IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, *et al.*, Plaintiffs-Appellees, And HOMER S. TAFT, et al., Intervening Plaintiffs/ Cross-Appellants, vs. STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.*, Defendants-Appellants, And STATE OF OHIO, Defendant-Appellant/ Cross-Appellee, And NATIONAL WILDLIFE FEDERATION, *et al.*, Intervening Defendants/ Appellants and Cross-Appellees.	CASE NO. 2009-1806 On Appeal from the Lake County Court of Appeals, Eleventh Appellate District Court of Appeals Case Nos. 2008-L-007, 2008-L-008 Consolidated

COMBINED MEMORANDUM OF PLAINTIFFS-APPELLEES IN RESPONSE TO APPELLANTS' AND CROSS-APPELLANT'S MEMORANDA IN SUPPORT OF JURISDICTION

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I. Introduction

Four different parties have requested that the Court accept jurisdiction over this appeal, each for different reasons. The original plaintiffs and the original defendant, however, have not made any such request and are here as appellees only. Plaintiffs-Appellees are a class of all property owners bordering Lake Erie represented by the Ohio Lakefront Group ("OLG" or "Plaintiffs-Appellees"). The original defendant was the Ohio Department of Natural Resources ("ODNR").[1] The parties now appealing are the Attorney General of Ohio ("Attorney General"), the Intervenor-Appellants National Wildlife Federation and Ohio Environmental Council (collectively, "Intervenor-Appellants" or "NWF") and Intervenor-Plaintiff and Cross-Appellant Homer S. Taft ("Cross-Appellant" or "Taft"). None of them raise an issue of law that is truly unsettled. Indeed, the two main public trust issues have been settled in Ohio for more than one hundred years. Only the Attorney General has raised a reason for the Court to accept jurisdiction, and even then the Court can enter judgment summarily without further briefing. Accordingly, although the Court may accept jurisdiction over one aspect of the Attorney General's appeal, it should reject jurisdiction over the remainder of both his and the other appeals as they present no open questions of public or great general interest for the Court to review.

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[1] ODNR, which withdrew from the case on July 16, 2007 "acting with the consent and direction of Governor Ted Strickland," filed a brief best characterized as jurisdictional memorandum of an *amicus curiae* as provided for under Rule IV, Section 5 of the Rules of Practice of the Court. ODNR does not claim any error by the Appeals Court, sets out no propositions of error and makes clear that it "seeks to participate in this case only for the limited purpose of assuring that the issues are clearly presented to the Court[.]" (ODNR Brief at p. 1.) Accordingly, OLG files no response other than to note that the clarity which ODNR seeks with regard to issues specific to individual parcels and questions of natural and artificial fill were not issues presented below and are more appropriately resolved in future proceedings, when and if needed.

II. The Combined Propositions of Error.

Rather than restate the case and facts for the Court, which the Attorney General, NWF and Taft have already done in great detail, OLG thinks it helpful to clarify the four different propositions of law put at issue in the various requests for jurisdiction.

The first proposition of law for the Court to consider here relates to the Attorney General's standing. Only the Attorney General has asserted this proposition of law as a basis for the Court's jurisdiction. He asks the Court to reverse the ruling by the Court of Appeals for the Eleventh Appellate District ("Appeals Court") which stated that, in light of the fact that Governor Strickland and ODNR had decided not to appeal the ruling from the Trial Court, the State of Ohio lacked standing to continue the case in the Appeals Court and the Attorney General lacked authority to prosecute this matter on his own behalf. (AG Brief at pp. 11-12.)

The second proposition of law relates to the most landward boundary of the State of Ohio's public trust "territory" in Lake Erie as that term is used in R.C. 1506.10 and 1506.11. The Attorney General, NWF and Taft each claim that this proposition of law is a basis for the Court's jurisdiction. The Attorney General and NWF ask the Court to reverse the Appeals Court ruling to the extent it stated that the most landward boundary of the "territory" is the water's edge between the high and low water marks. They contend that the boundary is the ordinary high water mark of Lake Erie. (*See* AG Brief at pp. 12-14; *see also* Intervenor-Apellants' "I-A" Brief at pp. 5-8.) Taft does not appear to assert this proposition of law as an independent basis for jurisdiction, but notes that if it is, the Court should consider the low water mark as the most landward boundary of the territory. (Cross-Apellant's "C-A" Brief at pp. 21-24.)

