ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, et al.,	:	Case No. 2009-1806
Appellees,	:	On Appeal from the Lake County Court of Appeals, Eleventh Appellate District
and	:	
HOMER S. TAFT,	:	
Appellee / Cross-Appellant,	:	Court of Appeals Case Nos. 2008-L-007, 2008-L-008 Consolidated
and	:	
L. SCOTT and DARLA J. DUNCAN,	:	
Appellees,	:	
v.	:	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Appellants / Cross-Appellees,	:	
and	:	
STATE OF OHIO,	:	
Appellant / Cross-Appellee,	:	
and	:	
NATIONAL WILDLIFE FEDERATION, et al.,	:	
Appellants / Cross Appellees.	:	

MERIT BRIEF OF APPELLANTS NATIONAL WILDLIFE FEDERATION AND OHIO ENVIRONMENTAL COUNCIL

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INTRODUCTION

This case concerns the sovereignty and authority of the State of Ohio and the scope of the public trust with regard to Lake Erie. Ohio holds Lake Erie in trust for the public up to the line of the lake's ordinary high water mark. The public trust was originally conceived to protect navigation, commerce, and the fishery, and now protects recreation and aesthetic enjoyment as well. The public trust inherently includes the right of citizen passage below the ordinary high water mark, that is to say, along the shore of Lake Erie, so citizens are able to engage in the activities protected by the trust.

Departing from controlling precedent, the court of appeals eliminated Ohio's sovereign power and took away the rights of millions of citizens who visit Lake Erie every year. The court of appeals discarded the boundary of Lake Erie this court has recognized for 131 years: the ordinary high water mark. This is a stable boundary, one that changes gradually, over decades. It maintains under state responsibility the full extent of the lake that Ohio received upon its admission into the Union and has never relinquished.

In place of the established boundary, the court of appeals charted a new boundary: the water's edge, wherever that happens to be at any given moment. This is a transitory boundary, one that continually changes with the constant fluctuations in the level of the lake. It provides no certainty for the state, littoral owners, or the public. Moreover, contrary to all precedent and the express language of R.C. 1506.10-11, the court of appeals effectively encouraged littoral owners to enlarge their domain at the state's and the public's expense by extending the water's edge with fill, ruling that littoral owners privately own filled-in lands.

As a consequence of the court of appeals' decision regarding the boundary of Lake Erie, littoral owners received a new right, a right inconsistent with the public trust. Specifically, the court of appeals for the first time ever granted littoral owners the right to exclude citizens from

the shore of Lake Erie, the area between the ordinary high and low water marks, forcing people to walk in the water or not at all. The court of appeals thus failed to recognize that the people's ability to travel by foot on the lands below the ordinary high water mark, not just in the water, is a necessary incident to the use and enjoyment of Lake Erie for the traditional public trust purposes of navigation, commerce, and the fishery, and the more modern public trust purposes of recreation and aesthetic enjoyment.

The court of appeals' ruling literally gives away a birthright that has been enjoyed by generations of Ohioans, and goes far beyond the rights this court has accorded littoral owners. Those rights, which Appellants National Wildlife Federation and Ohio Environmental Council do not dispute, are (1) the right to the reasonable use of the waters of the lake in front of or flowing past littoral lands, (2) the right to access the lake, and (3) the right to wharf out to the point of navigability, *provided the exercise of these rights do not interfere with the uses protected by the public trust.*

The court of appeals' recognition of private title to and sole control over the shore to the detriment of the public trust is a direct contradiction of the settled law of Ohio. This court has expressly held that the state in its sovereign capacity as trustee for the public may never relinquish its control over Lake Erie up to the ordinary high water mark, except under very stringent conditions that do not obtain here. The United States Supreme Court has also expressly disapproved such an abdication of a state's sovereign authority, and no other Great Lakes state has ever sanctioned a surrender of the public trust such as the one made by the court of appeals in this case.

To restore Ohio's sovereignty, the public trust, and the protection of the rights of all citizens in Lake Erie, this court should reverse the erroneous decision of the court of appeals.

STATEMENT OF FACTS

On May 28, 2004, Appellees Robert Merrill *et al.*, owners of littoral property along Lake Erie, initiated this class action in the Lake County Court of Common Pleas. (Complaint, Trial Docket ("Tr. Dkt.") 12.) Among other things, they sought declarations that (1) they own fee title to the lands below the ordinary high water mark of Lake Erie and (2) the public trust in Lake Erie held by the State of Ohio applies only to the lands below the low water mark. (Amended Complaint, Tr. Dkt. 22, at 9, ¶2.)

On February 23, 2005, Appellant the State of Ohio ("the state") opposed the relief sought by appellees. (Answer, Counterclaim, and Cross-Claims, Tr. Dkt. 74.) The state also filed a counterclaim seeking a declaration that the state owns and holds in trust for the people of Ohio the lands and waters of Lake Erie up to the ordinary high water mark within the territorial boundaries of the state, subject only to the paramount authority retained by the United States for the constitutional purposes of commerce, navigation, national defense, and international affairs, and that the state has so owned and held those lands and waters since statehood. (*Id.* at 20-21, ¶a.)

On June 5, 2006, Appellants National Wildlife Foundation and Ohio Environmental Council ("Conservation Appellants") intervened on behalf of their members who walk along the lake below the ordinary high water mark and, in the process, engage in bird-watching, fossil-hunting, shell-collecting, or the study of plants, and enjoy the natural beauty of the lake and quiet contemplation, or use the shore to gain access to the water of Lake Erie for wading, fishing, or other recreational pursuits. (Motion to Intervene, Tr. Dkt. 121.) Conservation Appellants are non-profit organizations whose missions are to conserve and protect natural resources for the use and aesthetic enjoyment of their members. (Affidavit of David B. Strauss, Tr. Dkt. 121, Exhibit 3, at 2, ¶5; Affidavit of Vicki Deisner, Tr. Dkt. 121, Exhibit 4, at 2, ¶5-6.)

The value placed on the use of the Lake Erie shore can be testified to by generations of citizens who have grown up enjoying Lake Erie. Carlette Chordas is a littoral property owner in Conneaut, Ohio, and has used and enjoyed the shore for more than twenty-five years. (Affidavit of Carlette Chordas, Tr. Dkt. 121, Exhibit 5, at 2, ¶4-5, 8.) Her home is on a bluff, which has a small beach below, but she and her husband, children, and grandchildren usually walk along the shore to visit nearby beaches for recreation. (*Id.* at 2, ¶8.) "While on the shore, . . . [they] picnic, bird watch, exercise, and enjoy the view over the lake. (*Id.* at 2, ¶9.) They also collect trash and litter along the shore. (*Id.* at 2, ¶10.) They enjoy "simply sitting on a piece of driftwood or in the sand and just enjoying the breeze and mist." (*Id.* at 3, ¶10.) "The lake is a very spiritual place and we just take it in." (*Id.*) Ms. Chordas wants the shore to remain accessible to the public. (*Id.* at 3, ¶12.) She would prefer that her family have the ability to walk along the shore of nearby areas, beyond the public beaches, rather than be restricted to the small beach area below the bluff in front of her home. (*Id.*)

Elaine Marsh has enjoyed the Lake Erie shore annually for more than fifty years, regularly vacations there with her family, and plans to continue doing so in the future "to experience the beauty and vastness of the lake." (Affidavit of Elaine Marsh, Tr. Dkt. 121, Exhibit 6, at 2, ¶5-7.) Ms. Marsh and her family enjoy walking along the shore, beyond the public areas, to "picnic, bird watch, exercise and enjoy the view of the lake . . . [to] search for shells and 'lucky stones' . . . [and to] canoe or swim from the shore." (*Id.* at 2, ¶7-8.)

Leonard Mitchell has enjoyed the Lake Erie shore for more than sixty years and also plans to continue recreating along the shore in the future. (Affidavit of Leonard Mitchell, Tr. Dkt. 167, Exhibit 9, at 2, ¶5-6.) However, his enjoyment was diminished when a littoral property owner erected a fence preventing his grandson's passage along the lake. (*Id.* at 2, ¶8.)

"When my grandson touched the fence, a man from the condominium area scolded him and told him to [sic] not to touch the fence because if he went around the fence he would be trespassing because he would be on private property." (*Id.*) Mr. Mitchell is particularly concerned that additional obstructions will be created were the shore deemed to be owned by littoral owners, preventing him and his family from continuing to use and enjoy Lake Erie. (*Id.* at 3, ¶3.)

Conservation Appellants sought relief similar to that sought by the state. (Motion to Intervene, Tr. Dkt. 121.) Their motion to intervene was granted. (Order, Tr. Dkt. 148.)

On June 8, 2006, appellees and the state entered into certain stipulations. (Notice of Joint Stipulation to Class Certification, Tr. Dkt. 122.) They stipulated that "upland property" is real property bordering a body of water. (*Id.* at 2, n. *.) They also stipulated that in Ohio "littoral property" is upland property that borders an ocean, sea, lake, or a bay of any of these water bodies. (*Id.*) They further stipulated that in contrast "riparian property" is upland property that borders a river, stream, or other such watercourse. (*Id.*)

On June 9, 2006, the trial court certified three questions of law, which may be summarized for purposes of this appeal as whether the ordinary high water mark is the boundary of Lake Erie and, if so, what are the respective rights and responsibilities of the state, appellees, and the people of the state in the lands below the ordinary high water mark? (Order Certifying Class Action, Tr. Dkt. 123.)

On December 11, 2007, the trial court granted summary judgment for appellees, in part, and denied summary judgment for the state and conservation appellants. (Summary Judgment Order, Tr. Dkt. 183.) The trial court declared that the boundary of the public trust territory of Lake Erie is a moveable boundary located at the water's edge, meaning where the water actually touches the land at any given moment. The trial court also declared that appellees own title to

the water's edge and reformed the legal descriptions in all deeds to littoral property along the southern shore of Lake Erie, ruling that title extends to the water's edge.

Upon appeal by the state and conservation appellants and cross-appeal by appellees, the court of appeals ruled that the state did not have standing. *State ex rel. Merrill v. State of Ohio* (11th Dist.), 2009-Ohio-4256 ("*Merrill*"), at ¶44. The court of appeals affirmed the trial court's decision, restricting the public trust to the actual water's edge and obligating citizens who wish to walk along Lake Erie to walk in the water. *Id.* at ¶89, 97, 127. The court of appeals also modified the trial court's decision in three particulars. First, the court of appeals held that although the boundary of Lake Erie is the water's edge, that boundary can extend no higher than the ordinary high water mark. *Id.* at ¶97, 127. Second, the court of appeals held that appellees own fee title to lands above the water's edge, whether those lands are naturally above the water's edge or raised above it with fill. *Id.* at ¶127. Third, the court of appeals vacated the trial court's reformation of the legal descriptions in deeds to littoral property along Lake Erie. *Id.* at ¶103.

