

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO EX REL.	:	Court of Appeals No. 2008-L-008
ROBERT MERRILL, TRUSTEE, et al.	:	
	:	
Plaintiffs-Appellees/ Cross-Appellants,	:	
	:	
and	:	Lake County Court of Common Pleas No. 04-CV-001080
	:	
HOMER S. TAFT, et al.	:	
	:	
Intervening Plaintiffs-Appellees, Pro Se,	:	Oral Argument Requested
	:	
v.	:	
	:	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.	:	
	:	
Defendants/Cross-Appellees,	:	
	:	
and	:	
	:	
STATE OF OHIO	:	
	:	
Defendant-Appellant/ Cross-Appellee,	:	
	:	
and	:	
	:	
NATIONAL WILDLIFE FEDERATION, et al.	:	
	:	
Intervening Defendants.	:	

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**ASSIGNMENTS OF ERROR AND BRIEF  
OF DEFENDANT-APPELLANT/CROSS-APPELLEE  
STATE OF OHIO**

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## II. STATEMENT OF THE CASE

Plaintiffs-Relators filed a Complaint against Defendants-Respondents the State of Ohio, its Department of Natural Resources, and the Director of that Department on May 28, 2004 in the Lake County Court of Common Pleas, seeking Declaratory Judgment, Mandamus and other relief, and requesting that this action be certified as a class action. (Complaint, T.d. 12). This action was captioned *State ex rel. Robert Merrill, Trustee, et al. v. State of Ohio, Department of Natural Resources, et al.*, Case No. 04CV001080 ("*Merrill*"), and assigned to Judge Eugene A. Lucci.

One half hour later, Homer S. Taft and L. Scot Duncan, each representing themselves Pro Se, filed a similar action against the same Defendants-Respondents in the Lake County Court of Common Pleas. That action was captioned *State ex rel. Homer S. Taft, et al. v. State of Ohio, Department of Natural Resources, et al.*, Case No. 04CV001081, and was assigned to Judge Vincent A. Culotta ("*Taft*"). On July 2, 2004, Plaintiffs-Relators in *Merrill* filed their First Amended Complaint. (First Am. Complaint, T.d. 22). On August 12, 2004, *Merrill* and *Taft* were consolidated on the docket of Judge Lucci. (Entry, T.d. 32).

On February 23, 2005, the State filed Answers, Counterclaims and Cross-claims against the United States and its Army Corps of Engineers in *Merrill* and *Taft*. (Answer, Counterclaim, Cross-claim, T.d. 74). On March 29, 2005, the United States and its Army Corps of Engineers filed a Notice of Removal in both *Merrill* and *Taft*, and both cases were removed to the United States District Court for the Northern District of Ohio. (Notice of Removal, T.d. 92). A number of procedural motions were filed in the federal court, and ultimately, on February 14, 2006, the district court granted the United States'

Motion to Dismiss, dismissing the State's Cross-claim and dismissing the United States and its Army Corps of Engineers as parties on the basis that the United States had not consented to be sued by waiving its sovereign immunity, and without waiving its immunity, there was no federal court jurisdiction over those federal parties. (Federal Docket 93; Supplement to Record, T.d. 204). After remand to the state trial court, the National Wildlife Federation and Ohio Environmental Council filed Motions with the trial court to Intervene in the *Merrill* and *Taft* cases on June 5, 2006. (Motion to Intervene, T.d. 121).

On June 8, 2006, the parties in *Merrill* filed a Notice of Joint Stipulation to Class Certification on Count I of the First Amended Complaint. (Notice of Joint Stipulation, T.d. 122). On June 9, 2006, the trial court issued an Order Certifying Class Action on Count One of the First Amended Complaint ("Class Certification Order") in *Merrill*. (Class Certification Order, T.d. 123) (Ex. C). The Class Certification Order defined the Class as follows:

"[A]ll 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<sup>1</sup> 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."

(T.d. 123, p. 2, footnote in original). The Class Certification Order found the following three questions of law common to the class:

- (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

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<sup>1</sup> 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.

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 RC. 1506.10 and 1506.11.

- (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.
- (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."

(T.d. 123, pp. 2-3).

The trial court also made the following finding in the Class Certification Order under Civil Rules 23(A)(3):

Pursuant to the stipulation of the parties, the court hereby finds that the claims or defenses of the named Plaintiffs in Merrill are typical of the claims or defenses of the class. Each of the named Plaintiffs in Merrill is either a member of the class or, with respect to Named Plaintiff Ohio Lakefront Group, Inc., a non-profit corporation representing its members who are members of the class. All of the named Plaintiffs in Merrill seek a declaratory judgment that resolves the questions of law common to the class. All members of the class have the same interests in a declaratory judgment that resolves the questions of law common to the class.

(T.d. 123, p. 3).

Further, the Class Certification Order bifurcated the remaining counts of the First Amended Complaint in *Merrill* (Counts II and III – alternatively seeking Mandamus), pending final resolution of Count I. (T.d. 123, pp. 3-4). The trial court's Class Certification Order was never modified.

On January 10, 2007, the trial court granted National Wildlife Federation's and Ohio Environmental Council's Motions to Intervene. (Order, T.d. 148). The trial court

had denied the *Taft* Plaintiffs' first Motion to Intervene in the *Merrill* case on December 15, 2004 (Order, T.d. 47), and no Order was ever issued regarding their second Motion to Intervene in *Merrill*, filed when the cases were pending in the federal district court, by either court. (Federal Docket, T.d. 94). However, the trial court did indicate during an August 30, 2006 telephone conference that the *Taft* Plaintiffs should be permitted to intervene in *Merrill* (Judgment Entry setting Conference, T.d. 132), and the trial court and all parties treated them as Intervening Plaintiffs since that time.

On February 13, 2007, the City of Cleveland filed a Motion to Opt Out of the Class stating in two short paragraphs as follows:

The City of Cleveland, to the extent that it has been named against its wishes as a class member by virtue of its ownership of littoral property bordering Lake Erie, wishes to opt out of this litigation and participate no further.

The City disavows the aim of this lawsuit, and wishes instead to support the State of Ohio's position on lakeshore ownership. The City believes that public access to Lake Erie should be maintained and encouraged, not diminished.

(Motion to Opt Out, T.d. 155). The City's Motion was held in abeyance pending further order of the trial court. (Order, T.d. 160).

Motions for Summary Judgment on the three certified Questions of Law were submitted on behalf of the Class Plaintiffs and the State Defendants on May 30, 2007. Intervening Defendants National Wildlife Federation and Ohio Environmental Council filed their Supplemental Motion for Summary Judgment on June 14, 2007. Intervening Plaintiffs, Homer S. Taft and L. Scot Duncan, filed their Supplemental Motion for Summary Judgment on June 15, 2007. The parties filed their respective Briefs in Opposition on July 16, 2007. Also, on July 16, 2007, a Notice of Substitution of Counsel and Response to the Pending Motions for Summary Judgment were filed on behalf of

Defendants Ohio Department of Natural Resources and the Director of that Department. Thereafter, all parties, except Defendants Ohio Department of Natural Resources and its Director, filed Reply Briefs on July 31, 2007.

On December 11, 2007, the trial court issued its Order Granting Plaintiffs' and Intervening Plaintiffs' Motions for Partial Summary Judgment, in Part, Order Denying Defendants' Motion for Summary Judgment and Order Denying Intervening Defendants' Motion for Summary Judgment ("Summary Judgment Order" or "SJ Order"). (T.d. 183) (Ex. B). The Summary Judgment Order was designated as a final appealable order. (T.d. 184).

On January 8, 2007, Defendant State of Ohio filed its Notice of Appeal of the trial court's Summary Judgment Order, which was assigned Appellate Case No. 2008-L-008. (State's Notice of Appeal, T.d. 192). On that same date, Intervening Defendants National Wildlife Federation and Ohio Environmental Council filed their Notice of Appeal of the trial court's Summary Judgment Order, which was assigned Appellate Case No. 2008-L-007. (Intervening Defendants' Notice of Appeal, T.d. 189).

On January 18, 2008, Class Plaintiffs filed Notices of Cross-Appeal in both Appellate Case No. 2008-L-007 and Case No. 2008-L-008. (Class Plaintiffs' Notices of Cross-Appeal, T.d. 200, 201). Also on January 18, 2008, Intervening Plaintiff, Homer S. Taft, filed his Notice of Cross-Appeal in Appellate Case No. 2008-L-007. (Intervening Plaintiff's Notice of Cross-Appeal, T.d. 199).

On March 24, 2008, the Appellant in Case No. 2008-L-008 (Defendant State of Ohio) and the Appellants in Case No. 2008-L-007 (Intervening Defendants National Wildlife Federation and Ohio Environmental Council) filed a Joint Motion to Consolidate

with this Court, to consolidate their respective appeals taken from the same final appealable Order in the *Merrill* case – the trial court’s Summary Judgment Order. That Motion remains pending.

### **III. STATEMENT OF FACTS**

It was stipulated between Class Counsel and the State, prior to the admission of Intervenor, that there are no facts in dispute between the parties to this Class Action, but only the three questions of law above. (Notice of Stipulation to Class Certification, T.d. 122). The trial court subsequently ordered that such was the case in its Class Certification Order which found the following undisputed facts pursuant to Civ.R.23(A)(1):

The court finds that the class is so numerous that joinder of all members is impracticable. As stipulated by the parties, the shore of Lake Erie in the State of Ohio extends approximately 312 miles, eight counties in the State of Ohio abut the shore of Lake Erie (Ashtabula, Lake, Cuyahoga, Lorain, Erie, Sandusky, Ottawa, and Lucas), and approximately 14,000 parcels of littoral property abut Ohio’s Lake Erie shore.