The third proposition of law relates again to the public trust. NWF alone claims that this proposition of law is a basis for the Court's jurisdiction. NWF asks the Court to further reverse the Appeals Court ruling to the extent it stated that the littoral property owners could exclude

citizens from the dry shore below the ordinary high water mark of Lake Erie. (I-A Brief at pp. 8-11.)

The fourth and final proposition of law relates to NWF's right to intervene in the proceedings below. Only Taft claims this proposition of law as a basis for the Court's jurisdiction. Taft asks the Court to reverse the Appeals Court ruling to the extent it stated that NWF properly intervened in the proceedings below under Ohio Rule of Civil Procedure 24(A) or (B). (C-A Brief at p. 25.)

III. The Court Can Summarily Issue Judgment on the Attorney General's Standing, But Need Not Remand and Has No Reason to Accept Jurisdiction over the Remaining Three Propositions of Error.

The Attorney General has raised one issue over which the Court could accept jurisdiction here: his authority to represent the State of Ohio in an appeal when the Governor, exercising his Article III "supreme executive power," has determined not to appeal. None of the other propositions of error framed by the Attorney General, NWF or Taft raise an open question of public or great general interest such that the Court should accept continuing jurisdiction over this appeal.

A. OLG Has No Objection to the Court Summarily Entering Judgment Regarding the Attorney General's Authority to Represent the State of Ohio in This Appeal.

The Attorney General asks the Court to summarily reverse the Appeals Court ruling to the extent it denied the State of Ohio standing and denied him the authority to act without a real client.[2] Taft has presented arguments to the contrary and points out that the Attorney General's Memorandum in Support, in part, contains misstatements. OLG has no objection to the Court accepting jurisdiction on this limited point and summarily entering judgment as to standing.

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[2] The Attorney General bases his request on Rule III, Section 6, of the Rules of Practice of this Court.

This standing issue only arose in 2007, nearly three years after the action was first filed, when Governor Strickland and ODNR declared that they would stop pursuing the litigation and would obey the then-pending judgment of the Trial Court.[3] Shortly thereafter, the Trial Court entered judgment, rejecting the landward boundary previously supported by ODNR and declaring the boundary to be the water's edge. That should have put an end to the spurious claim that the State's interest in Lake Erie extends to ordinary high water mark. However, then-Attorney General Marc Dann decided to split from the Governor and ODNR and to pursue this issue on his own by separately appealing the subsequent Trial Court ruling. Dann broadly claimed common-law authority to use the "State of Ohio" as a vehicle to represent the interests, as he saw them, of the general public in this matter. It is Dann's judgment that precipitated this question of standing.

The Attorney General wrongly claims that the Appeals Court "*sua sponte* questioned" his standing. (AG Brief at 4.) As the Attorney General knows, and as Taft made clear in his Memorandum in Response, Taft raised the issue of the Attorney General's standing in his briefs to the Appeals Court, setting out argument and citing authority on that point, and the Attorney General responded in kind with opposing argument and authority in his briefs. The Attorney General also responded to questions on this topic during oral argument. Thus, the Appeals Court did not raise the issue on its own, *sua sponte*, but instead addressed the issue as raised and framed by the parties in their briefs.