On October 7, 2009, conservation appellants filed their notice of appeal to this court. (Appx. Ex. 1). On March 3, 2010, this court granted jurisdiction to hear the case and allowed the appeal. Order of Mar. 3, 2010 (granting review).

ARGUMENT

Proposition of Law No. I: The State of Ohio holds Lake Erie in trust for the public up to the line of the lake's ordinary high water mark.

A. Upon admission to the Union, the State of Ohio received as a public trust title to Lake Erie, including the land submerged when the waters of the lake are at their ordinary high water mark.

The thirteen states that formed the United States of America held title as trustees to the lands under their navigable waters up to the ordinary high water mark. In 1803, Ohio entered the Union on an equal footing with the original thirteen States. Upon admission, therefore, Ohio

received title as trustee to the lands under Lake Erie within the state's boundaries up to the ordinary high water mark. Ohio must conscientiously preserve its sovereign responsibility as trustee.

These principles evolved long ago in a series of decisions by the Supreme Courts of the United States and Ohio, and they remain valid today. The court of appeals cited and quoted many of these decisions and then proceeded to ignore or misunderstand them.

As early as 1842, the U.S. Supreme Court articulated the "public trust doctrine" in *Martin v. Waddell's Lessee* (1842), 41 U.S. 367, 10 L. Ed. 997, 16 Pet. 367. In that case, the Court explained that "when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Id.* at 410. The Court then rejected the plaintiff's claim that he had the exclusive right to harvest oysters from New Jersey's Raritan Bay, holding that he did not own the land below the high water mark of the bay. *Id.* at 418; *see id.* at 407-08. The Court thus considered the land below the high water mark to be included in the soils "under" the navigable waters, even though they were not constantly covered by water.

In 1845, the Court held that each state is admitted to the Union on an equal footing with the original thirteen states in support of its ruling that Alabama received title as trustee to the lands beneath the navigable waters within its boundaries. *Pollard's Lessee v. Hagan* (1845), 44 U.S. 212, 228-30, 11 L.Ed. 565, 3 How. 212. The Court therefore endorsed an instruction given by the state court in a lawsuit for ejectment, namely that the plaintiff could not acquire any title to land that was below the usual high water mark when Alabama was admitted into the Union. *Id.* at 220, 230.

This court was briefed on *Martin* and *Pollard's Lessee* and followed *Martin* when deciding in 1878 that the public has the right to fish in Lake Erie and it bays. *Sloan v. Biemiller* (1878), 34 Ohio St. 492, at paragraph two of the syllabus, 514 ("That fishery in such waters as Lake Erie and its bays should be as free and common as upon tide waters, and alike subject to control by public authority, is obviously just."). In deciding *Sloan*, the court addressed the extent of the title of landowners bounding on Lake Erie and Sandusky Bay. The court held that the ownership extends only to "the line at which the water usually stands when free from disturbing causes," not to the middle of the lake and bay. *Id.* at paragraph four of the syllabus, 511-12.

The court regarded this line as the ordinary high water mark, drawing on the opinion in *Seaman v. Smith* (1860), 24 Ill. 521. *Sloan*, 34 Ohio. St. at 512-13. In *Seaman*, the Illinois Supreme Court rejected the *high* water mark as the boundary of Lake Michigan in favor of the *ordinary* high water mark. In the *Seaman* court's words, "the highest point" water may reach as the result of storms and other events is *not* "the point where the owner's rights terminate, nor yet should it . . . be the lowest point . . . it may recede" to. 24 Ill. at 525. Rather, the point of demarcation, as in tidal waters, is the "*ordinary* high water mark," which the court also called the "*usual* high water mark" and described as "that line where the water usually stands when unaffected by any disturbing cause." *Id.* (emphasis added).

By borrowing from *Seaman* the phrase "the line at which the water usually stands when free from disturbing causes," therefore, this court defined the boundary of littoral owners bordering on Lake Erie as the ordinary high water mark. Moreover, this court adhered to that definition in its public trust cases involving Lake Erie within Ohio's boundaries, as discussed below.

Sloan prefigured the decision of the U.S. Supreme Court in *Illinois Central Railroad Company v. Illinois* (1892), 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018. In *Illinois Central*, the Court held that the Great Lakes, like the seas, are subject to the public trust, and to the same extent. *Id.*, 146 U.S. at 436-7 ("We hold . . . that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tidal waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.").

In *Shively v. Bowlby* (1894), 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331, the Court conducted an extensive review of its own precedents and other cases touching on the public trust, producing what the Court still characterized nearly 100 years later as the "'seminal case in American public trust jurisprudence.'" *Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469, 473, 108 S.Ct. 791, 98 L.Ed.2d (citation omitted). In *Shively,* the Court concluded, "The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, *and in the lands below the high-water mark*, within their respective jurisdictions." *Shively*, 152 U.S. at 26 (emphasis added).

Mindful of *Sloan*, *Illinois Central*, and *Shively*, this court recognized the ordinary high water mark as the boundary of Lake Erie in its own public trust cases. In *State v. Cleveland & Pittsburgh Railroad Company* (1916), 94 Ohio St. 61, this court considered whether a littoral property owner (a railroad company) had the right to wharf out to reach the navigable water of Lake Erie. 94 Ohio. St. at 68. The court held that "[t]he title of the *land under the waters of Lake Erie* within the limits of the state of Ohio, is in the state as trustee for the benefit of the

people, for the public uses to which it may be adapted." *Id.* at paragraph three of the syllabus (emphasis added).

A careful reading of the opinion shows that by the phrase "land under the waters of Lake Erie" the court meant the land below the ordinary high water mark of Lake Erie. At the outset of the opinion, the court identified the positions of the opposing parties. The state contended that a littoral owner has no right to wharf out over the "subaqueous land between the shore and the harbor line [in navigable waters, established by the federal government]," because the state is the absolute owner of such land. *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. at 68. The railroad company contended that a right to wharf out "over the shallow waters between the shore and the harbor line" is a property right incident to the ownership of the upland, but acknowledged that the state owns the title to "submerged land" as trustee for the public. *Id.*

Thus, the parties agreed that the dispute was over the use of the shore, not its ownership. Moreover, both the parties and the court understood the "shore" to mean the lands below the ordinary high water mark, as the court's following distillation of the issue in the case reveals:

> Impressed with the importance of the subject, counsel have submitted able and exhaustive briefs on the question. They disclose a wide diversity of view as to public and private rights in *subaqueous land below the high-water mark of navigable waters*.

Cleveland & Pittsburgh RR. Co., 94 Ohio St. at 69 (emphasis added).

No one questioned that the ordinary high water mark is the boundary of the public trust, because that had been settled by *Shively* and the cases that preceded it. In 1916, the terms "land under the waters," "subaqueous land," "submerged land," and "shore" were all understood to be nothing more than the expression of the longstanding principle that the navigable waters subject to the public trust extend to the lands that are under water when those waters are at their ordinary high water mark.

The issue before the court, then, and the issued it decided, was the "public and private rights" in the land subject to the public trust, namely the "*subaqueous land below the high-water mark of navigable waters.*" *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. at 69 (emphasis added). In deciding this issue, the court held that the state holds the lands below the ordinary high water mark in trust and that a littoral owner has the right to wharf out, provided it does not interfere with the public trust. *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. at 79.

This court revisited the right of littoral owners to wharf out, as well as the state's public trust ownership of the lands below the ordinary high water mark of Lake Erie, in *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303. In *Squire*, the court expressly re-affirmed its holding in *Cleveland & Pittsburgh Railroad Company*, quoting the syllabus in the case to the effect that "The title of the land under the waters of Lake Erie within the limits of the state of Ohio is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted." *Id.* at 323 (quoting *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. 61, at paragraph three of the syllabus).

Moreover, the court held that the Fleming Act, now codified at R.C. 1506.10-1506.11,[1] did "not change the concept of the declaration of the state's title as found in [*Cleveland & Pittsburgh RR. Co.*]." *Squire*, 150 Ohio St. at 337. The first section provides as follows:

> It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary 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

[1] Formerly G.C. § 3699-a *et seq.* (1917), re-codified as R.C. 123.03 *et seq.* (1953), renumbered as R.C. 1506.10 and R.C. 1506.11 (1989). The legislature enacted the Fleming Act a year after the court decided *Cleveland & Pittsburgh Railroad Company* following the court's suggestion that it do so.

> 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 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.

R.C. 1506.10.

The supreme court's construction of the Fleming Act is justified because of the statutory language declaring that Lake Erie and the lands beneath it "do now belong and have always, *since the organization of the state of Ohio*, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted." R.C. 1506.10 (emphasis added). The statutory language tying the lands owned to Ohio's entry to the Union shows that the lands in question are the lands submerged when the waters of Lake Erie are at their ordinary high water mark, just as the original thirteen states held title to the lands below the ordinary high water mark of the navigable waters within their boundaries. The significance of the link to Ohio's admission must inform the interpretation of all the remaining terms in R.C. 1506.10 and R.C. 1506.11, rendering incongruous any interpretation that might reduce the extent of the title Ohio received and expressly acknowledged and retained in R.C. 1506.10. Accordingly, R.C. 1506.10's terms "southerly shore" and "natural shoreline" refer to the ordinary high water mark, and the terms "waters of Lake Erie" and "territory" include the lands submerged when the waters of Lake Erie are at their ordinary high water mark.

B. The State of Ohio has always recognized that it has the responsibility as trustee to protect Lake Erie, including the land below the ordinary high water mark, for the benefit of the public.

In *Illinois Central*, the Court specifically cautioned against misreading general language in case law indicating that states have the power to dispose of lands under navigable waters without regard to the public trust: "General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases." *Illinois Central*, 146 U.S. at 453. Then the Court affirmatively held that a state cannot grant absolute title to navigable waters below the ordinary high water mark, as follows:

> *The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties*, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace.*

Id. (emphasis added).

This court followed *Illinois Central* on this point. In *Cleveland & Pittsburgh Railroad Company*, it ruled, "The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created." 94 Ohio St. at 80. In addition, the legislature may not "authorize property dedicated to the public for a specific purpose to be used for a purpose inconsistent with the purpose for which it was dedicated." *Id.*

The General Assembly followed these dictates when it enacted R.C. 1506.10. It specifically provided that, "Any *artificial* encroachments by public or private littoral 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." R.C. 1506.10 (emphasis added). The court of appeals' holding that littoral owners possess fee title to lands created by fill directly contradicts the public trust doctrine and the statute and must be reversed. *See Merril l* at ¶127.

C. In ruling that the public trust extends only to the line of the water's edge at any given moment, the court of appeals failed to understand or follow precedent and statutes.