(Class Certification Order, T.d. 123, p. 2). The trial court’s Class Certification Order also found 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.” (Class Certification Order, T.d. 123, p. 2, n. 1). It has also remained undisputed on the record that Lake Erie is a non-tidal, navigable body of water, part of which lies within the territorial boundaries of the State of Ohio.

Thereafter, the trial court’s Order, from which this appeal is taken, alternatively stated that there were only questions of law before the court, but listed pages of “facts”

that the trial court found “relevant,” which were both disputed and improper for resolution on summary judgment. (SJ Order, T.d. 183, pp. 13-24; 61-62)

As provided in the Statement of the Case above, the trial court’s Class Certification Order was never modified. Therefore, in spite of the contradictions in the trial court’s Summary Judgment Order, the controversy between the parties remains appropriately distilled into the three questions of law common to the Class as previously certified by the trial court in this class action litigation. (Class Action Order, T.d. 123)

#### **IV. ARGUMENT**

##### **INTRODUCTION**

This class action involves a significant challenge to the time-honored body of law uniquely crafted to apply to the great navigable waters of this nation and specifically to Lake Erie in the State of Ohio. The fundamental liberty of the people of this nation to travel and move about freely throughout the country upon its public highways has long been one of the central and defining hallmarks of nation’s freedom, and never has that liberty been more jealously guarded by the several states than upon their navigable waters. Since the time of the Northwest Ordinance, the navigable waters of Lake Erie were proclaimed to be “common highways and forever free.” Northwest Ordinance of 1787, art. 4.

It has been long settled in federal law that each of the states received the lands beneath the navigable waters within their territorial boundaries, the waters themselves, and their contents upon statehood to hold in trust for its citizens in perpetuity. It has been equally well settled that the interchangeable terms “lands beneath navigable waters” and “submerged lands” do not refer to land physically under water at any given

moment, but have been defined as a matter of law to mean lands up to the mean high tide of the tidal, navigable waters of the oceans, and lands up to the ordinary high water mark of the non-tidal, navigable waters of the Great Lakes. After statehood, each state may, within the limitations of their role as public trustee, recognize private rights and interests in its lands beneath navigable waters, but it may never entirely abdicate its sovereign authority over the same.

The owners of the uplands that border the navigable waters of Lake Erie in the State of Ohio have been granted a number of important rights that they may exercise in Lake Erie under Ohio law, in addition to all of the rights that they enjoy as a member of the public. These special rights, known as littoral rights, have long been recognized by the Ohio Supreme Court and the Ohio General Assembly as entirely subservient to the rights of the United States, the State of Ohio and the public in Lake Erie.

Now the Plaintiffs and Intervening Plaintiffs allege that the upland owners bordering Lake Erie in the State of Ohio also have either title to, or a right to exclude others from, the lands beneath the navigable waters of Lake Erie between its ordinary high and low water marks. The upland owners allege that, because of this claimed title or a right to exclude, anyone who walks along the shore of Lake Erie without their permission is a trespasser upon their respective properties. They allege that, because of this claimed title, the State of Ohio no longer has title or authority over any of the lands of Lake Erie that Plaintiffs claim to own and, therefore, the upland owners bordering Lake Erie no longer need authorization from the State under R.C. 1506.11 to place any artificial improvement in any part of Lake Erie that they claim to own.



As thoroughly briefed by the State in the trial court below, the State of Ohio has never granted title in, or a littoral right to exclude others from, any part of Lake Erie entrusted to the State of Ohio to the owners of the uplands that border the Lake. Further, a conveyance of title may be impossible given the State's obligations as trustee. If Plaintiffs desire to obtain such a title or a littoral right of exclusion, then new law must be created and/or the existing law must be changed. Either action is in the exclusive authority of the Ohio General Assembly, not in Ohio's courts.

The errors in the trial court's Summary Judgment Order largely result from the fact that the trial court misconceived the entire case as a title dispute over fast lands, rather than as a controversy over the extent of "lands beneath navigable waters" and the private and public interests in those lands. Standard real property law may be more comfortable and familiar to attorneys and jurists in Ohio, but it is no more applicable to Lake Erie than the law of navigable waters is applicable to the fast lands not bordering Lake Erie. They are two very different subjects which, by their very nature, have led to two very different bodies of law uniquely applicable to each. The trial court failed to appreciate this important distinction in its Summary Judgment Order. As a result, the trial court's Summary Judgment Order reads as if this class action was a typical real property case involving a parcel of land called "Lake Erie," rather than what it is—a navigable waters case re-affirming and declaring the geographical extent of and rights in a non-tidal, navigable Great Lake under the Equal Footing Doctrine and the Public Trust Doctrine.

## **STANDARD OF REVIEW**

The standard of review in a summary judgment appeal is de novo. *DiSanto v. Safeco Ins. of Am.*, 168 Ohio App. 3d 649, 655, 2006-Ohio-4940. De novo review means that the reviewing court uses the same standard that the trial court should have used, and examines the evidence to determine whether, as a matter of law, no genuine issues exist for trial. *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St. 2d 116. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *State ex rel. Widmer v. Mohnney* (11th Dist. 2008), 2008-Ohio-1028, 2008 Ohio App. LEXIS 897.

### **A. FIRST ASSIGNMENT OF ERROR:**

**THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF DEFENDANT-APPELLANT/CROSS-APPELLEE STATE OF OHIO, IN DENYING ITS MOTION FOR SUMMARY JUDGMENT AND IN GRANTING PLAINTIFFS'-APPELLEES'/CROSS APPELLANTS' AND INTERVENING PLAINTIFFS'-APPELLEES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT, IN PART. (T.d. 183).**

The trial court's Summary Judgment Order disregards the three Questions of Law it certified and instead characterizes this controversy as a traditional land title dispute. (T.d. 183, p. 4). The first two Questions of Law before the trial court have nothing to do with title to uplands or inlands, or even whether the Class Members possess any title in Lake Erie, but only seek to reaffirm the geographical extent of Lake Erie within the State of Ohio as a matter of law, and to declare whether the current methodology used to locate the upper boundary of Lake Erie is reasonable and entitled to administrative deference as a matter of law.

### **Issues Presented for Review and Argument**

**First Question of Law: 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. (Class Certification Order, T.d. 123).

1. As a matter of federal law, the furthest landward boundary of the “territory” referred to in R.C. 1506.10 and 1506.11, is the ordinary high water mark of Lake Erie. The trial court’s holding that such boundary is “the most landward place where the lake water actually touches the land at any given time,” must be reversed as it is contrary to law, and results in either an unconstitutional taking of property or an unlawful abdication of the public trust when the water rises above or below the ordinary high water mark.

a. The ordinary high water mark is the landward boundary of the “lands beneath navigable waters” of Lake Erie, that do now belong, and have always belonged, to the State of Ohio as proprietor in trust for the people of the State since statehood.

Under the first question of law before the trial court, and now this Court, “[t]he issue . . . is not what rights the State has accorded private [land] owners in lands which the State holds as sovereign; but, rather, how far the State’s sovereign right extends under the equal-footing doctrine and the Submerged Lands Act.” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 369. The answer is a long-settled principle of federal law. *Id.*

In declaring the upper boundary of Lake Erie in the State of Ohio, the trial court needed first to determine where it was originally set at statehood under federal law. All further analysis stems from there. The United States Supreme Court has announced that the “seminal case in American public trust jurisprudence is *Shively v. Bowlby* (1894), 152 U.S. 1.” *Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469, 473. The *Shively* Court held that the United States held title in trust to the shores and lands of navigable waters in the territories, reserved to future states by the Constitution. *Shively*, 152 U.S. at 36 (“The shores of navigable waters and the soil under them were

not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones.”). This principle, known as the Equal Footing Doctrine, means that a “State’s title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. *Corvallis Sand & Gravel Co.*, 429 U.S. at 372-74.

Both the United States Supreme Court, in subsequent decisions, and Congress, pursuant to the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, have reaffirmed the geographic extent of the “lands beneath navigable waters” that each of the coastal states received upon statehood under the U.S. Constitution. Both branches have made a distinction in the landward boundary of the lands originally granted to a state depending upon whether that state’s boundary is adjacent to tidal navigable waters or non-tidal navigable waters.

In the ocean states, bounded by tidal waters, “the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide” defined as the line of the “mean high tide.” *Phillips Petroleum Co.*, 484 U.S. at 478-79; *Borax, Ltd. v. Los Angeles* (1935), 296 U.S. 10, 26-27; 43 U.S.C. § 1301. However, in those states bounding non-tidal navigable waters, such as the Great Lakes, the original grant to the state has been held to extend only to the ordinary high water mark, as that line denotes the common law boundary for navigable waters upon which the state’s “jurisdiction was made to depend ... and not upon the ebb and flow of the tide.” *Phillips Petroleum Co.*, 484 U.S. at 478-79.

Congress, in the Submerged Lands Act, expressly confirmed to the states, “the 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” along with “the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law.” 43 U.S.C. §§ 1311(a)(1) and (2). The Submerged Lands Act affirmed the law as previously articulated by the U.S. Supreme Court in its definition of “lands beneath navigable waters” for both tidal states and non-tidal coastal states. See 43 U.S.C. §§ 1301(a)(1), (2) and (3). The Act defines “lands beneath navigable waters” for non-tidal states, such as Ohio and the other Great Lakes States, as “lands . . . up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . [and] all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined.” 43 U.S.C.A. §§ 1301(a)(1) and (3) (emphasis added).