Despite this mischaracterization by the Attorney General, OLG has no objection to the Court summarily entering judgment on the issue of the Attorney General's authority to proceed on behalf of the State of Ohio as an independent party. In his Memorandum in Support of Jurisdiction, the Attorney General noted a number of decisions by this Court supporting his

[3] Taft correctly notes that Plaintiffs-Appellees filed their complaint against ODNR and the State of Ohio "care of" the Governor. (C-A Brief at 6.)

authority to represent the State of Ohio as a plaintiff or relator and asks the Court to find that they apply here.[4] (AG Brief at pp. 5-12.) Taft has cited a number of decisions suggesting that the Governor exercises supreme executive authority under the circumstances presented here, particularly given the General Assembly's designation of ODNR in R.C. § 1506.10 "as the state agency in all matters pertaining to the care, protection, and *enforcement* of the state's rights designated in this section." (emphasis added). By requesting summary judgment, the Attorney General has made clear he believes no further briefing or argument is necessary to assist the Court in reaching its decision. Plaintiffs-Appellees agree with the Attorney General that no further briefing or argument is necessary. The Court thus should summarily enter judgment on this issue without further consideration.

In the event that the Court does summarily enter judgment in favor of the Attorney General's on his Proposition of Law No. 1, the Attorney General has not requested, and the Court accordingly need not, remand to the Appeals Court. The Attorney General claims that the Appeals Court struck his briefs, did not allow him to "participate" in the appeal and rendered its opinion "without addressing any of the State's merits arguments" (AG Brief at p. 7). Contrary to these statements, the Attorney General did actually "participate" at all levels of the appeal. He submitted briefs which the Appeals Court read and about which it questioned him at oral argument. He "participated" extensively in oral argument, making an opening presentation to the Appeals Court and answering questions throughout. OLG knows of no argument made by the Attorney General in briefs or oral argument that were not also made or argued by NWF and

[4] Although the Attorney General relies in part upon *State ex rel. Cordray v. Marshall*, 2009-Ohio-4986 (*See* Brief at p. 8), this decision appears to be limited to its facts. While the Attorney General may represent the State of Ohio over the objections of a county prosecutor in an action involving the criminal justice system, it is an entirely different matter to suggest that he can represent the State of Ohio in conflict with the Governor's direction, or at a minimum, without the direction of the Governor in an action not involving the criminal justice system. As of July 2007, the Governor, through ODNR, has been represented by special counsel, and the Attorney General cannot claim executive authority under the circumstances presented here.

fully addressed by the Appeals Court.[5] Indeed, the one judge who dissented on standing in the Appeals Court, and thus formally considered the Attorney General's briefs and arguments, still agreed with the opinion of the majority, and thus against the Attorney General, on the "overall disposition of the case." (App. Op. at ¶134.) Thus, Plaintiffs-Appellees agree with the Attorney General that, should the Court decide to summarily reverse on standing, a remand is unnecessary.

B. The Propositions of Error Relating to the Boundary of the Public Trust Territory, as Framed by Either the Attorney General, NWF or Taft, Raise No Question at All, Let Alone One of Public or Great General Interest.

There is no question about the location of the most landward boundary of the State of Ohio's public trust "territory" in Lake Erie under R.C. 1506.10 and 1506.11, and thus no reason for the Court to accept jurisdiction on this point. The General Assembly describes it as the "shoreline." *See* R.C. §§ 1506.10 and 1506.11. The Trial Court and Appeals Court, drawing on settled Ohio precedent, described it similarly, though with more particularity, as the "water's edge." (App. Op. at ¶127; Trial Op. at ¶250.) ODNR, prior to the late 1990s, and even the Attorney General by formal opinion in 1993, have defined it in the same way. *See* Ohio Attorney General Opinion No. 93-025, 1993 Ohio AG LEXIS 27 (1993). Both the trial court's and the Appeals Court's decisions were extensively researched and contain an exhaustive legal analysis. The efforts by Marc Dann and now by the current Attorney General, NWF and Taft to suggest otherwise ignore not only those prior statements, but the seminal ruling of this Court, from more than a century ago, on that boundary. *See Sloan v. Biemiller*, 34 Ohio St. 492, Syll. ¶ 4 (1878).