The court of appeals in this case went astray by construing the terms used in *Cleveland & Pittsburgh Railroad Company* and *Squire* – terms like "under the waters," "subaqueous soil," and "shore," for example – without any appreciation of their roots or their legal import. Consequently, the court of appeals erroneously concluded that land "under the waters of Lake Erie" means only land actually covered by the water at any given moment and that only such land is held in trust by the state of Ohio. *Merrill* at ¶125-27. In the court of appeals' opinion, any other ruling would "improperly extend [the trust] in violation of littoral property owners' rights." *Id.* at ¶84. But *Shively* and its predecessors, as well as *Cleveland & Pittsburgh Railroad Company* and *Squire*, establish that the rights of private owners of littoral property in the land below the ordinary high water mark of Lake Erie has always been subject to the public trust. Recognizing the state's dominant sovereign interest in those lands therefore violates no littoral owner's rights.

1. Contrary to the court of appeals' finding, the U.S. Supreme Court established as a matter of American jurisprudence that the ordinary high water mark is the boundary of the public trust in navigable waters.

The court of appeals held that federal law did not establish that upon statehood Ohio received title as trustee to the lands under Lake Erie up to the ordinary high water mark. *Merrill* at ¶77. In the court of appeals' view, *Shively* "merely noted that the public trust doctrine, in England, set the border of the crown's trust for the benefit of the public at the high water mark." *Id.*

The Court did not merely note the scope of the public trust in England in *Shively*. Rather, the Court explicitly stated, as quoted above, that all states in this country, like the original thirteen states, are trustees of the lands of navigable waters within their boundaries below the ordinary high water mark. *Shively*, 152 U.S. at 26. The Court reiterated this principle in *Shively* when it summed up its conclusions, noting that the title and control of lands below the ordinary high water mark "are vested in the sovereign, for the benefit of the whole people"; that the states acquired this title and control upon the American Revolution; and that "[t]he new states admitted into the Union since the adoption of the constitution have the same rights as the original states." *Id.* at 57.

The court of appeals also incorrectly opined that "The *Shively* court specifically recognized that state law determined the scope of the public trust in land beneath navigable waters in this country." *Merrill* at ¶77. The Court did not rule that the *scope* of the public trust is a matter of state law, but only "that *the title and rights of riparian or littoral proprietors in the soil below high-water mark* of navigable waters are governed by the local laws of the several states . . . ." *Shively*, 152 U.S. at 40 (emphasis added). The Court did not hold that the states may relinquish their public trust responsibilities in the lands below the ordinary high water mark.

Rather, as the Court subsequently clarified, it was referring to the states' rights to determine "the question of the *use* of the shores by the owners of uplands." *Id.* at 58 (emphasis added).

A state may grant to littoral owners a form of title or rights in lands below the ordinary high water mark (the *jus privatum*), but that title and those rights are subject to the public trust (the *jus publicum*). *Illinois Central*, 146 U.S. at 436-37, 452-54; *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. at paragraphs two and three of the syllabus;[2] 2000 Ohio Atty.Gen.Ops. No. 2000-047, at 4-5; *see Shively*, 152 U.S. at 11-13. This becomes clear from the cases the Court in *Shively* cited to explain its passage regarding the states' authority to govern "title and rights" below the ordinary high water mark. Those cases either involve the rights of littoral owners to

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[2] In paragraphs two and three of the syllabus, the court held as follows:

> The title and rights of littoral and riparian proprietors in the subaqueous soil of navigable waters, within the limits of a state, are governed by the laws of the state, subject to the superior authority of the federal government.
>
> The title of the land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted.

Cleveland & Pittsburgh RR. Co., 94 Ohio St. at paragraphs two and three of the syllabus.

Taken together, paragraphs two and three of the syllabus demonstrate the court's recognition that that there are two different, coexisting interests in the land under Lake Erie, one private (to the extent decided by the state) and one public. The court defined the private rights as follows:

> The 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.

Cleveland & Pittsburgh RR. Co., 94 Ohio St. at paragraph five of the syllabus. The court immediately added that private rights are subordinate to the public rights in the waters of Lake Erie, which include the lands under the water – meaning, of course, the land below the ordinary high water mark. *Id.* at paragraph six of the syllabus ("The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate.").

access or wharf out to navigable waters,[3] or they approve a state's assertion of ownership of the lands below the ordinary high water mark of navigable waters.[4] None of the cases authorize a state to alter the scope of the public trust by granting absolute title to the lands below the ordinary high water mark of navigable waters. Even in those cases where states granted rights to access or wharf out, the Court noted that these rights were subject to state regulation for the protection of public uses, such as navigation. *Shively*, 152 U.S. at 40-41.

The Court also made specific mention in *Shively* of its earlier decisions in *Hardin v. Jordan* (1891), 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428,[5] and *Illinois Central*. As the Court noted, in both cases it had held that the state has the authority to decide how lands below the ordinary high water mark may be disposed of, but only "when that can be done without

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[3] *St. Louis v. Myers* (1885), 113 U. S. 566, 5 S.Ct. 640, 28 L.Ed. 1131 (access and wharfing out); *Atlee v. Union Packet Company* (1874), 88 U.S. 389, 22 L.Ed. 619, 21 Wall. 389 (wharfing out); *Weber v. Board of Harbor Commissioners* (1873), 85 U.S. 57, 21 L.Ed. 798, 18 Wall. 57 (access); *Yates v. Milwaukee* (1870), 77 U.S. 497, 19 L.Ed. 984, 10 Wall. 497 (wharfing out); *St. Paul & Pacific Railroad Co. v. Schurmeir* (1868), 74 U.S. 272, 19 L.Ed. 74, 7 Wall.272 (wharfing out); *Dutton v. Strong* (1861), 66 U.S. 23, 17 L.Ed. 29, 1 Black 23 (wharfing out).

[4] *Packer v. Bird* (1891), 137 U. S. 661, 11 S. Ct. 210, 34 L. Ed. 819 (person holding land bounded by the Sacramento River took no title below the high-water mark); *Barney v. Keokuk* (1876), 94 U. S. 324, 24 L. Ed. 224, 4 Otto 324 (the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark; the shore between high and low water mark, as well as the bed of the river, belongs to the state).

In *St. Paul & Pacific Railroad Co. v. Schurmeir*, the Court affirmed the Minnesota Supreme Court's judgment that a riparian owner's title extended to the low water mark of a navigable river, but the Minnesota court later clarified that title is not absolute below the ordinary high water mark. *Carpenter v. Board of Comm'rs*, 56 Minn. 513, 520-521, 58 N.W. 295 (1894). The title of the riparian owner in the area between the ordinary high water mark and the low water mark "is qualified or limited by the public right," such as navigation, and the public right below the ordinary high water mark is supreme. *Id.* at 521.

[5] *Hardin v. Jordan* concerned Wolf Lake, a small inland lake in Illinois, not one of the Great Lakes. The Court indicated that upon attaining statehood, title to tidal waters and the Great Lakes below the high water mark "enures [sic] to the state" and is "incidental to the sovereignty of the state . . . and held in trust for the public purposes of navigation and fishery." 140 U.S. at 381. In holding that under the common law of Illinois the owner of land bordering an inland lake owns to the center of the lake, the Court expressly stated that this rule of the common law does not apply to the Great Lakes. *Id.* at 385-86, 391.

substantial impairment of the interest of the public in such waters . . . ." *Shively*, 152 U.S. at 47 (citing *Illinois Central*, 146 U.S. at 435-37.)

In *Illinois Central*, the Court was even more explicit. First, the Court specifically cautioned against misreading general language in case law indicating that states have the power to dispose of lands under navigable waters without regard to the public trust: "General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases." *Illinois Central*, 146 U.S. at 453. Then the Court affirmatively held that a state cannot grant absolute title to navigable waters below the ordinary high water mark, as follows:

> *The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties*, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace.*

Id. (emphasis added).

This court followed *Illinois Central* when it ruled that a littoral owner has the right to access Lake Erie water and wharf out, but that "the state holds the title to the subaqueous land of navigable waters as the trustee for the protection of the public rights therein." *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. at 77. The court continued by stating, "The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created." *Id.* at 80. In *Squire*, this court reiterated "that the littoral rights of the upland owners are not titles to land, and though they are property rights they are restricted and limited and entirely subservient to the power and

authority of the state and federal governments in whatever either of them do in aid of navigation, water commerce or fishery." 150 Ohio St. at 342.

2. Contrary to the court of appeals' finding, the federal Submerged Lands Act recognized that the states received title and ownership of land below the ordinary high water mark of navigable waters, including Lake Erie.

In the Submerged Lands Act ("SLA"), 43 U.S.C. §§ 1301-1315, Congress codified the principle that a state receives upon admission the lands submerged when navigable waters are at their ordinary high water mark. Congress confirmed in the states "title to and ownership of the *lands beneath navigable waters* within the[ir] boundaries." 33 U.S.C. § 1311(a) (emphasis added). In the SLA, Congress codified the common law definition of "lands beneath navigable waters," for non-tidal bodies of water like the Great Lakes as "all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, *up to the ordinary high water mark.*" 43 U.S.C. § 1301(a)(1) (emphasis added). The legislative history reinforces that § 1311 "merely fixes as the law of the land that which . . . was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters." H.R. Rep. No. 83-215, at 13 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1399.

Despite the clarity of § 1311 and its legislative history, the court of appeals rejected the principle that the federal statute recognized the ordinary high water mark as the boundary of Lake Erie. The court of appeals found that the SLA recognizes that "state law governs the determination of ownership in the land under the Act." *Merrill* at ¶81. The court of appeals

reached this finding by reading an excerpt from § 1311 out of context, specifically language that refers to "the law of the respective States in which the land is located." *Id.*

The full provision in which this language appears reads as follows:

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

43 U.S.C. § 1311(a) (emphasis added).

The words "under the law of the respective States in which the land is located" modify the preceding phrase "the persons who were . . . entitled thereto." Thus, title to the lands beneath navigable waters was assigned to the States or to any person who, as of June 5, 1950, held title to those lands "under the law of the respective States." This provision did not authorize states to divest themselves of the public trust in submerged land, but to recognize whatever title a person was entitled to under state law. As explained above, no private person was entitled to a state's public trust interest in submerged land. *See Illinois Central*, 146 U.S. at 453; *Squire*, 150 Ohio St. at 342; *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. at 77.

The court of appeals also erred by misconstruing *California ex rel. State Lands Commission v. U.S.* (1982), 457 U.S. 273, 288, 102 S.Ct. 2432, 73 L.Ed.2d 1, to mean that "state law governs the determination of ownership in the land under the Act." *Merrill* at ¶81. The Court never said that. The issue before the Court was whether federal or state law governed the ownership of oceanfront land created through accretion to upland owned by the United States on

the California coast. *State Lands Commission* at 275. The Court held that federal law, not state law, governed the issue. *Id.* at 283.

