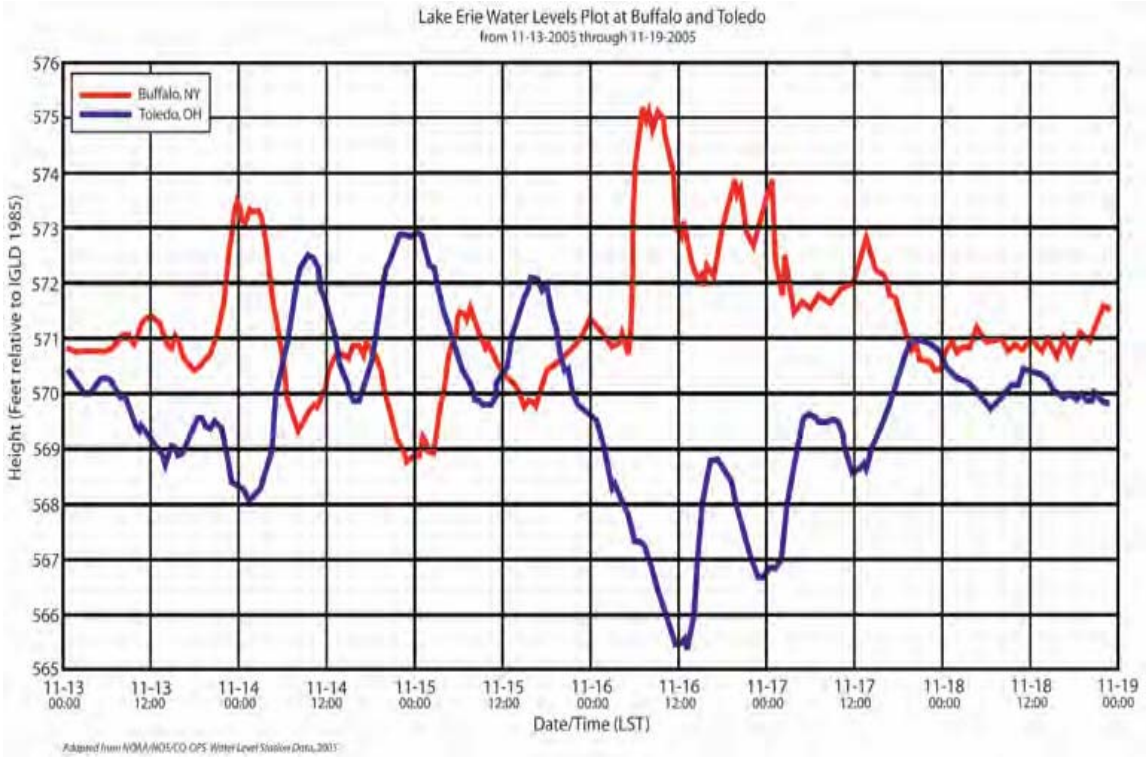


Figure 10

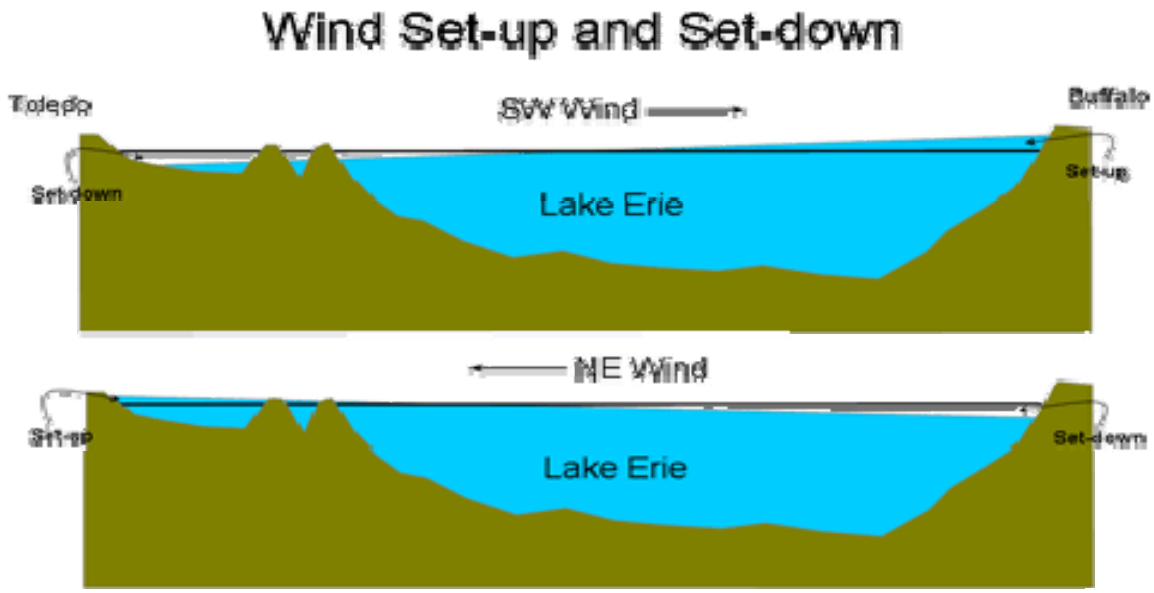
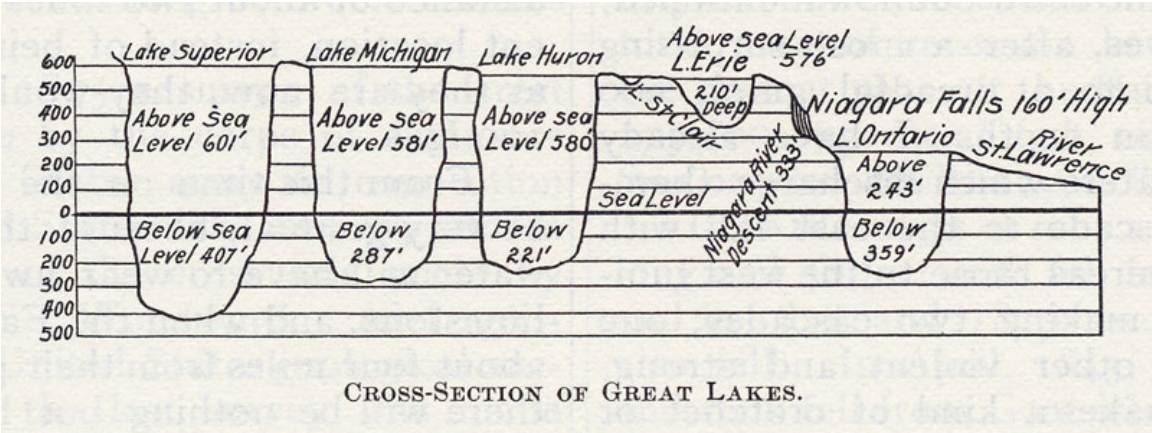


Figure 11



CROSS-SECTION OF GREAT LAKES.

Figure 12