In *Sloan*, this Court held both that the shore could be privately owned and that the boundary between the private shore and the public trust is "the line at which the water usually

[5] Indeed, it was NWF that raised additional issues beyond those raised by the Attorney General, and not the reverse.

stands when free from disturbing causes." *Sloan*, 34 Ohio St. at Syll. ¶ 4. Thus, *Sloan* describes the edge of water against the shore in calm conditions. Landowners on Cedar Point can trace settled rights and expectations directly to *Sloan*. All other private landowners bordering Lake Erie and its bays can trace the same settled rights and expectations to that opinion through its logical application to their properties. No case in the intervening one hundred thirty one years has reconsidered, or even questioned, the boundary as set in *Sloan*.

Thirty nine years later, in 1917, the General Assembly similarly described that boundary in the Fleming Act as the "natural shoreline." *See* R.C. 1506.10 and 1506.11. Under any common understanding, the terms "shoreline" and "water's edge" describe the same line. Modern dictionaries define the shoreline as "the line where a body of water and the shore meet[.]" *See* Merriam Webster Online (emphasis in original). In 1916, the year before the General Assembly enacted the "natural shoreline" language, Webster's New International Dictionary similarly defined the "shoreline" as the "line of contact of a body of water with the shore." Both *Sloan* and the Appeals Court Opinion reflected these definitions in setting the boundary of the territory at the water's edge or the line at which the water usually stands when free from disturbing causes.[6]

Neither the Attorney General, nor NWF nor Taft have identified any cases or alternate usage to suggest that the location of the boundary in *Sloan* or the "shoreline" in the Fleming Act is an open question in Ohio. To attract the Court's attention, the Attorney General and Intervenor-Appellants instead offer an impossible reading of *Sloan*, inapt federal opinions and a parade of horribles, all without success.

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[6] The Appeals Court, unlike the Trial Court, specifically acknowledged that the shoreline can only exist between the low and high water marks. This more accurately describes the shoreline as it confines the water's edge to the limits of the shore. Black's Law Dictionary, Webster's 1916 version and the 1878 American Dictionary, edited the same year as the *Sloan* opinion, all define the "shore" (described synonymously, and respectively, as "shore," "foreshore" and "sea-shore") as the land between low and high water marks.

First, and for the first time conceding that Ohio law might apply here, NWF claims that *Sloan* set the boundary of the "territory" at the ordinary high water mark, the very top of the shore. Such an interpretation would both separate the shoreline from the water and remove the entirety of the shore from private ownership. While that might meet the goals of NWF, it would also completely eviscerate the overall holding of *Sloan*, *i.e.* that the landowner could own the shore, and grant or restrict access to the same. *See Sloan*, 34 Ohio St. at 515-17. Even the Attorney General does not take such interpretive liberties with *Sloan*. This specious argument does nothing to raise a dispute as to the boundary of the territory and thus nothing to merit the Court's jurisdiction.

Next, the Attorney General and NWF both argue that the federal "equal footing" doctrine – which allows each state to decide the boundaries of its public trust territory – set the boundary retroactively in Ohio, and every other then-existing state, at the ordinary high water mark and thus prohibited Ohio from setting the boundary at any other line. (*See* AG Brief at pp. 13-14 *and* I-A Brief at pp. 6-9.) If they were correct, and the ordinary high water mark was the boundary of all of Ohio's navigable waters, their "equal footing" argument would require the reversal of all of Ohio's various navigable water decisions. Navigable waters include not just Lake Erie, but also other lakes, ponds, rivers and streams. Ohio has never set a uniform boundary for the public trust in these waters, but instead has, for more than one hundred sixty years, recognized various dividing lines. For example, property owners bordering Ohio's smaller navigable lakes, rivers and streams hold title to the submerged land to the center of the stream or lake. *Gavit v. Chambers*, 3 Ohio 495, 496 (1828); *cf. Lembeck v. Nye*, 47 Ohio St. 336 (1890), syll. ¶ 2. On the Ohio River, however, the property owner holds title to low water. *Lessee of Blanchard v. Porter*, 11 Ohio 138, 144 (1841). By arguing for "uniform footing," rather than "equal footing," the Attorney General and NWF pervert the purpose of that doctrine, ignore a multitude of settled

Ohio precedent and generally offend principles of *stare decisis*, none of which are reasons for the Court to accept jurisdiction on this issue.