In the course of the opinion, the Court rejected California's argument: that § 1311(a) granted title to the state by confirming the title of persons who were entitled to such lands "under the laws of the respective States in which the land is located." *Id.* at 288. The Court said, "This provision means nothing more than that state law determines the proper beneficiary of the grant of land under the Act; *it is clear that federal law determines the scope of the grant under the Act in the first instance.*" *Id.* (emphasis added). In other words, the SLA confirmed that land under the territorial sea and tideland up to the line of mean high tide received by the coastal states upon admission are controlled by state law – subject, of course, to preservation of the public trust – but that federal law withheld from the states ownership of additions to upland formed by accretion if the upland was owned by the United States. *Id.* at 283 (citing 43 U.S.C. § 1313(a)).

3. Contrary to the court of appeals' finding, this court has consistently endorsed the principle that the public trust in Lake Erie includes land below the lake's ordinary high water mark.

The court of appeals found "that any reference by the Supreme Court of Ohio to the 'high water mark' acting as the boundary of the public trust in navigable waters in *Cleveland & Pittsburgh RR. Co.*, and *Squire*, is simply a reference to the history of the public trust doctrine, as imported from English law – not a finding as to the boundary of that trust in Lake Erie." *Merrill* at ¶84. Nothing in *Cleveland & Pittsburgh Railroad Company* or in *Squire* provides any basis for the court of appeals' finding.

Quite the contrary, in *Cleveland & Pittsburgh Railroad Compnay*, the court used the term "high water mark" when it identified the issue for decision, which was the "public and private rights in subaqueous land below the *high-water mark* of navigable waters." 94 Ohio St. at 69

(emphasis added). This then was not "simply a reference to the history of the public trust doctrine," but the very focus of the case. The term "high water mark" next appeared in the court's reference to *Shively*. *Id.* at 71-72. The court took no issue with the continued currency of the Court's pronouncement in *Shively* that the ordinary high water mark is the boundary of navigable waters such as Lake Erie.

In *Squire*, the court made reference to the "voluminous briefs filed in this case," which, among other things, fully discussed "the common-law rule to the effect that the title to subaqueous and marginal lands of tidal and navigable waters in Great Britain is in the crown, that the law with reference to tidal waters in Great Britain applies not only to tidal waters in the United States but likewise is applicable to the waters of Lake Erie, and that the title to subaqueous and filled-in lands *beyond high water mark* is in the state bordering upon such waters." 150 Ohio St. at 322 (emphasis added). The court was not giving a history lesson, but discussing the common law rule that the state has title, that is to say, ownership and control, over the lands below the ordinary high water mark of the navigable waters it borders.

The court then referred back to *Cleveland & Pittsburgh RR. Co.*, saying it had already "decided the nature of the title of the state of Ohio with reference to the waters of Lake Erie and the littoral rights of the upland owners on the shores of Lake Erie to have access to navigable water therein and to wharf out to the same." *Squire*, 150 Ohio St. at 322. In fact, the court actually quoted the syllabus in *Cleveland v. Pittsburgh RR. Co.*:

> "2. The title and rights of littoral and riparian proprietors in the *subaqueous soil of navigable waters*, within the limits of a state, are governed by the laws of the state, subject to the superior authority of the federal government."

Squire, 150 Ohio St. at 323 (quoting *Cleveland v. Pittsburgh RR. Co.*, at paragraph two of the syllabus) (emphasis added). As shown above, the "subaqueous soil of navigable waters" is a term of art that means "soil below the ordinary high water mark."

> "3. The title of the *land under the waters of Lake Erie* within the limits of the state of Ohio is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted."

Squire, 150 Ohio St. at 323 (quoting *Cleveland v. Pittsburgh RR. Co.*, at paragraph three of the syllabus) (emphasis added). "The land under the waters of Lake Erie" is merely another way of saying the land that is submerged when Lake Erie is at its ordinary high water mark. Thus, far from a historical artifact, the court recognized the ordinary high water mark as *the* boundary between uplands, belonging wholly to littoral owners, and the lake, owned by the state and subject to the public trust.

> **Proposition of Law No. II: The public trust includes the right of citizen passage along the shore of Lake Erie as a necessary incident to the use and enjoyment of Lake Erie for the traditional public trust purposes of navigation, commerce, and the fishery, and the more modern public trust purposes of recreation and aesthetic enjoyment.**

The court of appeals held that littoral owners own absolute title to the water's edge at any given moment and therefore may exclude the public from land below the ordinary high water mark of Lake Erie. These holdings are repugnant to the public trust doctrine formulated by the United States Supreme Court, enunciated by this court, and codified by the General Assembly.

The court of appeals' holdings rest entirely upon a misapplication and a misinterpretation of this court's opinion in *Sloan*. This court held that a littoral owner's "strict boundary line" is the ordinary high water mark, and that an upland owner does not have the right to exclude the public from exercising the public right of fishery in Lake Erie and Sandusky Bay. Accordingly,

Sloan is not authority for the proposition that littoral owners may exclude the public from land below the ordinary high water mark.

The court of appeals also misinterpreted *Sloan*. Citing *Sloan*, the court of appeals said, "Nearly 130 years ago, the Supreme Court of Ohio observed that littoral owners have the right to exclude the public from their property." *Merrill* at ¶89. Littoral owners may have the right to exclude the public from *their* property, but *Sloan* held that the land below the ordinary high water mark is *not* their property.

Sloan held that "the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay [sic], extends to a line at which the water usually stands when free from disturbing causes." 34 Ohio St. at paragraph 4 of the syllabus. As explained above, this line is the ordinary high water mark. Littoral owners may have the right to exclude the public from land *above* the ordinary high water mark, because that land is their property. But *Sloan* cannot be interpreted to hold that littoral owners may exclude the public from land *below* the ordinary high water mark of Lake Erie, because the court explicitly held that land is not their property.

Immediately after fixing the ordinary high water mark as the boundary of littoral ownership, the court described the issue it had to decide as "whether the right of fishing in the lake and bay is limited to the plaintiff as the proprietor of the *shores*." *Sloan*, 34 Ohio St. at 513 (emphasis added). Since the court had just held that the plaintiff was the proprietor only to the ordinary high water mark, it considered the "shores" to be land above the ordinary high water mark. Consequently, when the court later said Sloan could reserve the right to land on the "shore" for certain uses when granting title to Biemiller, *id.* at 516, it was referring to land above ordinary high water mark. Otherwise, the court would have been directly contradicting its earlier holding.

Another possibility is that the court was less than precise in its use of the term over the course of its opinion. The court was precise, however, in identifying the boundary of the littoral owner as the ordinary high water mark. Therefore, littoral owners had no right then and can have no right now to exclude the public from land below that line.

Even in *Sloan*, the court found no fault in Biemiller's use of land that was below the ordinary high water mark, despite Sloan's reservation of landing rights. Specifically, during the fishing season, Biemiller's fishermen daily drew their boats down to the water in the morning, fished during the day, and drew them back on to the land for the night after they had finished fishing for the day. 34 Ohio St. at 516-17. The court held that these activities did not infringe on Sloan's rights. *Id.*

In the thirty-eight years between this court's decisions in *Sloan* and *Cleveland & Pittsburgh Railroad Company*, the U.S. Supreme Court held in *Illinois Central* that the state owns the land below the ordinary high water mark "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, *freed from the obstruction or interference of private parties*." *Illinois Central*, 146 U.S. at 452 (emphasis added).

This court was well-aware of *Illinois Central* when it ruled in *Cleveland & Pittsburgh Railroad Company* that "the state holds the title to the subaqueous land of navigable waters as the trustee for the protection of the public rights therein." 94 Ohio St. at 77 (emphasis added). The court continued by stating, "The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to *private* ends different from the object for which the trust was created." *Id.* at 80 (emphasis added).

As the court of appeals correctly observed, this court has recognized that littoral owners have certain special rights in the land below the ordinary high water mark. *See Merrill* at ¶90. These rights, which are not titles to land, are (1) reasonable use of the waters of the lake in front of or flowing past their lands; (2) access to the water, and (3) "wharfing out" to navigable waters. *Squire*, 150 Ohio St. at 323 (quoting *Cleveland & P. R. Co.*, 94 Ohio St. at paragraph 5 of the syllabus), 342 ("[W]e again repeat that *the littoral rights of the upland owners are not titles to land*, and though they are property rights they are restricted and limited and entirely subservient to the power and authority of the state and federal governments in whatever either of them do in aid of navigation, water commerce or fishery.") (emphasis added); *see also* R.C. 1506.10. However, a littoral owner may only exercise these special rights "provided he does not interfere with the public rights of navigation or fishery." *Cleveland & P. R. Co.*, 94 Ohio St. at 77. "The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate." *Id.* at paragraph 6 of the syllabus. In other words, the littoral owners' enumerated property rights do not include a right to exclude the public from the shore, that is to say, the land below the ordinary high water mark.

The General Assembly provided that the waters of Lake Erie below the ordinary high water mark belong "to the state as proprietor in trust for the people of the state," subject to "the public rights of navigation, water commerce, and fishery." R.C. 1506.10. It also provided that unauthorized artificial fill beyond the natural shoreline "shall not be considered as having prejudiced the rights of the public" in the waters of the lake. *Id.* It further recognized the people's right to recreation. *See* R.C. 1506.11(G) ("[N]o lessee or permit holder [of the lands and waters underlying the waters of Lake Erie] shall change any structures, facilities, or buildings, make any improvements, or expand or change any uses unless the director first

determines that the proposed action will not adversely affect any current or prospective exercise of the *public right of recreation* in the territory.") (emphasis added).

The General Assembly's recognition of a public right of recreation in the navigable waters of Lake Erie, which, as conservation appellants have shown, include the lands below the ordinary high water mark, anticipated the like recognition of the Michigan Supreme Court in *Glass v. Goeckel* (2005), 473 Mich. 667. That court ruled, "Because walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the high water mark." *Id.* at 696. The court relied heavily on the historical connection between Roman law, English common law, and the evolution of the public trust doctrine in America in reaching its decision. *Id.* at 708-710. Citing this connection, the court held that the public trust doctrine places so high a value on protecting for the public benefit "all the lands below the high water mark" that the title granted to any littoral property owner has always been subject to the public's rights. *Id.* at 677-78.

By requiring the people to confine their activities to the water of Lake Erie, to walk in the water rather than on the shore, the court of appeals frustrated the uses protected by the public trust. Its denial of the navigational, fishing, and recreational use the public has, for generations, made of the lands below the ordinary high water mark of Lake Erie was an abdication of the state's sovereign duty as a trustee. The court of appeals' holding that littoral property owners may exclude citizens from the lands below the ordinary high water mark of Lake Erie therefore must be rejected as a radical departure from the public trust doctrine, as articulated in the decisions of this court and the United States Supreme Court.

Moreover, the court should rule that the public trust doctrine includes the right of the public to travel by foot on the shore below the ordinary high water mark. Such a right is a necessary incident to the use and enjoyment of the water itself for navigational, fishing, and recreational purposes. The court's recognition of such a right will enable future generations to use and enjoy Lake Erie, just as do Ms. Chordas, Ms. Marsh, Mr. Mitchell, and the millions of other citizens who visit Lake Erie annually.