Ohio courts have analyzed the issue consistent with this federal precedent. The landmark public trust doctrine decision in Ohio was issued by the Ohio Supreme Court nearly a century ago in *State v. Cleveland & Pittsburgh Railroad Company* (1916), 94 Ohio St. 61 (“*C&P R.R. Co.*”). The Court began its analysis by incorporating the *Shively* holding, that title and dominion of the shores and lands of navigable waters had been granted to the states upon entry to the union and that, thereafter, “the title and rights of riparian or littoral proprietors in the soil below the ordinary high water mark . . . are governed by the laws of the several states.” *C&P R.R. Co.*, 94 Ohio St. at 72 (citing *Shively*, 152 U.S. at 1) (emphasis added). The Ohio Supreme Court called upon the General Assembly to enact legislation in conformance with its opinion. *Id.* at 84.

A year later, the General Assembly passed the Fleming Act, originally found in Sections 3699-a to 3699-9 of the General Code. Today, the relevant portions of the Act are found at R.C. §§ 1506.10-.11. The Fleming Act expressly re-affirmed that the lands, waters, and contents of Lake Erie composing the “territory” are those that were granted to the State at statehood. The statute speaks of the waters and lands of Lake Erie that “do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state.” R.C. 1506.10. The Act makes clear that Ohio presently holds in trust what the federal government held for it and what it received under the Equal Footing Doctrine.

The trial court was asked to interpret the Fleming Act, but all it had to do was to re-affirm the long-accepted existing interpretation of the Act. The Fleming Act has already been interpreted by the Ohio Supreme Court in the only other public trust doctrine case to be decided by the court – *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303. In that decision, the court provided a thorough discussion of the “natural shoreline” and the effects of artificial fill placed by upland property owners upon the State’s public trust lands, as well as a detailed constitutional review of the Fleming Act. The court began by reaffirming its 1916 holding in *Cleveland & Pittsburgh Railroad Co.* in its entirety. Thereafter, the court turned to an analysis of the Fleming Act and held that “the passage of [the Act] . . . merely codified the existing law in the state with respect to . . . Lake Erie.” *State ex rel. Squire*, 150 Ohio St. at 325.

It is clear, then, that “[t]he Fleming Act did not purport to change the common law with regard to navigable waters in this state,” *Thomas v. Sanders* (1979), 65 Ohio App. 2d 5, 9, but rather codified and re-affirmed the existing common law boundary of the

“territory.” Construing the plain language of the Fleming Act in accordance with the law, principles, and definitions existing at the time it was enacted, as well as the subsequent interpretations of the Act by Ohio courts, the Act served to codify the common law legal boundary of the State’s interest as it had existed under the Equal Footing Doctrine since statehood – the ordinary high water mark. Accordingly, Summary Judgment should have been granted to the State on the first question of law before the trial court, and its denial of that Motion was contrary to law.

- b. **A trial court’s interpretation of R.C. 1506.10-.11 that results in a declaration that the landward boundary of Lake Erie is “the most landward place where the lake water actually touches the land at any given time” ignores the existing common law and conflicts with traditional canons of statutory interpretation.**

Instead of following the clearly-established interpretation of the Fleming Act discussed above, the trial court engaged in errant statutory construction. It is a well-settled rule of statutory construction that “Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment.” *Bresnik v. Beulah Park Ltd. P’ship, Inc.* (1993), 67 Ohio St. 3d 302, 304. The Fleming Act was the codification of the existing common law expressly reaffirming that Ohio retained all of the Lake Erie “territory” that it received under the federal common law Equal Footing Doctrine. In disregarding this rule of statutory construction, the trial court ignored the existing common law Equal Footing and Public Trust Doctrines, and re-interpreted the term “shoreline” in the Fleming Act in a way that conflicts with the existing common law. Instead of interpreting “shoreline” as “ordinary high water mark” in accordance with the existing common law, the trial court attempted

to find another meaning to this term by use of dictionary definitions and misreading Ohio caselaw.

On the basis of its interpretation of a 1916 dictionary definition of the term “shoreline,” the trial court redefined the term “shoreline” in R.C. 1506.10-.11 to mean “as a matter of law . . . the place where the water of Lake Erie actually touches the land on shore.” (SJ Order, T.d. 183, p. 50). Again on the basis of dictionary definitions, and upon the trial court’s finding that “[b]ecause there is an approximately six-foot fluctuation between the elevation of ordinary high water mark and ordinary low water mark in Lake Erie, the land ‘presently’ underlying the waters of Lake Erie varies at any given time,” the trial court found that the phrase in R.C. 1506.11(A) defining the “territory” as “the waters and lands presently underlying the waters of Lake Erie,” means “that the boundary of the area of the ‘Territory’ varies with the place where the water actually touches the shore at any given time.” (SJ Order, T.d. 183, p. 51).

Under federal and Ohio law, the same legal definition of the lands beneath navigable waters of Lake Erie that have belonged to the State of Ohio since the organization of the State still belong to the State today as trustee for the people of Ohio-those up to the ordinary high water mark. The first line of the Fleming Act expressly re-affirmed that the lands, waters, and contents of Lake Erie composing the “territory” are those that were granted to Ohio at statehood. R.C. 1506.10. The trial court ignored that first line of the Act and, instead, attempted to offer a statutory construction of the term “shoreline” that is insupportable under current or then existing law. Such an analysis is improper, as the statute is unambiguous.



“Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute.” *Bd. of Educ. of Pike-Delta-York Local Sch. Dist. v. Fulton Cty. Budget Comm’n* (1975), 41 Ohio St. 2d 147, 156. This is because “[t]he paramount consideration in determining the meaning of a statute is legislative intent.” *State v. Jackson* (2004), 102 Ohio St. 3d 380, 2004-Ohio-3206, at ¶34. The trial court should not have disregarded the plain language of the Fleming Act that expressly describes “the territory” as the lands, water and contents of Lake Erie that “do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state,” in an attempt to convey title to lands that have never been granted by the Legislature through that Act or any other act.

Further, any terms that the trial court found ambiguous should have been interpreted pursuant to the Ohio statute governing interpretation of ambiguous statutes. See R.C. 1.49. Revised Code 1.49(A) instructs courts to consider “the object sought to be obtained” by the statute. It has already been determined by Ohio’s courts that the objects sought to be obtained by the Fleming Act were to codify the existing common law pertaining to Lake Erie, and to provide for the State’s duties and responsibilities as Trustee in managing the public trust estate. *State ex rel. Squire*, 150 Ohio St. at 325, 336-337; *Thomas*, 65 Ohio App. 2d 9.

Under R.C. 1.49(B), courts are to look to “the circumstances under which the statute was enacted.” The Fleming Act was not passed because the General Assembly decided it would be a good idea to codify the definition of “shoreline” provided in “the 1916 edition of Webster’s New International Dictionary,” but because the Ohio Supreme

Court asked the Legislature to enact legislation that would “appropriately provide for the performance by the state of its duty as trustee.” *C&P R.R. Co.*, 94 Ohio St. at 84.

Courts are also instructed to consider “[t]he common law or former statutory provisions, including laws upon the same or similar subjects.” R.C. 1.49(D). The United States and Ohio Supreme Courts had provided extensive constitutional and common law on the subject prior to the enactment of the Fleming Act in 1917, all of which describe the extent of navigable waters held in trust by the sovereign states in terms of “the ordinary high water mark” and not the location of the water. See *Pollard’s Lessee v. Hagan* (1845), 3 How. 313; *Barney v. Keokuk*, (1876), 94 U.S. 324; *Shively*, 152 U.S. at 1; *Illinois Cent. R.R. v. Illinois* (1892), 146 U.S. 387; *Illinois Cent. R.R. v. Chicago* (1900), 176 U.S. 646; *C&P R.R. Co.*, 94 Ohio St. at 72.

The common law has long distinguished the term “upland” from the word “shore.” See *C&P R.R. Co.*, 94 Ohio St. at 72 (“The Court held that the question of the *use of the shores* by the *owners of uplands* was left to the sovereign control of each state, subject only to the rights vested by the Constitution of the United States.” (citing *Shivley*) (emphasis added). Upland is the land above the shore—the land above the ordinary high water mark. See *Jefferis v. East Omaha Land Co.* (1890), 134 U.S. 178, 181-182. As a matter of settled common law at the time of the Fleming Act, the shore of Lake Erie had always been held to end where the upland bordering it began, at the line of ordinary high water. That is the only “shore line” of Lake Erie that could describe the limit of *the State’s rights* received by the State of Ohio at statehood as a matter of law. The trial court’s Order to the contrary should therefore be reversed.

- c. **A trial court’s decision that disregards the settled law recognizing the landward boundary of non-tidal, navigable waters as the ordinary**

**high water mark, and instead holds that the ordinary high water mark can not be the landward boundary of Lake Erie is flawed and inconsistent with clearly established law.**

The trial court rejected the clearly established common law and statutory definition of upper boundary of lands beneath non-tidal navigable waters discussed above, and created a new boundary for Lake Erie in the State of Ohio.<sup>2</sup> This new boundary, “the water’s edge, which means the most landward place where the lake water actually touches the land at any given time,” (SJ Order, T.d., 50-51, 63-64, 71-74), is wholly inconsistent with federal and Ohio precedent. The trial court offered four reasons for its creation of a new boundary due to its belief that the common law high water mark boundary is inconsistent with: (1) Ohio Supreme Court precedent; (2) Ohio Department of Natural Resources rules; (3) the Ohio Attorney General’s position on the issue; and (4) traditional property rights. As fully discussed below, none of these justifications is valid.