Finally, the Attorney General turns history on its head, and fabricates prejudice, by claiming that the Appeals Court opinion "declar[ed] that Ohio has been using the wrong line for generations ... [and] ... threatens untold liability for takings claims and other damages claims." (AG Brief at p. 10.) The Attorney General knows from his own published opinions, from the briefs submitted below, and from the cases from this Court and others over the generations, that Ohio had used the right line – the water's edge – up until ODNR changed course sometime in the 1990's (and then changed course again in 2007). *See, e.g.,* Ohio Attorney General Op. No. 93-025, 1993 Ohio AG LEXIS 27 (1993) (opining that a "littoral owner along Lake Erie holds title to the extent of the natural shoreline" which he defined as "the edge of a body of water"). Cleveland, Sandusky and other lakefront municipalities have, since their incorporation in the early 1800's, developed lakefront property up to, and even beyond, the water's edge. *See, e.g. State ex rel. Crabbe v. The Sandusky & Mansfield & Newark RR Co.*, 111 Ohio St. 512, 518-20 (1924) (acknowledging that the City of Sandusky had historically conveyed title to "water lots" beyond the shoreline). Private landowners have been permitted to do the same, obtaining (when appropriate) regulatory approval from ODNR and the U.S. Army Corps of Engineers, its predecessors and even this Court, constructing wharves and breakwalls and depositing fill again right up to, and sometimes beyond, the water's edge. *See, e.g.* Brief at p. 14 (acknowledging that Ohio might have "in individual instances, grant[ed] private title below the ordinary high water mark"); *Hogg v. Beerman*, 41 Ohio St. 81 (1884) (affirming the right to fill the waters of East Harbor on Catawba Island and noting that the landowner "may, without the limits of the channel, erect fishing houses or such other structures as his means and the depth of water will permit he may convert shallow portions into cranberry patches; he may fill up other parts and make solid

ground"). Regardless, this Court does not decide the merits of a case based on potential damages that could result, which, in this case, presumably would be limited in time. Plaintiffs-Appellees do not deny that this is an issue with public and great general importance; they simply deny that it is an open question. Nothing in this dispute over damages makes it otherwise.

The Attorney General, NWF and Taft have all failed to demonstrate an open question of public or great general interest on the boundary of Ohio's public trust "territory." This Court has previously spoken on this topic, setting that boundary at the water's edge, and has no reason to commit its time and resources do so again.

C. The Proposition of Error Relating to the Asserted Right to Walk the Shores Again Raises No Question at All.

As with the boundary above, this Court has already spoken definitively on the rights of the public to walk, hunt or fish from the shores of Lake Erie. And again, the Court did this more than a century ago. This purported right is not of modern origins nor simply a matter of "more modern" concerns as NWF craftily suggests. (I-A Brief at pp. 8-11 (referring to "the more modern public trust purposes of recreation and aesthetic enjoyment".)) On at least two separate occasions, years ago, this Court heard arguments and decided that the public has no right to walk, hunt or fish from the private shores of Lake Erie. *See, e.g. Sloan v. Biemiller*, 34 Ohio St. 492, 516-17 (1878) *and Bodi v. The Winous Point Shooting Club*, 57 Ohio St. 629, 630 (1897), *affirming in part, Winous Point Shooting Club v. Bodi*, 10 Ohio Cir. Dec. 544, 20 Ohio C.C. 637, 1895 Ohio Misc. LEXIS 451 at *19-20 (Ottawa Cty. App. July 1897) (containing mandate from Supreme Court dated Oct. 5, 1897 modifying Supreme Court's prior decision on case found at 57 Ohio St. 226, 233 (1897)).