CONCLUSION

For the foregoing reasons, the court should reverse the court of appeals on both propositions of law raised by the conservation appellants. Specifically, the court should hold that the State of Ohio holds Lake Erie in trust for the public up to the line of the lake's ordinary high water mark. The court should also hold that the public trust includes the right of citizen passage along the shore of Lake Erie as a necessary incident to the use and enjoyment of Lake Erie for the traditional public trust purposes of navigation, commerce, and the fishery, and the more modern public trust purposes of recreation and aesthetic enjoyment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellants National Wildlife Federation and Ohio Environmental Council was sent by e-mail to the following counsel of record and parties not represented by counsel on July 12, 2010:

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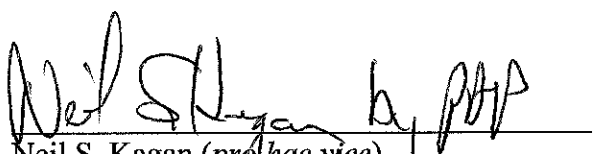

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APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, et al.,	:	Case No. 2009-09-1806
Appellees,	:	
and	:	On Appeal from the Lake County Court of Appeals,
HOMER S. TAFT, et al.,	:	Eleventh Appellate District
Appellees,	:	Court of Appeals Case Nos. 2008-L-007, 2008-L-008
v.	:	Consolidated
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Defendants,	:	
and	:	
STATE OF OHIO,	:	
Appellant,	:	
and	:	
NATIONAL WILDLIFE FEDERATION, et al.,	:	
Appellants.	:	

NOTICE OF APPEAL
OF APPELLANTS NATIONAL WILDLIFE FEDERATION
AND OHIO ENVIRONMENTAL COUNCIL

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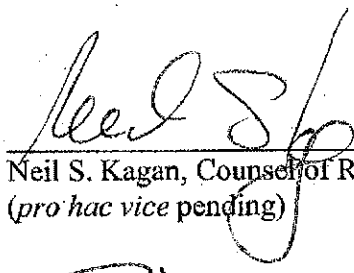
Notice of Appeal
of Appellants National Wildlife Federation
and Ohio Environmental Council

Appellants National Wildlife Federation and Ohio Environmental Council give notice of their discretionary appeal to the Supreme Court of Ohio from the judgment of the Lake County Court of Appeals, Eleventh Appellate District, entered in consolidated Case Nos. 2008-L-007 and 2008-L-008 on August 24, 2009.

This case is one of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal of Appellants National Wildlife Federation and Ohio Environmental Council was sent by ordinary U.S. mail to the following counsel of record and parties not represented by counsel on October 7, 2009:

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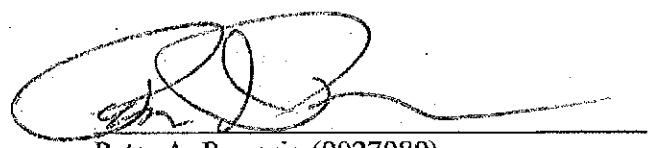

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THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,	:	**O P I N I O N**
	:	**CASE NO. 2008-L-007**
Plaintiffs-Appellees/ Cross-Appellants,	:	
HOMER S. TAFT,	:	
Intervening Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
L. SCOT DUNCAN, et al.,	:	
Intervening Plaintiffs-Appellees,	:	
- vs -	:	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Defendants,	:	
NATIONAL WILDLIFE FEDERATION, et al.,	:	
Intervening Defendants-Appellants/Cross-Appellees.	:	
	:	
STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,	:	**CASE NO. 2008-L-008**
	:	
Plaintiffs-Appellees/ Cross-Appellants,	:	
HOMER S. TAFT, et al.,	:	
Intervening Plaintiffs-Appellees,	:	
- vs -		

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al., :

Defendants, :

STATE OF OHIO, :

Defendant-Appellant/ Cross-Appellee. :

Civil Appeal from the Court of Common Pleas, Case No. 04 CV 001080.

Judgment: Modified and affirmed as modified.

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COLLEEN MARY O'TOOLE, J.

{¶1} The issue before us in this case is one of first impression, concerning title to the lands below the ordinary high water mark of Lake Erie. Lake Erie is a non-tidal, navigable body of water, part of which lies within the territorial boundaries of the state of Ohio. The natural shoreline of Lake Erie extends approximately 262 miles, within the

eight counties of Lucas, Ottawa, Sandusky, Erie, Lorain, Cuyahoga, Lake, and Ashtabula.

{¶2} The state of Ohio, through the Ohio Department of Natural Resources ("ODNR"), has asserted trust ownership rights to the area of land along the southern shore of Lake Erie up to the ordinary high water mark, set at 573.4 feet above sea level by the U.S. Army Corps of Engineers in 1985. The Ohio Lakefront Group,[1] ("OLG"), along with several of its members, many of whom own property adjoining Lake Erie, dispute the authority of ODNR to assert these trust ownership rights without first acquiring the property in question through ordinary land appropriation proceedings. The validity of the ordinary high water mark, set at 573.4 feet International Great Lakes Datum (IGLD)(1985) is also disputed, the argument being that the ordinary high water mark is a boundary that must be determined on a case-by-case basis with respect to each parcel bordering the lake. Further, the ODNR's authority to require landowners to lease land from the state of Ohio when that land is already contained within the legal description in their respective deeds is disputed.

{¶3} **Procedural History**

{¶4} May 28, 2004, OLG, Robert Merrill, and other individuals owning real property abutting Lake Erie, filed a lawsuit (Case No. 04CV001080) in the Lake County Court of Common Pleas against ODNR, ODNR's director, and the state of Ohio, for declaratory judgment, mandamus, and other relief. Immediately thereafter, on said date, Homer S. Taft, L. Scot Duncan and Darla J. Duncan filed a complaint (Case No.

1. Ohio Lakefront Group is a duly formed non-profit corporation which represents owners of littoral property on Lake Erie.

04CV001081) in the Lake County Court of Common Pleas against the same defendants, containing nearly identical factual allegations and seeking similar relief.

{¶5} July 2, 2004, an amended complaint seeking certification as a class action and for declaratory judgment, mandamus, and other relief was filed in Case No. 04CV001080. August 12, 2004, the trial court consolidated Case Nos. 04CV001080 and 04CV001081.

{¶6} February 23, 2005, ODNR and the state of Ohio filed an answer, a counterclaim, and a cross-claim against the United States of America and the United States Army Corps of Engineers. The counterclaim sought a declaration that the state of Ohio owns and holds in trust for the people of Ohio the lands and water of Lake Erie up to the natural location of the ordinary high water mark within the territorial boundaries of the state, subject only to the paramount authority retained by the United States for the purposes of commerce, navigation, national defense, and international affairs. Also, a declaration was sought that the state of Ohio has owned and held those lands and waters in trust since statehood.

{¶7} This case was removed to the United States District Court for the Northern District of Ohio on March 28, 2005, on the motion of the United States of America and the United States Army Corps of Engineers. The federal case was dismissed on April 14, 2006, when the federal district court found that neither the federal defendants nor the federal questions were properly before it. Consequently, the case was remanded to the court of common pleas.

{¶8} **Class Certification**

{¶9} June 8, 2006, the parties filed a notice of joint stipulation to class certification on count one of the first amended complaint, which sought a declaration regarding the extent of the state of Ohio's property rights. Counts two and three of the complaint, which deal with constitutional takings issues, were reserved pending the outcome of the declaratory judgment action. The trial court certified the following group of persons as a class for purposes of pursuing a declaratory judgment action:

{¶10} "'*** all persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property[1] bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio' ***. To the extent that governmental entities are included in the class, they are included solely in their proprietary capacity as property owners and not for any purpose or capacity implicating their governmental authority or jurisdiction.

1. "The parties have stipulated that 'upland property' is defined as real property bordering a body of water and that, in Ohio, 'littoral property' is defined as upland property that borders an ocean, sea, lake, or a bay of any of these water bodies, as opposed to 'riparian property' which is defined as upland property that borders a river, stream, or other such watercourse."

{¶11} The class certification order found the following three questions of law common to the class:

{¶12} "(1) What constitutes the furthest landward boundary of the 'territory' as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms 'southerly shore' in R.C. 1506.10, 'waters of Lake Erie' in R.C. 1506.10, 'lands presently underlying the waters of Lake Erie' in R.C. 1506.11,

'lands formerly underlying the waters of Lake Erie and now artificially filled' in R.C. 1506.11, and 'natural shoreline' in R.C. 1506.10 and 1506.11.

{¶13} "(2) If the furthest landward boundary of the 'territory' is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such 'territory' as proprietor in trust for the people of the State.

{¶14} "(3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the 'territory.'"

{¶15} **Intervenors**

{¶16} Thereafter, the trial court allowed two groups to intervene: (1) Homer Taft and L. Scot Duncan, members of the class, and (2) the National Wildlife Federation ("NWF") and the Ohio Environmental Council ("OEC"), environmental organizations whose purpose is to protect the rights of their members to make recreational use of the shores and waters of Lake Erie. NWF and OEC assert that the state holds the area of the "territory" of the waters of Lake Erie in trust for the public up to the ordinary high water mark.

{¶17} February 13, 2007, the city of Cleveland filed a motion to opt out of the class, which motion was held in abeyance pending further order of the trial court.

{¶18} **Overview of Motions for Summary Judgment**

{¶19} A motion for summary judgment was filed on behalf of the state of Ohio, Department of Natural Resources, its director, and the state, by the Ohio Attorney General. In this motion, the state advanced three arguments:

{¶20} "(1) As a matter of law, the furthest landward boundary of the 'territory' as that term appears in R.C. 1506.10 and 1506.11, is the ordinary high water mark, and the State of Ohio holds title to all such 'territory' as proprietor in trust for the people of the state;

{¶21} "(2) The furthest landward boundary of the 'territory' is the ordinary high water mark as a matter of law, and that line may be located at the present time using the elevation of 573.4 feet IGLD (1985); and

{¶22} "(3) The rights and responsibilities of littoral owners in their upland property, as well as the respective rights and responsibilities of the federal government, the State of Ohio, the public, and the littoral owners in the 'territory,' have long been settled in state and federal law, as has the hierarchy of those rights."

{¶23} In their motion for summary judgment, NWF and OEC concurred with and affirmatively adopted the state's position.

{¶24} OLG asserted that under Ohio's case law, public trust rights in Lake Erie, extend no farther than the actual waters and those public rights do not extend to the shores or uplands. Further, OLG maintained that "shoreline" cannot be defined as the ordinary high water mark, for this boundary would run afoul of case law, opinions authored by the Ohio Attorney General, ODNR's own rules as set out in the Ohio Administrative Code, and would violate the rights of littoral property owners. OLG alleged that in locating the ordinary high water mark, ODNR unilaterally adopted the Army Corps of Engineers' estimate of 573.4 feet IGLD (1985), which the Corps adopted for regulatory purposes unrelated to the establishment of boundaries between private property and public trust property.