The trial court’s assertion that the longstanding definition of Lake Erie’s boundary “violates Ohio Supreme Court case law” is simply incorrect. (SJ Order, T.d. 183, pp. 55-

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<sup>2</sup> The trial court’s utter disregard for applicable precedent is evidenced by the fact that it discussed only one case among the plethora of time-honored authorities presented by the State—*Barney v. Keokuk*, (1876), 94 U.S. 324—and distinguished it because it dealt with the Mississippi River rather than the Great Lakes and noting that “the title of the state to navigable waters is bounded to the extent that it might interfere with vested rights and established rules of property.” (SJ Order, T.d. 183, 63, ¶222). While *Barney* did involve the Mississippi River, the trial court ignored the *Barney* Court’s holding that the proprietorship of the beds and shores below the ordinary high water mark of navigable waters, including the Great Lakes, belongs to the states, and that the upland owners have no title below that mark unless the state law provides otherwise, *Barney*, 94 U.S. at 336, 338, and that, while the city was not the upland owner, it still had the right as a public authority under the local law to build such improvements below the ordinary high water mark “necessary to navigation, or public passage by railways or otherwise,” and that it could do so “without the consent of the adjacent proprietor” of the upland and “without . . . compensation.” *Id.* at 339-40, 342.

57) In support of its position that “wherever the boundary line may be set, the one place where it simply can not be set is ordinary high water mark” (SJ Order, T.d. 183, pp. 56-57) (emphasis in original), the trial court cites to *Hogg v. Beerman* (1884), 41 Ohio St. 81, 89; *State ex rel. Squire*, supra, at 339; and *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8. The conclusion drawn from these cases is inaccurate.

The site at issue in *Hogg* was known as “East Harbor.” The court described it as a triangular body of water, referred to as “the marsh,” that was separated from Lake Erie by a narrow strip of land and held it to be bounded on the north by the shore of Lake Erie and *not to be part of the Lake*. *Hogg v. Beerman*, supra at 81, 97-98. Subsequent Ohio Supreme Court opinions make clear a significant distinction between the law applicable to the marsh lands and waters of “East Harbor” and the law applicable to Lake Erie. See, e.g., *Winous Point Shooting Club v. Slaughterbeck* (1917), 96 Ohio St. 139, 146-49. Consequently, the Ohio Supreme Court never cited to *Hogg* in *C&P R.R. Co.* or *State ex rel. Squire*.

The remaining Ohio Supreme Court cases cited by the trial court, *State ex rel. Squire* and *State ex rel. Duffy*, do pertain to Lake Erie and different issues in this case. However, neither of them supports the court’s notion that “wherever the boundary line may be set, the one place where it simply can not be set is ordinary high water mark.” (SJ Order, T.d. 183, pp. 56-57) (emphasis in original). As discussed above, nothing in *State ex rel. Squire* stands in conflict with the settled law that the ordinary high water mark is the extent of lands beneath the non-tidal, navigable waters of Lake Erie held in

trust by the State, while the owners of the uplands have only littoral rights of use upon the shore. Indeed, the case begins with that basic recognition, and ends with deference to *Illinois Central* and approval, not rejection, of the “brief of the state of Ohio, amicus curiae, the Attorney General.” *State ex rel. Squire*, 150 Ohio St. at 321-22, 345-47.

*State ex rel. Duffy* is likewise consistent with the State’s position in this case. *Duffy* is not a case that defines the upper boundary of Lake Erie as a matter of law, but it is rather an accretion case which sets forth one of the common law rules governing how the boundary can move over time – the “moveable freehold.” The moveable freehold concept was first applied by the Supreme Court in an accretion case where it found that over a period of 17 years new land “formed by natural causes and imperceptible degrees” until “the new land so formed became high and dry, *above the usual highwater mark.*” *Jefferis v. East Omaha Land Co.* (1890), 134 U.S. 178, 181-82 (emphasis added). Accordingly, the Court held that this new land belonged to the riparian owner to whose existing upland the newly accreted upland had attached. *Id.* Therefore, movement in relation to the ordinary high water mark, and not the momentary movements of the water, underlies the concept of the “moveable freehold.”

The trial court’s second justification for its creation of a brand new boundary for Lake Erie is that the long-accepted boundary of navigable waters “violates ODNR’s own rules.” (SJ Order, T.d. 183, pp. 54-55). However, the administrative rules to which the trial court refers were not promulgated under the statutes at issue in this case, do not conflict with the ordinary high water mark, or both.

The first rule cited to by the trial court, OAC 1501-6-10(U), was not promulgated under and does not amplify the statutes at issue in this case. Rather, this rule amplifies

the Coastal Erosion Area statute found at R.C. 1506.06, which is not at issue here. However, even if the rule were promulgated under R.C. 1506.10-.11, it would not conflict with the ordinary high water mark as the landward boundary of Lake Erie. The Rule defines the term "shoreline" as "the line of intersection of Lake Erie with the beach or shore" – in other words, the ordinary high water mark.

Submerged Land Leasing Rules OAC 1501-6-01(M) and (W) were promulgated under R.C. 1506.10-.11. They include the terms "shoreline" and "natural shoreline," found in R.C. 1506.10-.11, but they do not define those terms and therefore do not conflict with the traditional definition of Lake Erie's boundary – the ordinary high water mark.

Other sections of the Ohio Revised Code and Ohio Administrative Code are also consistent with the ordinary high water mark boundary of Lake Erie. R.C. 1514.01(L), pertaining to in-stream mining, provides that:

"High water mark" means the line on the shore that is established by the fluctuations of water and indicated by physical characteristics such as a natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding area.

In contrast, there is no reference to or definition of the trial court's new boundary, the water's edge found in the Ohio Code.

Further, the Administrative Code sections pertaining to the State's "surface waters" of Lake Erie define the line where Lake Erie ends and estuaries begin as "the lake Erie mean high water level." OAC 3745-1-02(B)(34). Those sections also explicitly provide that "sediment" that is deemed to have been "precipitated and deposited below surface waters" includes "materials found below the ordinary high water mark (OHWM)

of lake Erie, as defined by International Great Lakes Datum (IGLD).” OAC 3745-300-01(A)(41)(e).

This definition expressly encompasses both the name of Lake Erie's landward boundary as a matter of law (the ordinary high water mark), and the methodology by which that mark is currently located by the Ohio Department of Natural Resources (ODNR) (the IGLD elevation method). The Ohio Environmental Protection Agency, ODNR and, as will be discussed below, the United States Army Corps of Engineers, all define the most landward boundary of Lake Erie as the ordinary high water mark, and they all use the IGLD method to locate that boundary in the exercise of their concurrent authority over the navigable waters of Lake Erie within the State of Ohio. All three of these agencies maintain that definition and manage the same lands and waters of Lake Erie up to its ordinary high water mark as located under IGLD. They do so regardless of whether those lands are covered by water at the time or not, for the location of the water at any given moment has never defined Lake Erie as a matter of federal law or Ohio law, until the trial court's decision in this case.

The trial court also claims that the ordinary high water mark can not be the boundary of Lake Erie because it believes that “the Ohio AG advised ODNR that public trust did not extend to [the ordinary high water mark].” (SJ Order, T.d. 183, p. 58., referring to 1993 Ohio Op. Atty. Gen. 128, No. 93-025 (1993 Opinion)). The trial court is incorrect. The 1993 Opinion confirmed that the federal Submerged Lands Act defined “lands beneath navigable waters” for non-tidal waters as bounded by the ordinary high water mark:

“Lands beneath navigable waters” include, for nontidal waters, lands “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) (1980), and “all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters,” 43 U.S.C.S. § 1301(a)(3) (1980).

1993 Ohio Op. Atty. Gen. 128, No. 93-025, pp. 7-8.

Finally, the trial court claims that the ordinary high water mark cannot be the boundary of Lake Erie because such a boundary “violates property rights.” (SJ Order, T.d. 183, pp. 57-58). These “property rights” include: (1) “the right of littoral property owners to ‘own’ the lakeshore and exclude others from the area above the lakeshore” which the trial court believes was established by the Ohio Supreme Court in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, and (2) the right of “access to the waters of the lake except on the irregular and infrequent occasions of flood” which the trial court extracts from the Ohio Supreme Court’s river law decision in *Lamb v. Rickets* (1842), 11 Ohio 311, and the U.S. Supreme Court’s state conflict case of *Massachusetts v. New York* (1926), 271 U.S. 65. (SJ Order, T.d. 183, pp. 57-58).

Neither *Sloan*, nor any other decision of the Ohio Supreme Court, has ever recognized that the upland owners also have title to the shore of Lake Erie or the right to exclude others from the shore. On the other hand, though *Lamb v. Rickets* and *Massachusetts v. New York* are not applicable to the Questions of Law before the trial court, the upland owners bordering Lake Erie in the State of Ohio have long been recognized to have a littoral right of access across the shore to the navigable waters of Lake Erie regardless of whether the water in the Lake is above or below the ordinary high water mark, and the trial court’s concerns on that regard are unfounded.

Contrary to the trial court’s opinion, the upper boundary of navigable waters may only be set in accordance with the mandates of the federal Equal Footing Doctrine, the



federal Submerged Lands Act, Ohio's common law Public Trust Doctrine, and the codification of that doctrine in the Fleming Act, and all of those authorities clearly provide that boundary is the ordinary high water mark of Lake Erie. None of the trial court's explanations properly justify its departure from the longstanding law in its Order, and the Order should be reversed.