On this issue, the *Sloan* opinion reviewed restrictions in a deed to Cedar Point limiting what the grantee could do on the "bay or lake shore" and in the "lake or bay" and held that while the grantor could not restrict the grantee from exercising his public right to fish while in the lake

or bay, it found no similar public right with respect to the actions on the shore. It thus upheld restrictions against the use of the shores, concluding in direct terms that the grantee "can land on or occupy the shore for no other purpose." *Sloan*, 34 Ohio St. at 516 (emphasis added). Indeed, the Court even noted that the grantee had trespassed against the grantor in using the shore for a prohibited purpose. *Sloan*, 34 Ohio St. at 517.

In *Bodi*, a case regarding the public right of fishery in Sandusky Bay, the Court affirmed a judgment for the hunting club claiming title to lands in the westerly end of the bay which "perpetually enjoined [defendants] from entering upon any of said lands, shores, marshes and islands therein, for any of the purposes aforesaid or any other purpose whatsoever, without the consent of the plaintiff[.]" It further affirmed the judgment to the extent it "perpetually enjoined [defendants] from ever claiming or asserting any right to enter or be upon said lands, marshes, islands ... and shores[.]" Most importantly, the Court affirmed that "the plaintiff's title in and to all of said lands, marshes, shores [and] islands ... is hereby forever quieted[.]" *Winous Point Shooting Club v. Bodi*, 1895 WL 542, *7 (Ottawa Cty. App. July 1897) (emphasis added) (containing mandate from Supreme Court dated Oct. 5, 1897 modifying Supreme Court's prior decision on case found at 57 Ohio St. 226, 233 (1897)).

Under Ohio law, a littoral property owner has an "*immemorial right*" to prevent the public from passing from the waters of Lake Erie upon his land without his consent. *State of Ohio v. Cleveland-Pittsburgh Railway Co.*, 21 Ohio C.A. 1, 19 (Cuyahoga Common Pleas 1914) (emphasis added). Indeed, the United States Supreme Court, in discussing littoral property adjoining the non-tidal waters of Lakes Ontario and Erie, agreed long ago that "there are no public rights in the shores of non-tidal waters." *Massachusetts v. New York*, 271 U.S. 65, 93 (1926). Likewise, this Court held long ago that lands on the Ohio River between high and low water mark are not common to the public but held in fee by the riparian owner. *Lessee of*

Blanchard v. Porter, 11 Ohio 138 (1841), syllabus. Thus, although ODNR decided in the 1990s that administrative convenience should trump clearly-established Ohio law, the northern and southern shores of Ohio always have been privately held and not accessible by the public.

NWF cites no Ohio law in support of its argument for a "more modern" public right to walk the shores of Lake Erie. It cites none because NWF's alleged right has been historically considered and rejected. As with the boundary issue, the Court should again decline to accept jurisdiction over this definitively settled, not open, question of Ohio law.

D. The Issue of NWF's Right to Intervene is Not a Question of Public or Great General Interest.

In his lone independent Proposition of Error, Taft asserts that the Court should accept jurisdiction here to resolve the NWF's right of intervention under Rules 24(A) and (B) of the Ohio Rules of Civil Procedure. (C-A Brief at p. 25.) This Court has heard numerous actions over the years on the right of intervention under Rule 24. *See, e.g., State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St. 3d 437 (2007); *University Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St. 3d 118 (2002). The question presented by Taft – whether the courts below properly allowed NWF to intervene – is not a question of public or great general interest and cannot serve as an independent basis for the Court's jurisdiction.

IV. Conclusion

None of the appellants here have raised an open question of public or great general interest. At most, the Court could summarily decide the issue of the Attorney General's standing but nothing else. For these reasons as further discussed above, Plaintiffs-Appellees, including OLG, request that the Court decline jurisdiction over the appeals and cross-appeal raised by the Attorney General, NWF and Taft.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **COMBINED MEMORANDUM OF PLAINTIFFS-APPELLEES IN RESPONSE TO APPELLANTS' AND CROSS-APPELLANT'S MEMORANDA IN SUPPORT OF JURISDICTION** has been sent by regular U.S. Mail upon the following persons this 7th day of December, 2009:

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