{¶25} In their motion for summary judgment, Taft and Homer argued that in determining this case, the trial court was required to consider the historical record, which was extensively set forth in their brief and attachments.

{¶26} **Trial Court's Ruling on Motions for Summary Judgment**

{¶27} In ruling on the motions for summary judgment, the trial court stated:

{¶28} "(1) each owner of Ohio real estate that touches Lake Erie owns title lakeward as far as the water's edge; (2) if the lakeside owner's deed contains a legal description that extends into the lake beyond the water's edge, then that legal description is hereby reformed so that the legal description ends at the water's edge; (3) likewise, 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, but no farther [sic]. With respect to Lake Erie, this is the boundary of the 'territory' that is subject to the regulatory authority of the State of Ohio's Department of Natural Resources; and (4) 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."

{¶29} The trial court further concluded:

{¶30} "Defendants-Respondents and Intervening Defendants have failed, as a matter of law, to show that the *landward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary High Water Mark of 573.4 IGLD (1985), and Plaintiffs-Relators and Intervening Plaintiffs have failed to show that the *lakeward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary Low Water Mark. The court declares that the law of Ohio is that the proper definition of

the boundary line for the public trust territory of Lake Erie is the water's edge, wherever that moveable boundary may be at any given time, and that the location of this moveable boundary is a determination that should be made on a case-by-case basis.

{¶31} "The court's decision does not attempt to list or comprehensively define all of the littoral rights of landowners of Ohio property adjoining Lake Erie, preferring instead to have those rights determined on a case-by-case basis." (Emphasis sic.)

{¶32} **Standard of Review**

{¶33} In order for a motion for summary judgment to be granted, the moving party must prove:

{¶34} "***(1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶35} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, *written admissions*, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). (Emphasis added.) Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.*, (1986), 477 U.S. 242, 248.

{¶36} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E), provides:

{¶37} "When a motion for summary judgment is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." (Emphasis added.)

{¶38} Summary judgment is appropriate pursuant to Civ.R. 56(E), if the nonmoving party does not meet this burden.

{¶39} Appellate courts review a trial court's grant of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116.

{¶40} **Ohio's Standing**

{¶41} Before considering the issues, we must ascertain whether the state of Ohio has standing to participate in this appeal. We conclude it does not.

{¶42} On July 16, 2007, ODNR, acting with the consent and direction of Governor Strickland, filed a response to the then pending motions for summary judgment stating that ODNR "will discharge its statutory duties and will adopt or enforce

administrative rules and regulatory policies with the assumption that the lakefront owners' deeds are presumptively valid." In addition, ODNR asserted that while it would still require construction permits for structures that may impact coastal lands, it "no longer require[d] property owners to lease land contained within their presumptively valid deeds[,]" and that it "must and should honor the apparently valid real property deeds of the plaintiff-relator lakefront owners unless a court determines that the deeds are limited by or subject to the public's interest in those lands or are otherwise defective or unenforceable."

{¶43} "'Standing' is defined at its most basic as '(a) party's right to make a legal claim or seek judicial enforcement of a duty or right.' Black's Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, ***. '"(T)he question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" (Citations omitted.) *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, ***, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, ***, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, ***, and *Flast v. Cohen* (1968), 392 U.S. 83, ***." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, at ¶27. (Parallel citations omitted.)

{¶44} The Ohio Attorney General may only act at the behest of the governor, or the General Assembly. R.C. 109.02. In this case, the attorney general represented the

state due to the activities of the ODNR, which department is under the authority of the governor, in whom the constitution vests the "supreme executive power." Section 5, Article III, Ohio Constitution. The governor has ordered ODNR to cease those activities that made it a party to the action. We find no authority for the attorney general to prosecute this matter on his own behalf. We conclude that the state of Ohio no longer has standing in this matter, and order its assignments of error and briefs stricken.

{¶45} **Appellants'/Cross-Appellees' Assignments of Error**

{¶46} NWF and OEC[2] assert the following assignments of error:

{¶47} "[1.] The trial court erred in holding that the public trust in Lake Erie is demarcated by the line the water of the lake touches at any given time.

{¶48} "[2.] The trial court erred in holding that the Ohio Department of Natural Resources may not use the IGLD elevation to establish the high water mark of Lake Erie.

{¶49} "[3.] The trial court erred in holding that littoral property owners may exclude the people from using the lands below the high water mark of Lake Erie."

{¶50} **OLG's and Taft's Cross-Assignments of Error:**

{¶51} OLG avers the following cross-assignments of error:

{¶52} "[1.] The Trial Court Erred in Finding that the Boundary of the Territory is Not the Low Water Mark.

{¶53} "[2.] The Trial Court Erred In Reforming All Littoral Property Deeds to the Water's Edge."

{¶54} Taft asserts the following cross-assignments of error:

---

2. NWF and OEC filed a joint brief in the instant case.

{¶55} "[1.] THE [TRIAL] COURT ERRED IN PERMITTING THE INTERVENTION OF [NWF] AND [OEC] AS DEFENDANTS AND COUNTERCLAIMANTS, AS THEY PRESENTED NO JUSTICIABLE CLAIM AGAINST ANY PARTY, AND THEIR APPEAL SHOULD BE DISMISSED.

{¶56} "[2.] THE [TRIAL] COURT ERRED IN REFORMING THE DEEDS OF PRIVATE PROPERTY OWNERS[.]

{¶57} "[3.] THE [TRIAL] COURT ERRED IN FAILING TO DECLARE THE LITTORAL RIGHTS OF PRIVATE PROPERTY OWNERS ALONG LAKE ERIE."

{¶58} **Applicable Law**

{¶59} Prior to analyzing the parties respective assignments and cross-assignments of error, a brief summary of Ohio case law, statutes, rules and regulations regarding the rights of littoral property owners along Lake Erie is in order. For a complete history of the development of littoral property rights in the Great Lakes states, we can only advise the reader to study the immensely scholarly opinion of the trial court, attached hereto as an appendix.

{¶60} We commence with the lead case of *Sloan v. Biemiller* (1878), 34 Ohio St. 492, a quiet title action regarding property on Cedar Point. The Supreme Court of Ohio held, at paragraph four of the syllabus:

{¶61} "Where no question arises in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, *the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to*

the line at which the water usually stands when free from disturbing causes." (Emphasis added.)

{¶62} The *Sloan* court derived this definition from the opinion of the Illinois Supreme Court in *Seaman v. Smith* (Ill. 1860), 24 Ill. 521, and quoted that case with approbation in the body of its opinion. *Sloan* at 512-513. We further note that none of the parties to this hard fought contest, nor we ourselves, have found any other syllabus law of the Supreme Court of Ohio defining *where* littoral owners' property extends relative to Lake Erie. Consequently, we find this extended quote from *Seaman* illuminating:

{¶63} "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 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.

{¶64} "A grant giving the ocean or a bay as the boundary, by the common law, carries it down to ordinary high water mark. *** 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.

{¶65} "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, But (sic) it should be at that line where the water usually stands when unaffected by any disturbing cause." *Seaman*, supra, at 524-525. (Citation omitted.)

{¶66} In *State v. Cleveland & Pittsburgh RR. Co.* (1916), 94 Ohio St. 61, the Supreme Court of Ohio acknowledged the "public trust" doctrine – i.e., that the state holds the waters and subaqueous lands of Lake Erie in perpetual trust for the people of the state, while littoral owners retain a right to "wharf out" from the shore to the lake's navigable waters. Cf. id., at 79-83. However, the court did not define where the public trust physically commenced, merely using the term "shore." Id. at 68, 79.

{¶67} The *Cleveland & Pittsburgh* court further called upon the legislature to codify the public trust doctrine, which the General Assembly did the following year, with

passage of the Fleming Act, presently codified at R.C. Chapter 1506. However, present R.C. 1506.10, defining the state's rights in Lake Erie, merely states that they commence at the lake's "southerly shore" or "natural shoreline." R.C. 1506.11(A), defining the extent of the public trust "Territory," again merely refers to the "natural shoreline."

{¶68} In *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, the Supreme Court of Ohio determined that the Fleming Act, as supplemented by the Abele Act of 1925, did not alter the common law of accretion as it applied to littoral property owners along Lake Erie. Id. at 11-13. The court consistently used the term "shore line," without further description, in referencing where the public trust territory commenced. Id. at 9, 11, 12.

{¶69} Finally, in *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, the Supreme Court of Ohio was presented with a dispute regarding whether construction of the east shoreway in Cleveland, Ohio, impinged upon the rights of certain littoral property owners. Id. at 316-321. Throughout the body of the opinion, the court generally used the term "natural shore line" to describe where the property of littoral owners cease, and the public trust in Lake Erie commences. Id. at 317, 319-322, 334, 337, 339. Notably for the matters at issue herein, the court, in describing the briefs filed on the case, states, at 322:

{¶70} "There is a full discussion of the common-law rule to the effect that the title to subaqueous and marginal lands of tidal and navigable waters in Great Britain is in the crown, that the law with reference to tidal waters in Great Britain applies not only to tidal waters in the United States but likewise is applicable to the waters of Lake Erie, and that

the title to subaqueous and filled-in lands *beyond high water mark* is in the state bordering upon such waters." (Emphasis added.)

{¶71} Further, at 337, the *Squire* court observed: "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."

{¶72} Moreover, while we recognize that an opinion authored by the Attorney General is persuasive authority and not binding on this court, *Gen. Dynamics Land Sys., Inc. v. Tracy* (1998), 83 Ohio St.3d 500, 504, the Ohio Attorney General has issued an opinion regarding this matter, which concludes, "[t]he land that lies above the natural *shoreline* of Lake Erie belongs to the littoral owner." 1993 Ohio Atty.Gen.Ops. No. 93-025, at 15. The attorney general further remarked: "The 'shoreline' is '(t)he line marking the edge of a body of water.' *The American Heritage Dictionary* 1133 (2d college ed. 1985). Naturally, the shoreline of a body of water is in a constant state of change." Id. at 11.

{¶73} Further, the Ohio Administrative Code, Chapter 1501-6, "Lease of Lake Erie Submerged Lands," defines the term "shoreline" as "the line of intersection of lake Erie with the beach or shore." OAC 1501-6-10(U). "Shore" is defined as the "land bordering the lake[,]" OAC 1501-6-10(T) and "beach" means "[a] zone of unconsolidated material that extends landward from the shoreline to the toe of the bluff or dune. Where no bluff or dune exists, the landward limit of the beach is either the line of permanent vegetation or the place where there is a marked change in material or physiographic form." OAC 1501-6-10(E).

{¶74} Having summarized the leading authorities bearing on the questions at hand, we turn to the assignments and cross-assignments of error.