- d. **The trial court's new definition of the boundary of the navigable waters under Lake Erie ignores the long-established existing law of the "moveable freehold," and results in either an unlawful abdication of the public trust or an unconstitutional taking of property when the water rises below or above the ordinary high water mark.**

Of equal concern to all parties, the trial court's redefinition of the boundary between the navigable waters of Lake Erie and the uplands that border that body of water as a matter of law, disregards and diverges from the well-established law that governs the ambulatory nature of the boundary known as the "moveable freehold." Under that concept, the rights and liabilities of upland owners in their upland property have been long defined by the common law doctrines governing the ambulatory nature of the boundary (accretion, erosion, reliction, submergence, and avulsion). Under the "moveable freehold," the ordinary high water mark is a boundary that can physically and legally move by virtue of gradual, natural, long-term processes, but it does not legally move by rapid, temporary or artificial changes.

The Supreme Court applied the "moveable freehold" concept in an accretion case where it found that over a period of 17 years new land "formed by natural causes and imperceptible degrees" until "the new land so formed became high and dry, *above the usual highwater mark.*" *Jefferis*, 134 U.S. at 181-82 (emphasis added). Accordingly, the Court held that this new land belonged to the riparian owner to whose

existing upland the newly accreted upland had attached. *Id.* Therefore, though the ordinary high water mark is a moving boundary, it is not a boundary that moves, as the trial court believes it should, to follow wherever the water is at any given moment.

The State of Ohio fully briefed the trial court on the long-standing common law that governs the ambulatory nature of the ordinary high water mark boundary of navigable waters in its Motion for Summary Judgment, both of its Briefs in Opposition and its Reply Brief. (T.d. 166, pp. ; T.d. 173, pp. 39-40, 47; T.d. 174, pp. 9-11, 14-15; T.d. 181, pp. 19-22, 37-39, 44-46). The State also explained that both Ohio's Fleming Act of 1917 and the United States' Submerged Lands Act of 1953 codified the "moveable freehold" concept that the common law boundary between the state's "lands beneath navigable waters" and the upland properties bordering those lands can change through gradual, natural processes, but do not change by avulsive, temporary or artificial changes. 43 U.S.C. §§ 1301(a)(1) and (3) provide that, "[l]ands beneath navigable waters" include, for nontidal waters, lands "up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction" and "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters." In addition, GC 3699(a) of the original Fleming Act recognized "the rights and liabilities of littoral owners *while said waters remain in their natural state of accretion, erosion and avulsion*" (emphasis added), and R.C. 1506.11(A) of the Act provides that the "territory" held in trust by the State includes "the lands formerly underlying the waters of Lake Erie and now artificially filled." The Ohio Supreme Court held that the Fleming Act, as merely a codification of the common law in Ohio, did not change any of these common

law doctrines, and Ohio's courts have specifically so found. *State ex rel. Duffy*, 137 Ohio St. 8.

The trial court brushed this significant issue aside in a single footnote:

There is no abdication of the trust because, when the water recedes gradually, the boundary of the trust territory also recedes with the water; similarly, there is no unconstitutional taking when the water advances landward gradually, because the moveable boundary of the littoral owner's title also moves landward with the water. And when the waters recede or advance suddenly, such as through reliction or avulsion, the boundary remains where it was prior to the sudden change.

(SJ Order, T.d. 183, p. 63, n. 110). The trial court's finding in this regard is not in accordance with the long existing law, and demonstrates a fundamental misunderstanding of the subject matter.

Reliction, as found by the trial court itself earlier in its Order, is not a rapid process. Reliction is one of the slow, gradual processes which may *change* the boundary—it does not fix the boundary where it used to be. (SJ Order, T.d. 183, p. 30, n. 54). Avulsion is a rapid process that may not change the boundary, but it involves changes to the adjoining upland rather than water levels. (SJ Order, T.d. 183, p. 30, n. 55). Further, it is evident from the rationale presented in this footnote that the trial court believed all changes to the boundary occur because of water levels and that the water levels of the Lake never rise above the ordinary high water mark. Both of these beliefs are incorrect as presented in the law above and the facts stipulated to by the parties in their respective briefs.

The law governing the ambulatory nature of the boundary briefed for the trial court holds that under no circumstances is a navigable body of water defined by where the water is at any given moment in time, rather it is defined by where the waters rise in

ordinary circumstances with enough repetition to leave evidence of their persistent action. Above this line is upland and, immediately landward, inland. These are the fastlands upon which traditional property law applies. During periods of high water, the water may rise out of the lakebed and temporarily flood this fastland, but it remains fastland – upland and inland – and does not become part of the lakebed because of this temporary inundation. Below this line is the bed of the navigable water to which the law of navigable waters applies. During periods of low water, the water may fall low and temporarily expose the lakebed, but it remains lakebed, and does not suddenly become upland by virtue of this temporary condition.

Under the existing law, upland is defined as the land that borders a body of water. A non-tidal navigable body of water like Lake Erie is defined by its ordinary high water mark. That boundary moves only in accordance with the gradual, natural changes of the “moveable freehold.” Yet, the trial court re-defined both Lake Erie and the uplands that border it, in terms of the moment to moment fluctuations of the water. By re-defining the most landward extent of the “territory” as a universal boundary for both Lake Erie in Ohio under R.C. 1506.10-.11 and the title of the littoral owners that border the Lake, the trial court’s decision evokes an unconstitutional taking of private property every time the water rises above the ordinary high water mark of Lake Erie, and an unlawful abdication of the public trust every time the water falls below the line of ordinary high water.

The trial court held that the Class Members hold *all of the interest* to any lands that are not covered by the water from Lake Erie at any moment, without reference or limitation to the ordinary high water mark. The trial court’s decision is unprecedented. It

holds that Lake Erie is no longer Lake Erie, and upland is no longer upland; that instead both things are now to be defined, not by the long established law, but by the whim of the moment to moment movements of the water, and that the State of Ohio does not even maintain its sovereign authority and jurisdiction under the public trust doctrine over the "lands beneath navigable waters" of Lake Erie that it has held since the organization of the State.

It is well settled that the State of Ohio may not abdicate any portion of Lake Erie. The trial court's solution around that insurmountable hurdle was to simply find that the bed of Lake Erie is not the bed of Lake Erie every moment the water recedes below the ordinary high water mark to expose the lakebed, and that upland ceases to be upland the moment the water rises above the ordinary high water mark. The trial court found that the boundary of Lake Erie is "the most landward place where the lake water actually touches the land at any given time," which could extend well landward of the upland Class Members properties during periods of extreme high water and flooding. Now, under the trial court's Order, the terms "uplands" and "lands beneath navigable waters" have lost their ancient definitions with regard to Lake Erie in the State of Ohio, and are re-defined every passing moment with the ceaseless movements of the waves.

The practical implications of the trial court's Order in this regard are mind-boggling. As a matter of day-to-day reality, even when the water is below the ordinary high water mark, it is never in the same location for more than a moment at a time. How is ODNR to determine where its jurisdiction begins and ends under this geographical re-definition of Ohio's Great Lake? A person could need a lease or permit in the morning, and not need one in the afternoon. How is Ohio to exercise its

concurrent authority with the United States over the *same* lands and navigable waters when Lake Erie is defined differently in the State of Ohio than the rest of the Great Lakes States? When the water from Lake Erie rises above the ordinary high water mark, what responsibilities does State have to these new trust lands which were always used and characterized as uplands and inlands before? When the water recedes below the ordinary high water mark, may upland owners build whatever they wish upon the exposed lakebed, rather than only structures in exercise of littoral rights? When the water falls below ordinary high water, can Class Members drill for natural gas and take minerals from what was always considered before to be the bed of Lake Erie without any authorization from the State? The answers to the First and Second Questions of Law in this action will have implications on interests far beyond the littoral rights of upland owners.

The State of Ohio has never claimed anything more than what it received at statehood to hold in trust for its whole people – the lands beneath the navigable waters of Lake Erie within the territorial boundaries of the state, the waters themselves, and their contents up to the ordinary high water mark. Now the trial court has attempted not only to divest the State of any part of those trust lands that become temporarily exposed, but also to take any part of the adjoining uplands and inlands that become temporarily inundated. The State of Ohio can do neither, and the trial court's Order must be reversed.

**Second Question of Law:** 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. (Class Certification Order, T.d. 123)

2. **Second Issue:** The furthest landward boundary of the “territory” is the ordinary high water mark as a matter of law, and that line may be located using the elevation of 573.4 feet IGLD (1985). The upper boundary of the “territory” is not and never has been “the most landward place where the lake water actually touches the land at any given time,” and the trial court’s decision rejecting the current methodology used to locate the lawful boundary in lieu of that unlawful boundary must be reversed as it is contrary to law.

a. **As a matter of law, the upper boundary of the “territory” is not the “the most landward place where the lake water actually touches the land at any given time,” and the upper boundary of the “territory” can not be reasonably or lawfully located based upon the location of the water of Lake Erie from moment to moment.**

The trial court’s answer to the Second Question of Law in a nutshell was “No . . . the boundary line may not be located at the present time using the elevation of 573.4 feet IGLD (1985).” (SJ Order, T.d. 183, pp. 72-73). The trial court gave three reasons for this answer: (1) the elevation “does not correspond uniformly to the moveable boundary of the place where the lake water actually touches the land at a given time;” (2) “the current selection of that elevation as the landward boundary has not been determined by legislative enactment; and (3) setting the boundary at that elevation “would, in many cases, constitute a ‘taking’ for which reasonable compensation would be due.” (SJ Order, T.d. 183, pp. 72-73).