{¶75} **Assignments of Error of NWF and OEC**

{¶76} By their first assignment of error, NWF and OEC assert the trial court erred in applying dictionary definitions to determine what the "natural shoreline" is under R.C. 1506.10 and 1506.11(A). The first issue they raise is that federal law requires that the Lake Erie shoreline be defined as the high water mark. In support of this contention, they cite to the decision of the United States Supreme Court in *Shively v. Bowlby* (1894), 152 U.S. 1, recognizing both the equal-footing doctrine and the public trust doctrine, for the proposition that states upon entering the Union, automatically receive land beneath navigable waters below the high water mark.[3]

{¶77} We respectfully reject this argument. The *Shively* court merely noted that the public trust doctrine, in England, set the border of the crown's trust for the benefit of the public at the high water mark. The *Shively* court specifically recognized that state law determined the scope of the public trust in land beneath navigable waters in this country.

{¶78} Next, NWF and OEC turn to federal statutory law. Citing to the Submerged Lands Act ("SLA"), 43 U.S.C.S. 1301-1315, they maintain that Congress confirmed a uniform boundary at the ordinary high water mark for all states. Specifically, they refer to 43 U.S.C.S 1311(a), which provides:

{¶79} "*** [T]itle to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands

3. The "equal-footing" doctrine holds that those states entering the Union following the establishment of the United States have the same rights as those originally forming the Union.

and waters, and *** the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof[.]"

{¶80} For non-tidal waters, "lands beneath navigable waters" includes "lands and water *** up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction[,]" 43 U.S.C.S. 1301(a)(1), and "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined[.]" 43 U.S.C.S. 1301(a)(3).

{¶81} We find this reliance upon the SLA to be misplaced. As the United States Supreme Court has observed, the effect of the SLA "was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 372, fn. 4. Further, state law governs the determination of ownership in the land under the Act, as evidenced by the provision "'under the law of the respective States in which the land is located *** [.]'" *California ex rel. State Lands Comm. v. United States* (1982), 457 U.S. 273, 288. See, also, *Corvallis Sand & Gravel Co.*, at 372, fn. 4 (discussing *Bonelli Cattle Co. v. Arizona* (1973), 414 U.S. 313).

{¶82} This issue lacks merit.

{¶83} By their second issue under the first assignment of error, NWF and OEC argue that, in defining the public trust territory in Lake Erie as commencing at anything

below the high water mark, land is removed from the public trust, which is strictly forbidden. See, e.g., *Cleveland & Pittsburgh RR. Co.*, supra, at paragraph six of the syllabus. In support of this, they cite to the Fleming Act, and the decisions of the Supreme Court of Ohio in *Cleveland & Pittsburgh RR. Co.*, and *Squire*. They contend that these decisions specifically incorporate the United States Supreme Court's decision in *Shively*, recognizing the English doctrine of the public trust in tidal waters, as well as that court's decision in *Illinois Cent. RR. Co. v. Illinois* (1892), 146 U.S. 387, 452, making the public trust doctrine applicable to the non-tidal waters of the Great Lakes. Consequently, they argue that any interpretation of the Fleming Act requires the courts of Ohio to recognize the high water mark as the boundary of the public trust in Lake Erie.

{¶84} We respectfully reject this argument. Just as the public trust in Lake Erie cannot be abandoned, it cannot be improperly extended in violation of littoral property owners' rights. The *Shively* court specifically recognized that state law defines the boundary of the public trust in navigable waters. We find that any reference by the Supreme Court of Ohio to the "high water mark" acting as the boundary of the public trust in navigable waters in *Cleveland & Pittsburgh RR. Co.*, and *Squire*, is simply a reference to the history of the public trust doctrine, as imported from English law – not a finding as to the boundary of that trust in Lake Erie.

{¶85} The second issue lacks merit, as does the assignment of error.

{¶86} By their second assignment of error, NWF and OEC protest the trial court's determination that ODNR cannot use the IGLD to establish the high water mark for Lake Erie.

{¶87} As ODNR is no longer enforcing this policy, we find this assignment of error moot.

{¶88} By their third assignment of error, NWF and OEC contend the trial court erred in determining that littoral property owners may exclude the public from lands below the high water mark of Lake Erie. By his third cross-assignment of error, Taft asserts the trial court erred in failing to declare the rights of littoral property owners. As the matters are interrelated, for purposes of brevity, we consider them together. We respectfully find each to be without merit.

{¶89} Nearly 130 years ago, the Supreme Court of Ohio observed that littoral owners have the right to exclude the public from their property. *Sloan*, supra. We appreciate and respect the fact that, in Ohio, the public has broad access to navigable waters, including "all legitimate uses, be they commercial, transportational, or recreational." *State ex rel. Brown v. Newport Concrete Co.* (1975), 44 Ohio App.2d 121, 128. See, also, R.C. 1506.10 and 1506.11(G). However, contrary to NWF's and OEC's assertion, the judgment of the trial court does not abolish the rights of the public to walk along Lake Erie. In fact, the public retains the same rights to walk lakeward of the shoreline along Lake Erie, but these rights have always been limited to the area of the public trust (i.e., on the lands under the waters of Lake Erie and lakeward of the shoreline). Therefore, the public does not interfere with littoral property rights when their recognized, individual rights are exercised within the public trust; that is, lakeward of the shoreline as defined herein.

{¶90} The littoral owner has certain well-defined rights incident to the ownership of shore land. Littoral owners may exercise these rights upon the soil and navigable

waters lakeward of the shoreline of Lake Erie within the territorial boundaries of the state, subject to regulation and control by the federal, state and local governments. Those rights include: (1) the right to wharf out to navigable waters to the point of navigability for the purposes of navigation; (2) the right of access to the navigable waters of Lake Erie; and (3) the right to make reasonable use of waters in front of or flowing past their lands.

{¶91} In its judgment entry, the trial court recognized the above enumerated rights of littoral owners. Additionally, the trial court noted that it had not been "asked to define categorically all of the littoral rights that are recognized under Ohio law for land adjoining Lake Erie. Accordingly, notwithstanding the argumentation of the parties, the court declines to make a comprehensive, categorical declaration of what those littoral rights are with respect to all members of the class. Such questions are probably best left to the resolution of specific disputes involving individual parties who are asserting such littoral rights with respect to a specific parcel of land, according to specific deed language, and pertaining to a specific area of the Lake Erie coastline."

{¶92} The trial court generally recognized the special rights that littoral owners possess, incident to owning shore land. However, it appreciated that the application of such rights to a particular littoral owner or parcel of land would best be resolved on a case-by-case basis. The trial court could not conceivably anticipate every possible scenario with respect to all members of the class. We find that the trial court properly declared the rights of the littoral owners, while acknowledging that individual members of the class may have to adjudicate a specific, individualized question.

{¶93} NWF's and OEC's third assignment of error, as well as Taft's third cross-assignment of error, lack merit.

{¶94} **Cross-Assignments of Error of OLG**

{¶95} We next turn to OLG's first cross-assignment of error, which states: "[t]he trial court erred in finding that the boundary of the territory is not the low water mark."

{¶96} OLG first argues that common usage dictates when interpreting the term "natural shoreline." The 1916 edition of Webster's New International Dictionary, relied upon by the trial court, defined "shoreline" as the "'line of contact of a body of water with the shore.'" OLG states that based upon the 1916 Webster's New International Dictionary, "shore" is defined as the land between low and high water marks. As such, because the "shoreline" is the line separating the water and the shore, and the "shore" describes the land between high and low water marks, the common meaning of the "shoreline" must be the low water mark. We find OLG's analysis to be flawed.

{¶97} First, the trial court found that the terms "shore" and "beach" are synonyms in the context of the issues in the instant case and, as a matter of law, they mean "'the land between low and high water marks.'" Since no party objected and we find this definition to be consistent with other dictionary definitions, as well as definitions adopted by Ohio courts and administrative agencies, we hold that "shore" is "the land between low and high water marks."[4] However, this does not mean that the boundary of the territory for purposes of the public trust doctrine should be set at the low water

4. See, e.g., *Busch v. Wilgus* (Aug. 21, 1922), 1922 Ohio Misc. LEXIS 272, at 14, stating "[t]he term 'shore' includes and designates the land lying between the high and low water mark[;]" OAC 1501-6-10(T) defining "shore" as "the land bordering the lake." Black's Law Dictionary defines "shore" as the "[l]and lying between the lines of high- and low-water mark; lands bordering on the shores of navigable waters below the line of ordinary high water." Black's Law Dictionary (8 Ed.2004) 1412.

mark. Instead, shoreline is the line of actual physical contact by a body of water with the land *between the high and low water mark* undisturbed and under normal conditions. See, e.g., *Sloan*, supra, at paragraph four of the syllabus.

{¶98} In addition, OLG cites to *Wheeler v. Port Clinton* (Sept. 16, 1988), 6th Dist. No. OT-88-2, 1988 Ohio App. LEXIS 3702, and *Mitchell v. Cleveland Elec. Illuminating Co.* (1987), 30 Ohio St.3d 92, to support the proposition that the natural shoreline is the low water mark. However, we find *Wheeler* and *Mitchell* to be inapposite to the instant situation.

{¶99} In *Wheeler*, the appellant, a swimmer who sustained injuries while swimming off of City Beach in Port Clinton, Ohio, sought review of the trial court's decision in granting the city's motion for summary judgment. *Wheeler*, supra, at 1-2. In reviewing the decision of the trial court, the Sixth District Court of Appeals stated, "[t]he north territorial boundary of Port Clinton extends to, but not beyond, the Lake Erie shoreline." Id. at 3. Although OLG attempts to utilize this decision as one that supports the low water mark as the boundary of the territory, we disagree. As we have previously concluded, the shoreline is not the low water mark. Furthermore, the main issue before the *Wheeler* court was whether the city was liable for appellant's injuries, not the definition of the public trust boundary.

{¶100} Similar to *Wheeler*, the issue before the court in *Mitchell* was not the definition of the public trust doctrine. In *Mitchell*, "[t]he sole question before [the Supreme Court of Ohio was] whether [the] appellee's opening statement and the allegations of the amended complaint state a cause of action against Avon Lake." *Mitchell*, supra, at 93. In its discussion of whether Avon Lake owed a duty to

decedents, the Supreme Court observed that it was "undisputed that Avon Lake's territorial limits extend only to the low water line of Lake Erie." Id. at 94. In making this statement, the Supreme Court was merely observing that the parties chose not to dispute the low water mark as the proper boundary; it clearly was not a legal conclusion of the Court.

{¶101} We, therefore, decline to adopt the low water mark to be the boundary of the public trust territory.

{¶102} Since OLG's second and Taft's second cross-assignments of error are interrelated, we consider them in a consolidated analysis.