First, it is axiomatic that the elevation of 573.4 feet IGLD (1985) does not uniformly correspond to the point at which the water touches the land at any moment, as the purpose of that elevation is determine the location of the “ordinary high water mark” of Lake Erie and not the momentary location of the water. Both the federal government and the State of Ohio must determine the location of the ordinary high water mark, rather than the location of the water from moment to moment, because that line marks the extent of their respective concurrent interests over “lands beneath navigable waters.” It is entirely

irrelevant that the elevation level used does not correspond with the new boundary created by the trial court.

It is similarly immaterial that the General Assembly has not determined the elevation level by legislative enactment. The Submerged Lands Act expressly confirmed that the United States retained its powers of regulation and control over the same "lands beneath navigable waters" granted to the states upon their admission to the union. 43 U.S.C. 1314(a). Neither the United States nor the State of Ohio may disclaim or abandon their concurrent powers to regulate and manage these same lands and waters for the public interest. The Army Corps of Engineers' jurisdiction over the Great Lakes "includes all the land and waters below the ordinary high water mark." The Corps locates that boundary in the State of Ohio, just as ODNR does, using the current elevation for the ordinary high water mark — 573.4 IGLD 1985. 33 CFR 329.11(a).

The trial court improperly dismissed the "Army Corps of Engineers' estimate of OHWM – 573.4 feet IGLD (1985)" as something entirely "unrelated to the establishment of boundaries between private property and the public trust territory." (SJ Order, T.d. 183, p. 48). Further, the trial court infers that ODNR would need to "engage in rule making to re-set the boundary" and/or the General Assembly would need to take action to "shift the public trust boundary from the moveable shoreline to the Army Corps' fixed boundary." (SJ Order, T.d. 183, p. 49, 59).

As set forth below, the IGLD method does not result in a "fixed boundary." Further, the line marking the extent of the interests of the United States and the State of Ohio with regard to Lake Erie as a matter of law is the same line – the ordinary high water mark. That line is not now, nor has it ever been, "the place where the lake water



actually touches the land at any given time.” Therefore, the IGLD elevation method is used to locate the ordinary high water mark, which is the boundary of concurrent federal and state authority, rather than the location of the water, which is not. Only the trial court believes that ODNR or the General Assembly would need to pass rules or statutes to “re-set” or “shift” the boundary, because only the trial court thinks that the upper boundary of non-tidal navigable waters is something other than the ordinary high water mark. It is the trial court that has attempted to “re-set” or “shift” the boundary of Lake Erie as a matter of law, not ODNR. No action on the part of ODNR or the General Assembly is necessary regarding the State’s use of this method of locating the “ordinary high water mark” which, unlike the Order below, respects the existing law rather than disregarding it.

The trial court also stated that “if such a uniform elevation were declared by the legislature as the farthest landward boundary of the ‘territory,’ it would, in many cases, constitute a ‘taking’ for which reasonable compensation would be due.” (SJ Order, T.d. 183, p. 72-73). It is unclear what the trial court meant by that because, as discussed above, it is the trial court’s invented boundary that results in an unconstitutional taking when the water rises above the ordinary high water mark and an abdication of public trust when it falls below that level. In addition, Ohio must fulfill its responsibilities as trustee up to the ordinary high water mark, and the people of the State of Ohio have vested public rights of use up to that point. There can be no “taking” based on a reasonable method for locating the ordinary high water mark of Lake Erie, for any littoral rights or littoral title of the Class Members in the lands below the ordinary high water mark of Lake Erie are held subject to the State’s authority and the public’s rights of use. Accordingly, the trial court’s decision under the Second Question of Law is in error and

should be reversed, and the State should be granted Summary Judgment on the Second Question as a matter of Law.

- b. The State's use of the International Great Lakes Datum (IGLD) to determine the ordinary high water mark parallels the method established for locating the landward boundary for tidal navigable waters in accordance with the Equal Footing Doctrine and accommodates the common law doctrines governing the ambulatory nature of the boundary.

As set forth above, the lands beneath the navigable waters of Lake Erie up to its ordinary high water mark vested in the State of Ohio upon its admission to the Union; and none of the State's interest lakeward of that line was conveyed or abdicated by the federal government or the State of Ohio prior or subsequent to Ohio's statehood. In tidal waters, under the Equal Footing Doctrine, the states' interest extends landward up to the "mean high tide line." There is, of course, no mean high tide line in the non-tidal waters of the Great Lakes, but under federal law the analogous boundary is the ordinary high water mark. See 43 U.S.C. §§ 1301(a)(1) & (2). The Supreme Court has adopted the definition of the mean high tide created by the U.S. Coast and Geodetic Survey based on the 18.6 year lunar cycle that can be predictably calculated through statistical methods to determine tidal water levels. *Borax*, 296 U.S. at 26-27.

The purpose of the Equal Footing Doctrine is to assure that newly admitted states get the same title and sovereignty over their navigable waters and the lands beneath them as did the original thirteen states. *Pollard's Lessee*, 3 How. at 222-223. Because the ownership and control of such lands are deemed essential to the equal sovereign status of each of the states, it is important that the ownership and control of such lands in non-tidal-water states be implemented to be as much as possible on all fours with that in the tidal-water states. The question, then, is how to best assure that

the ordinary high water mark standard for non-tidal waters is equivalent to the “mean high tide line” standard used in ocean states.

Using the Equal Footing Doctrine as the standard, a court must determine the non-tidal equivalent of the mean high tide line on tidal waters. A number of state and lower federal courts have articulated somewhat varying tests for locating the ordinary high water mark. Some use what is known as the common law “visual inspection test” or “vegetation test.” “Those tests are usually expressed in the following terms: The ordinary high-water mark is the margin of the land over which the waters have visibly asserted their dominion or the mark impressed on the soil by the effect of water covering it for a sufficient period to deprive the land of vegetation and to destroy its value for agriculture purposes.” Bruce S. Flushman, *Water Boundaries, Demystifying Land Boundaries Adjacent to Tidal or Navigable Waters* (2002), pp. 301-302; see also *Glass v. Goeckl* (2005), 473 Mich. 667.

There is an existing federal formulation for locating the “ordinary high water mark” which parallels the tidal formulation of “mean high tide line,” in that there is an ordinary/mean, high-water/high-tide, mark/line. In order to assure that the Great Lakes States are on Equal Footing with the ocean states, the next step is to determine the location of the ordinary high water mark so as to obtain an equivalent to the mean used to determine the “mean high tide line.”

In light of the methodology for determining the mean high tide line in tidal waters, the most closely analogous methodology lies in finding an elevation line that reflects the mean high water mark, averaged over a long enough period of time to even out periodic outlier cycles of lower and higher water years. Such an elevation line, like the mean

high tide elevation line, would serve to mark the boundary of a state's public trust ownership along the Great Lakes shoreline, just as the mean high tide line does along an ocean shoreline, without the potential for dispute and litigation over the boundary along every individual upland property.

The IGLD Elevation Method produces such an elevation line, and its use for locating the "ordinary high water mark" of Lake Erie is consistent with the longstanding principles of the "moveable freehold." As established above, under the long settled law of this state, and every other coastal state, the ordinary high water mark is a boundary that can physically and legally move by virtue of gradual, natural, long-term processes, but it does not legally move by rapid, temporary or artificial changes. The IGLD Elevation Method accounts for long-term changes in water levels defined in the doctrines of submergence and reliction in its periodic re-calculation every thirty years. (Appendix to State's Brief in Opposition to Plaintiffs' Motion for SJ, T.d. 175, Appendix B, C, D, E, F, G and H). This methodology is also consistent with the common law doctrines of erosion and accretion. If the elevation of the land has changed over time due to erosion or accretion, the elevation line for the ordinary high water mark will necessarily intersect the land at a different location. (Appendix to State's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, T.d. 175, Appendix I – Lake Michigan-Ordinary High Water Mark, Indiana Dep't of Natural Res., Div. of Water, *available at* [http://www.in.gov/dnr/water/lake\\_michigan/coastal/ord\\_hwm.html](http://www.in.gov/dnr/water/lake_michigan/coastal/ord_hwm.html)).

It is undisputed by the parties that ODNR utilizes the IGLD Elevation Method in locating the landward boundary of the "territory," following the current federal determination of the Ordinary High Water Mark of Lake Erie – 573.4 feet IGLD 1985.

As an administrative agency, ODNR has all powers that are expressly conferred on it together with such powers as are necessarily implied in order to effectuate such expressly granted powers. See *Waliga v. Bd. of Trustees of Kent State Univ.* (1986), 22 Ohio St. 3d 55. "Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do." *Industrial Comm. v. Brown* (1915), 92 Ohio St. 309, 311. The administrative construction and application that ODNR has given the statute and administrative rules since the Legislature unanimously passed Ohio's Coastal Management Act in 1989, which delegated the authority under R.C. 1506.10-.11 to ODNR, has been both reasonable and in accordance with law.

Pursuant to both state and federal law, ODNR must use the ordinary high water mark of Lake Erie as the landward boundary of the "territory" held in trust for the people of the State when issuing leases for the use and occupation of the "territory" pursuant to R.C. 1506.11. As also set forth above, the IGLD Elevation Method of locating the "ordinary high water mark" on the Great Lakes complies with the Equal Footing Doctrine, as it most closely mirrors the method approved as a matter of federal law for locating the line of the mean high tide in the nation's ocean states. Therefore, the method used by the State to locate the "ordinary high water mark" of Lake Erie in all respects conforms to the existing federal and state law pertaining to the determination, location, and alternately moveable/immoveable nature of the boundary, it is reasonable, and entitled to administrative deference as a matter of law. Accordingly, the trial court's

decision under the Second Question of Law should be reversed, and the State should be granted Summary Judgment on the Second Question as a matter of Law.

**Third Question of Law:** What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the “territory.” (Class Certification Order, T.d. 123)

3. **Third Issue:** The respective rights and responsibilities of the United States, the State of Ohio, the public, and the littoral owners in the “territory,” have long been settled in state and federal law, as has the hierarchy of those rights. The trial court’s decision that attempts to reverse that hierarchy, and declines to answer a question of law that it found common to all Class Members in its Class Certification Order, is in error and must be reversed.

a. **The littoral rights that upland owners may exercise in the “territory” recognized under Ohio law are held subject to the rights of the United States, the State of Ohio, and the public. The “territory” is a public navigable water of the United States, and is not susceptible to private ownership or the law that applies to private ownership of fastlands.**

The public and private rights that exist in the navigable waters of Lake Erie in the State of Ohio are long-settled. The United States holds supreme authority over Lake Erie through both its navigational servitude and regulatory jurisdiction under the Commerce Clause in the navigable bodies of water throughout the nation. The State of Ohio is proprietor in trust for the people of the State of the lands, waters and contents of Lake Erie within the territorial boundaries of the State. The State of Ohio’s sovereign proprietorship is in the hands of the citizens of Ohio, and in that character, the State holds the absolute right to all of Lake Erie for its citizens’ common use, subject only to the rights surrendered by the Constitution to the general government.

The public trust doctrine was recognized as the law of Ohio in the landmark public trust doctrine decision *Cleveland & Pittsburgh Railroad Co.* The Ohio Supreme Court made it clear in that case that “the state . . . cannot by acquiescence or otherwise abandon the trust property or permit a diversion of it to private uses different from the

object for which the trust was created." *C&P R.R. Co.*, 94 Ohio St. at 80. In addition to its duty to protect and manage Lake Erie, the State of Ohio cannot abdicate any control over that public trust estate. *Id.* ("An individual may abandon his private property, but a public trustee cannot abandon public property.")

The Ohio Supreme Court re-affirmed the State of Ohio's interest and duties under the public trust doctrine as set forth in both its prior opinion in *Cleveland & Pittsburgh Railroad Co.*, and by the Legislature in the Fleming Act, in its 1948 decision in *State ex rel. Squire*, 150 Ohio St. at 322. ("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 aid in 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.").

The public's rights in Lake Erie recognized under Ohio law include the rights of navigation, commerce, fishery, and recreation. These rights were initially recognized by the courts, but also have been codified. See R.C. 1506.10; R.C. 1506.11(G).

Upland owners bordering Lake Erie in the State of Ohio possess all of the public rights above, all of the property rights and reciprocal liabilities under the "moveable freehold" doctrines (accretion, erosion, reliction, submergence, and avulsion), and special property rights that they may exercise in Lake Erie known as littoral rights. Subject to regulation and control by the federal and state governments, littoral owners are entitled to: (1) make reasonable use of the waters in front of and flowing past their upland; (2) access navigable water on the front of which their property lies, and; (3) wharf out to navigable water for the purposes of navigation. *C&P R.R. Co.*, 94 Ohio St. at 79; R.C. 1506.10.; OAC 1501-6-01(L). Yet, the law is equally clear that the exercise

of littoral rights is entirely subservient to the State's proprietorship in trust of the lands and waters of Lake Erie. Accordingly, the answer to the Third Question of Law before the trial court is a well-settled matter of law.

Perhaps the most provocative error in the trial court's decision falls under this question of law, and results from the trial court's perceived relationship between the resolution of the definition and location of the boundary (First and Second Questions of Law) and the exercise of the littoral rights and other unique property rights of upland owners bordering Lake Erie in Ohio (Third Question of Law). The law is clear that the definition and location of the boundary have no impact whatsoever on the unique rights and privileges of littoral owners. The littoral rights of upland owners to use the shores below the ordinary high water mark, as well as the unique property rights and liabilities of upland owners in their upland property above the ordinary high water mark, are as fully preserved in the "high water mark states" that have maintained their full public trust interest up to the ordinary high water mark, as they are in the "low water mark states" where grants of the *jus privatum* down to the ordinary low water mark have been recognized.

However, the trial court chose to discard the existing law and fashion its own in order to redistribute public and private rights in Lake Erie as they have never existed before. First, as already set forth above, the trial court redefined the boundary of the public trust "territory" itself by the location of the water at any given moment. Second, the trial court recognized new littoral title and rights in any lands of Lake Erie that happen to be exposed at any time. Third, the trial court utterly disregarded the supremacy of the State's rights and responsibilities under the previously unquestioned Public Trust Doctrine



of Ohio, and instead, attempted to restructure the “property rights” in Lake Erie to match those that exist in privately owned fastlands. Each of these is a significant legal error.

The trial court found that the public has the right to use Lake Erie for “traditional purposes such as fishing, navigation, and recreation” and “water commerce” though by name only, without definition or analysis. (SJ Order, T.d. 183, pp. 59, 75). However, the court erred in finding that the people of the State of Ohio may exercise those rights only up to the new “water’s edge” boundary created by the trial court in this case under the First Question of Law, even when the location of the water is below the ordinary high water mark.

In enumerating the rights of the Class of littoral owners, the trial court listed all of their longstanding rights set forth above under the existing law and added some that had never existed, while failing to mention any of the reciprocal liabilities or limitations on those rights. (SJ Order, T.d. 183, pp. 60, 74). As for the State’s rights, the trial court recognized “the right of the state as trustee to enact regulatory legislation” and that “it is true that the State of Ohio holds title in trust to the waters of Lake Erie and the lands submerged beneath those waters.” However, the trial court erred in abdicating all of the State’s interest in any public trust lands below the ordinary high water mark of Lake Erie not covered by water at any moment, and erred further in finding that, even in the lands of Lake Erie covered by water, the State’s rights are to be held subject to the rights of upland owners that border the Lake.

Undeniably, it is the venerable law establishing the dominance of the State’s rights in Lake Erie, and the subservience of the upland owners’ littoral rights in Lake Erie, that the trial court finds most unable to follow. The trial court was candid that it

holds a very different view of public and private rights in Lake Erie than those expressed by the Ohio and United States Supreme Courts, and is incensed with the State's presentation of the existing law. (SJ Order, T.d. 183, pp. 66-67 ("Contrary to the [State's] description, it is the right of private property that belongs *at the top* of the hierarchy." (emphasis in original))).

Littoral owners whose property borders Lake Erie in Ohio do not have the same exclusive rights of ownership, possession and use over the public trust waters and lands of Lake Erie that they enjoy on their own upland property. They have no title to the lands below the ordinary high water mark of Lake Erie.

That being said, Ohio law does recognize that Plaintiffs, as upland owners, may exercise certain "littoral rights" in the "territory," regardless of the water level in the Lake. The nature of these littoral rights, and their place in the public trust hierarchy, were firmly established from the earliest opinion in which such rights were tentatively recognized, and have been consistently followed by every appellate district in Ohio that has issued a decision in a public trust case, other than the trial court's decision in this action. See, e.g., *C&P R.R. Co.*, 94 Ohio St. at 61; *State ex rel. Squire*, 150 Ohio St. at 303; *Thomas*, 65 Ohio App. 2d at 5; *Schnittker v. Ohio Dep't of Natural Res.* (10th Dist., 2001), 2001 Ohio App. LEXIS 1828; *Beach Cliff Board of Trs. v. Ferchill* (8th Dist., 2003), 2003-Ohio-2300. Accordingly, the trial court's indignation at the well-settled hierarchy of rights in navigable waters is misplaced, and the regulatory takings "substantial interference" language the trial court applies throughout its Answers to the certified Questions of Law, is inapposite to the law of navigable waters. (SJ Order, T.d. 183, p. 71-75).

Moreover, the trial court's decision precluding upland owners from the requirement that they apply for and obtain a leases pursuant to R.C. 1506.11 for their respective use and occupation of public trust land adversely affects the ability of the State of Ohio to perform its duties as trustee to manage and protect the lands and waters of Lake Erie, and the interest of the public. (SJ Order, T.d. 183, p. 74). The State's title to public trust lands (*jus privatum*) may not be alienated except for significant public purposes, in furtherance of the trust, and only by express grant with the consent of the legislative and executive branch. Even then, the State's sovereign authority as trustee (*jus publicum*) must remain in the State and never be abdicated. *Illinois Cent. R.R. Co.*, 146 U.S. at 435; 2000 Op. Att'y Gen. No. 2000-047.

The trial court's Order alienates the State from all of its interest to any part of Lake Erie not covered by water at any given moment, and makes the public trust "lands beneath navigable waters" of Lake Erie susceptible to wholly private use and ownership by the Class Members, to the exclusion of the people of Ohio. This result is not permissible under Ohio law, and the trial court's Summary Judgment Order upon the Third Question of Law before it must be reversed.

- b. **Upland owners bordering the "territory" do not have title in, or the right to exclude others from, the "territory," and the public's rights necessarily include the right of pedestrian travel incidental to recognized public uses.**

There were only two interrelated issues actually in controversy under the Third Question of Law: (1) Class Plaintiffs' claimed title or littoral right to exclude others from any Lake Erie shorelands not covered by water at any given moment; and (2) the people of Ohio's claimed right to walk the shore of Lake Erie as an incident to existing public rights. Whether or not the public has a right to walk the Lake Erie shore in Ohio,

is a question of first impression under Ohio law. It has become a point of controversy in this case in response to Plaintiffs' assertion that they "own" or have the right to prevent others from walking along the shore of Lake Erie adjacent to their upland properties

Though the other Great Lake States have spoken strongly about the public's rights of use below the ordinary high water mark, the recent Michigan Supreme Court's decision in *Glass v. Goeckel* (2005) 473 Mich. 667, is the only decision issued by a Supreme Court of any Great Lakes State directly on this issue. The State of Ohio respectfully directs the Court to that decision which began as follows:

Our Court unanimously agrees that plaintiff does not interfere with defendants' property rights when she walks within the area of the public trust. Yet we decline to insist, as do Justices Markman and Young, that submersion at a given moment defines the boundary of the public trust. Similarly, we cannot leave uncorrected the Court of Appeals award to littoral landowners of a "right of exclusive use" down to the water's edge, which upset the balance between private title and public rights along our Great Lakes and disrupted a previously quiet status quo.