{¶103} We agree with OLG's and Taft's assertion that the trial court erred in reforming the deeds. First, in reforming the deeds, the trial court went beyond the scope of the class certification. Further, since this issue was not before the trial court, the parties were not afforded the opportunity to argue their positions for the trial court's consideration. Reformation of the littoral owner's deeds could potentially have an impact on title insurance policies and the littoral owners' rights established by the Fleming Act or other legislation. By reforming all of the littoral owners deeds to the water's edge, all parties were deprived of the opportunity to be notified of each other's arguments, and to respond to those arguments, which is contrary to traditional notions of due process. As a result, we vacate this portion of the trial court's judgment entry.

{¶104} Taft's First Cross-Assignment of Error

{¶105} As Taft's first cross-assignment of error, he alleges NWF and OEC presented no justiciable claim against any party and, thus, the trial court erred in permitting their intervention.

{¶106} Ohio courts should liberally construe Civ.R. 24 in favor of intervention. *Indiana Ins. Co. v. Murphy*, 165 Ohio App.3d 812, 2006-Ohio-1264, at ¶5. The granting or denial of a motion to intervene rests with the discretion of the trial court and will not be disturbed on appeal absent the showing of an abuse of discretion. *Peterman v. Pataskala* (1997), 122 Ohio App.3d 758, 761. (Citation omitted.) "'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶107} Pursuant to Civ.R. 24, there are two avenues of intervention: intervention of right and permissive intervention. Civ.R. 24(A)(2) sets forth the relevant requirements for intervention of right:

{¶108} "Upon timely application anyone shall be permitted to intervene in an action: *** (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

{¶109} To be entitled to intervene as of right, pursuant to Civ.R. 24(A), the applicant must demonstrate: (1) the application is timely; (2) an interest in the property or transaction that is the subject of the suit; (3) the disposition of the action may impair or impede his ability to protect that interest; and (4) the existing parties do not adequately protect that interest. *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 352. (Citations omitted.)

{¶110} In his brief, Taft alleges NWF and OEC failed to demonstrate a "legally protectable" interest in the real estate boundary in question. We disagree.

{¶111} "Civ.R. 24(A) requires that the applicant claim an interest relating to the property or transaction which is the subject of the action. While the claim may be shown to be without merit, *** it is not required that the interest be proven or conclusively determined before the motion is granted." *Blackburn* at 354. (Internal citation omitted.)

{¶112} According to the affidavit of David B. Strauss, attached to NWF and OEC's brief in support of the motion to intervene, NWF is a non-profit organization whose mission is to conserve natural resources and the wildlife that depends on such resources for the use and aesthetic enjoyments of its members. NWF is comprised of approximately 921,922 members nationwide, approximately 303,997 members in the states bordering the Great Lakes, and approximately 98,114 members in Ohio alone.

{¶113} According to the affidavit of Vicki Deisner, also attached to the brief in support of the motion to intervene, OEC is an Ohio, non-profit corporation, whose purpose is to preserve and protect the environment of the state of Ohio and to represent the interests of its members across the state regarding environmental and conservation issues. OEC is comprised of approximately 2,135 individual members and 113 group members that represent thousands of citizens throughout the state of Ohio.

{¶114} As further stated in their brief in support of the motion to intervene, the NWF and OEC sought to intervene since the relief requested by appellant, if granted, would extinguish the rights of its members to make recreational use of the shore along

Lake Erie below the ordinary high water mark and would have a direct and substantial adverse impact upon the recreational use and aesthetic enjoyments of such shorelands.

{¶115} Therefore, by fulfilling the requirements as set forth under Civ.R. 24(A) and, further, since it has been established that Ohio courts should liberally construe Civ.R. 24, we conclude the trial court was correct in granting NWF's and OEC's motion to intervene.

{¶116} The second type of intervention, permissive, is governed by Civ.R. 24(B), which states:

{¶117} "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

{¶118} We further conclude that NWF and OEC were permitted to intervene under Civ.R. 24(B), permissive intervention, since they demonstrated their defense and counterclaim were both legally and factually related to the claims of OLG. In addition, it is evident that NWF and OEC's intervention did not "unduly delay or prejudice the adjudication of the rights of the original parties." Civ.R. 24(B).

{¶119} Taft also argues that the counterclaim of NWF and OEC failed to state a claim upon which relief could be granted. Civ.R. 12(B) provides, in pertinent part:

{¶120} "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: *** (6) failure to state a claim upon which relief can be granted ***[.]"

{¶121} Save for the exceptions stated in Civ.R. 12(H), a party generally waives all defenses and objections not properly raised by motion, a responsive pleading, or amendment allowed under Civ.R. 15(A). Although Taft alleges he asserted a Civ.R. 12(B)(6) claim in his responsive pleading to NWF's and OEC's counterclaim, a review of the record in this case reveals that this responsive pleading is not part of our record on appeal, for it was only filed in Case No. 04CV001081, which is not pending before this court. Therefore, we cannot consider it on appeal. App.R. 9(A).

{¶122} Based on the foregoing, Taft's first cross-assignment of error is without merit.

{¶123} **Public Trust Boundary is the Water's Edge**

{¶124} In *Sloan*, the Supreme Court of Ohio affirmed private property rights in the "shores" of Lake Erie and held the boundary between public and private rights is, "the line at which the water usually stands when free from disturbing causes." Id. at paragraph four of the syllabus.

{¶125} As we have identified, the Supreme Court of Ohio recognized the public trust doctrine by holding, "[t]he title of the land *under the waters of Lake Erie* within the

limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted." *Cleveland & Pittsburgh RR. Co.*, at paragraph three of the syllabus. (Emphasis added.) As a result of the Supreme Court's decision, the Fleming Act, now codified at R.C. Chapter 1506, was enacted. In *Squire*, the Supreme Court of Ohio further spoke of the title to the lands under the waters of Lake Erie, stating:

{¶126} "The state of Ohio holds the title to the *subaqueous* soil of Lake Erie, which borders the state, as trustee for the public for its use in aid of navigation, water commerce or fishery, and may, by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use." Id., at paragraph two of the syllabus. (Emphasis added.) The *Squire* court also declared that littoral owners of the upland do not have title beyond the *natural shoreline*, for they only have the right of access and wharfing out to navigable waters.

{¶127} Based upon its decisions, the Supreme Court has identified that the waters, and the lands under the waters of Lake Erie, when submerged under such waters, are subject to the public trust, while the littoral owner holds title to the natural shoreline. As we have identified, the shoreline is the line of contact with a body of water with the land *between the high and low water mark.* Therefore, the shoreline, that is, the actual water's edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled in lands privately held by littoral owners.

{¶128} By setting the boundary at the water's edge, we recognize and respect the private property rights of littoral owners, while at the same time, provide for the public's

use of the waters of Lake Erie and the land submerged under those waters, when submerged. The water's edge provides a readily discernible boundary for both the public and littoral landowners.

{¶129} Based on principle, authority, and considerations of public policy, we determine that the waters and submerged bed of Lake Erie when under such waters is controlled by the state and held in public trust, while the littoral owner takes fee only to the water's edge.

{¶130} Conclusion

{¶131} Based on the above analysis, the Ohio Attorney General's assignments of error are stricken. NWF's and OEC's first and third assignments of error lack merit, while the second assignment is moot. OLG's first cross-assignment of error lacks merit, as do Taft's first and third cross-assignments of error. OLG's second cross-assignment of error, as well as Taft's, have merit to the extent indicated. The judgment of the Lake County Court of Common Pleas is modified to vacate the portion of the judgment concerning the amendment of the littoral owner's deed, and the judgment of the Lake County Court of Common Pleas is hereby affirmed as modified.

{¶132} It is the further order of this court that the parties share equally costs herein taxed.

{¶133} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/ Dissenting Opinion.

Appendix attached.

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶134} I respectfully concur in part with the majority opinion as to the overall disposition of the case; however, I dissent in part as it pertains to the disposition of the issue of standing.

{¶135} At the outset, I would note a concern and the need for caution about issuing rulings on matters not raised by any party, particularly when the parties have not been given an opportunity to brief those issues. While App.R. 12(A)(2) allows an appellate court to consider issues not briefed by the parties, I believe the better rule is "*** when a court of appeals chooses to consider an issue not briefed by the parties, the court should notify the parties and give them an opportunity to brief the issue." *State v. Blackburn*, 11th Dist. No. 2001-T-0052, 2003-Ohio-605, at ¶45, citing *State v. Peagler* (1996), 76 Ohio St.3d 496, 499, fn.2.

{¶136} The state of Ohio is a named defendant. The majority cites R.C. 109.02 for the proposition that the attorney general may "only act at the behest of the governor, or the General Assembly." I do not agree with that reading of the statute. The statute states: "[w]hen *required* by the governor or the general assembly, the attorney general *shall* appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested." R.C. 109.02. (Emphasis added.) This is language of inclusion, not of exclusion. There is nothing that *prohibits* the attorney

general from appearing and representing the state when suit has been filed against it. I would not suggest the attorney general needs an order from the governor or legislation from the General Assembly to defend the state in litigation without first giving the attorney general the full opportunity to brief the issue. It is, quite simply, ground that does not need to be plowed in this case. As acknowledged by the majority, it is clear the citizens of the state of Ohio have an interest in the public trust portion of the waters of Lake Erie. Consequently, they are entitled to representation.

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

JUDGMENT ENTRY

CASE NO. 2008-L-007

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,

Plaintiffs-Appellees/
Cross-Appellants,

HOMER S. TAFT,

Intervening Plaintiff-Appellee/
Cross-Appellant,

L. SCOT DUNCAN, et al.,

Intervening Plaintiffs-Appellees,

-vs-

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,

Defendants,

NATIONAL WILDLIFE FEDERATION, et al.,

Intervening Defendants-
Appellants/Cross-Appellees.

CASE NO. 2008-L-008

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,

Plaintiffs-Appellees/
Cross-Appellants.

HOMER S. TAFT, et al ,

Intervening Plaintiffs-Appellees,

-vs-

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,

Defendants,

STATE OF OHIO,

Defendant-Appellant/
Cross-Appellee.

For the reasons stated in the opinion of this court, the Ohio Attorney General's assignments of error are stricken. National Wildlife Federation's and Ohio Department of Natural Resource's first and third assignments of error lack merit, while the second assignment is moot. The Ohio Lakefront Group's first cross-assignment of error lacks merit, as Homer S Taft's first and third cross-assignments of error. Ohio Lakefront Group's second cross-assignment of error, as well as Homer S. Taft's have merit to the extent indicated. The judgment of the Lake County Court of Common Pleas is modified to vacate the portion of the judgment concerning the amendment of the littoral owner's deed, and the judgment of the Lake County Court of Common Pleas is hereby affirmed as modified

It is the further order of this court that the parties share equally costs herein taxed.

The court finds there were reasonable grounds for this appeal

JUDGE COLLEEN MARY O'TOOLE

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DIANE V. GRENDELL, J., concurs,
TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/ Dissenting Opinion