*Glass*, 473 Mich. at 672-673. The Court then announced its holding regarding the public right to walk the shores of the Great Lakes:

We hold, therefore, that defendants cannot prevent plaintiff from enjoying the rights preserved by the public trust doctrine. 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 ordinary high water mark. Therefore, plaintiff, like any member of the public, enjoys the right to walk along the shore of Lake Huron on land lakeward of the ordinary high water mark.

*Glass*, 473 Mich. at 674-675.

Similarly, the Class Members' interest in Lake Erie is a qualified interest, not at their absolute disposal as is their upland property. See *Scranton v. Wheeler* (1900), 179 U. S. 141; *State ex rel. Squire*, 150 Ohio St. at 342 ("[T]he littoral rights of the upland

owners are not titles to land, and though they are property rights they are restricted and limited and entirely subservient to the power and authority of the state.”). Accordingly, upland owners bordering Lake Erie in the State of Ohio do not have title in, or littoral right to exclude others from, the lands beyond the ordinary high water mark of Lake Erie.

c. **A trial court can not decline to fully answer a Question of Law as to all members of the Class when it found that Question of Law to be common to all Class Members in its Class Certification Order.**

The trial court erred when it refused to fully answer the Third Question of Law. In its Summary Judgment Order, the trial court refused to answer the third common question of law as to all Class Members upon the trial court's erroneous belief that it would require a case by case analysis for each upland owner. (SJ Order, T.d. 183, pp. 60, 69, 73-74, 76). But this decision contradicts not only the court's Certification Order, which properly found the Third Question of Law common to the Class, but also the long settled Ohio law regarding littoral rights in Lake Erie. The rights of littoral owners bordering Lake Erie in the State of Ohio have always been defined and described in universal terms by the Ohio Supreme Court and the Ohio General Assembly. *C&P R.R. Co.*, 94 Ohio St. at 61; *State ex rel. Squire*, 150 Ohio St. at 303; R.C. 1506.10-.11.

This action is a class action. It was certified as a class action by Order of the trial court upon the Notice of Joint Stipulation to Class Certification by the State and the Class Representatives. (Notice of Joint Stipulation, T.d. 122; Class Certification Order, T.d. 123). The parties agreed, and the trial court ordered, that this case met the elements necessary for class certification and that there were Three Questions of Law common to the Class. (Notice of Joint Stipulation, T.d. 122; Class Certification Order,

T.d. 123). The parties thoroughly briefed the competing public and private rights in controversy. The Third Question of Law was a significant aspect of the case and its answer was readily universal in its application. The State, in fact, initiated the Stipulation for Class Certification on the basis that it would provide final and complete resolution of all Three certified Questions of Law. In refusing to fully answer the Third Question of Law, the trial court defeated the parties' goal to achieve finality and consistency under the Class Certification Stipulation and Order. The trial court's refusal to answer the Third Question of Law that it certified in this class action was in error and the stated bases for its refusal were incorrect.

**B. SECOND ASSIGNMENT OF ERROR:**  
**THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF DEFENDANT-APPELLANT/CROSS-APPELLEE STATE OF OHIO, IN CONCLUDING THAT THE REQUIREMENTS FOR SUMMARY JUDGMENT TO ISSUE IN FAVOR OF PLAINTIFFS'-APPELLEES'/CROSS APPELLANTS' AND INTERVENING PLAINTIFFS'-APPELLEES' WERE MET. (T.d. 183)**

**Issue:** To the extent the trial court relied upon the factual/historical allegations of Plaintiffs, or upon its own judicial notice, in reaching its decision, such reliance was improper for Summary Judgment under Civil Rule 56 and Rule of Evidence 201. (T.d. 183, pp. 6-8, 8-9, 13-24, 24-44, 61-62).

For the reasons discussed above, the trial court properly could have decided all three Questions of Law in summary judgment. Civil Rule 56 provides:

Summary judgment shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion. . . .

Here, the parties stipulated that there were no facts in dispute in this Class Action and the trial court needed only to consider the Questions of Law discussed above. (Notice

of Stipulation to Class Certification, T.d. 122; Class Certification Order, T.d. 123, p. 2; SJ Order, T.d. 183, p. 70). Therefore, the trial court could have and should have decided these issues under summary judgment, and the State of Ohio asks this Court to reverse the trial court and grant summary judgment in its favor.

However, to the extent that the trial court relied on alleged historical evidence and other disputed facts, summary judgment was not proper. Intervening Plaintiffs, Pro Se, presented a number of factual and historical allegations in their arguments under the First and Second Questions of Law certified by the Court. (SJ Motion and Briefs of Intervening Plaintiffs, T.d. 168, pp. 2, 4-12, 15-18; T.d. 179, pp. 4-5). These allegations were disputed by the State and noted as improper for a motion for summary judgment by the State in its Brief in Opposition to Intervening Plaintiffs' Motion. (T.d. 173, pp. 1-2, 5-7). Thereafter, Plaintiffs made the same factual and historical allegations in their Reply Brief (T.d. 180, pp. 11-12, Exhibits B, C, D, E), and Intervening Plaintiffs continued as well. (T.d. 179, pp. 4-5)

While the trial court's Summary Judgment Order stated that there were only questions of law before the court, its Order listed pages of "history" and "facts" that the trial court found "relevant"—namely those alleged by Intervening Plaintiffs and Plaintiffs which were disputed and improper for resolution on summary judgment as described above. (SJ Order, T.d. 183, pp. 13-24; 61-62, 70).

One such instance of the court reaching outside of proper Rule 56 evidence is reflected in the trial court's Order as it related to the "lands governed by the federal Swamp Land Act of September 28, 1850." (SJ Order, T.d. 183, pp. 13, 60, 69). In its Order, the trial court found **as fact** in Ohio that "some of the land along the shore of Lake

Erie is swampland which may be owned by individuals or other persons, free from the restrictions of the public trust” and, therefore, the trial court excepted such supposed land from this class action without notice of that intention to the parties or opportunity to object. (SJ Order, T.d. 183, pp. 13, 60 at n. 104, 69). But it is not a fact in evidence on the record of this case whether any of the swamplands Ohio petitioned for and received under the Swamp Land Act of 1850, and subsequently conveyed, border Lake Erie at all or are all further inland. Moreover, to the extent that any such swampland does border Lake Erie, the parties stipulated that the owners of upland property bordering Lake Erie in the State of Ohio, regardless of the source of that upland title, have the same universal rights and responsibilities in the “territory” of Lake Erie. The trial court’s decision to exclude potential uplands and persons from this action are not supportable in law or fact.

The “historical record” referenced by the trial court might be a very interesting interpretation of land title issues in the territory that would become Ohio, and could be relevant at trial if this were a traditional fastlands title dispute, but this record provides nothing relevant about the navigable waters of Lake Erie within the State under the Three Questions of Law certified by the trial court. Nevertheless, to the extent that this Court finds that the trial court did rely upon these disputed “facts” and “historical record” in reaching its decision, such reliance was in error and improper on Summary Judgment.

To prevent prejudice and to ensure fairness to parties, the trial court should have provided notice to the parties, before issuing its Summary Judgment Order, that the court intended to consider the alleged “historical record” and alleged “facts” of the Intervening Plaintiffs, and provide an opportunity for the parties to brief and present proper, authenticated evidence for summary judgment. Given that the trial court did not



provide that opportunity, it should not have relied upon the alleged "historical record" as a basis for its Summary Judgment Order.

For similar reasons, to the extent that the Summary Judgment Order was based upon the trial court's judicial notice of this "historical record," as well as past "Legislative Treatment of the Issues" or "Executive Branch Treatment of the Issues," this was also prejudicial error and improper under Rule 201 of the Rules of Evidence. Judicial notice may be taken of facts not in dispute, generally known, and capable of being accurately and readily determined. The trial court's "historical record" does not meet this standard.

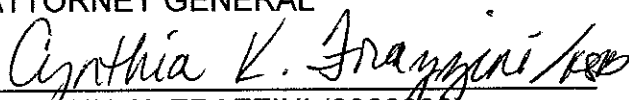
For all these reasons, to the extent that the trial court relied upon unstipulated facts in its Summary Judgment Order, summary judgment was in error.

**V. CONCLUSION**

For the above reasons, the State of Ohio respectfully requests that this Court reverse the Lake County Court of Common Pleas' Summary Judgment Order and grant summary judgment in its favor.

Respectfully submitted,

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**VI. CERTIFICATE OF SERVICE**

We hereby certify that a copy of the foregoing **Assignments of Error and Brief of Defendant-Appellant/Cross-Appellee State of Ohio** was sent this 17th day of April 2008 to:

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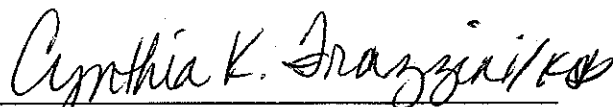
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