IN THE INDIANA COURT OF APPEALS
No. 46A03-1508-PL-1116

DON H. GUNDERSON AND BOBBIE J. GUNDERSON,
CO-TRUSTEES OF THE DON G. GUNDERSON
LIVING TRUST DATED NOVEMBER 14, 2006,

Appellants,

v.

STATE OF INDIANA, INDIANA DEPARTMENT
OF NATURAL RESOURCES,

Appellees,

and

ALLIANCE FOR THE GREAT LAKES, SAVE THE DUNES,
LONG BEACH COMMUNITY ALLIANCE, PATRICK CANNON,
JOHN WALL, DORIA LEMAY, MICHAEL SALMON, AND THOMAS KING,

Intervenor/Appellees.

On Appeal from the LaPorte Superior Court No. 2
Trial Court Case No. 46D02-1404-PL-606
Honorable Richard R. Stalbrink, Jr., Judge

BRIEF AMICUS CURIAE OF RAY CAHNMAN AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Rule 41 of the Indiana Rules of Appellate Procedure, Ray Cahnman and Pacific Legal Foundation (PLF) respectfully submit this brief amicus curiae in support of Appellants Don H. Gunderson and Bobbie J. Gunderson, Co-Trustees of the Don H. Gunderson Living Trust, Dated November 14, 2006. A verified motion for leave to appear as amicus curiae and file a brief on behalf of Appellants is pending before this Court.

Ray Cahnman owns property in Porter, Indiana, along the shore of Lake Michigan. Resolution of the issue in this case—whether the State of Indiana holds the land below the administratively created high watermark in "public trust" for the public—has the potential to affect the scope of his ownership interest.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. PLF has numerous supporters and contributors nationwide, including in the State of Indiana. Since 1973, Pacific Legal Foundation has litigated in support of property rights. PLF has participated, either through direct representation or as amicus curiae, in nearly every major property rights case heard by the United States Supreme Court in the past three decades, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. U.S. Envtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has also been involved with many cases raising similar questions to those presented in this case, including before this Court. *See, e.g., LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077 (Ind. Ct. App. 2015) (holding that the state is a necessary party in a dispute over ownership of sand between water line and administratively created high watermark on Lake

Michigan in Long Beach); *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 955 N.E.2d 935 (Ohio 2011); *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009) (addressing a legislative expansion of public beach access effecting a taking of private property); *Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.*, 187 P.3d 888, 897 (Cal. 2008) (addressing a proposed expansion of the public trust doctrine over all wildlife). Moreover, PLF attorneys have contributed to the body of scholarly literature on the public trust doctrine and the background principles of property law. *See, e.g.*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1 (2002).

Amici are familiar with the legal issues raised by this case. Amici supplement the arguments of the parties by offering guidance to this Court on background principles of property law and on the proper application of the public trust doctrine. In furtherance of PLF's continuing mission to defend private property rights, and to protect Mr. Cahnman's ownership interest in his property, amici urge this Court to avoid expanding the scope of Indiana's public trust doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises important questions regarding ownership of Lake Michigan shoreline property, and whether the courts of Indiana can change centuries of law to convert private land into public property. At issue is the common law public trust doctrine, which recognizes that certain waters must remain open to the public for commerce, navigation, fishing, bathing, and related activities, regardless of who holds title to the submerged land. *PPL Montana, LLC v. Montana*, 132 S Ct. 1215, 1234 (2012). Historically, the public rights established by the doctrine ended at the

water's edge. But the state, in this case, asks the Court to expand the doctrine beyond that well-settled demarcation line by declaring the existence of a public trust across dry, upland property so that the public can gain access to this historically understood private property. Specifically, the case asks who owns the strip of land between the water's edge and an administratively set "ordinary high watermark" on Gunderson's three lots bordering Lake Michigan.[1]

The trial court concluded that, under the public trust doctrine, the state owns the bed of the Lake, and the land beyond the water's edge, all the way up to the administratively set "ordinary high watermark" (and, by extension, any other private properties along Lake Michigan) as fixed by 312 Indiana Administrative Code 1-1-26(2). Yet Indiana law has never held the public trust to extend beyond the water line of the Lake for a simple reason: The administrative "ordinary high watermark" is not an actual high watermark, but only a legal fiction. According to the common law of property, the public trust entails only the bed of the Lake, and extends no farther than the point at which the water meets the shore. Moreover, Gunderson's deeds, and surveys of the lots, all showed that Gunderson owned to the lake edge, consistent with the law.

This Court should reverse the trial court's decision because it misinterpreted the public trust doctrine and because the consequences of the trial court's decision would be far-reaching and harmful to Indiana's shoreline property owners. Indeed, if left in place, the trial court's decision could expose the State to liability under the U.S. Constitution because creating a public interest in private property above the water's edge would represent an expansion of the public trust beyond its

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[1] Because Lake Michigan is a non-tidal lake, the location of the so-called "ordinary high watermark" is established by administrative rule, rather than by measuring the average reach of tides. *See* 312 Ind. Admin. Code 1-1-26(2); *see also* National Oceanic and Atmospheric Administration, Do the Great Lakes Have Tides?, *available at* http://oceanservices.noaa.gov/facts/gltides.html (last visited Sept. 30, 2015) ("[T]he Great Lakes are considered to be non-tidal").

original scope as recognized by the original thirteen states at the time of the ratification of the U.S. Constitution in 1787. *See Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601, 2614 (2010) (a judicial ruling that redefines established principles of a state's property law will raise federal constitutional problems under the Due Process and Takings Clauses). This Court should instead determine the scope of the Lake Michigan public trust in a manner consistent with the historical common law doctrine, so as to avoid negating previously recognized property rights in contravention of the Fifth Amendment.

ARGUMENT

I

THE PUBLIC TRUST DOCTRINE ESTABLISHES THE WATER'S EDGE AS THE BOUNDARY OF THE RES

The trial court's decision is inconsistent with the public trust doctrine, under which the State holds certain waters, and the submerged lands, in trust for the benefit of its citizens. *Lake Sand Co. v. State ex rel. Attorney Gen.*, 120 N.E. 714, 715 (Ind. Ct. App. 1918) (preventing foreign corporation from dredging sand and gravel from lakebed). This common law tradition passed to the original thirteen states at the time they attained sovereignty over the beds of the sea following the revolution and was passed on to the later-admitted states, including Indiana, by operation of the equal footing doctrine. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436-37 (1892) (The equal footing doctrine allowed Indiana to enter the Union in 1816 with the same sovereign powers that the original thirteen states held at common law when the Constitution was ratified).

To preserve the public's rights, the public trust doctrine places limits on the sovereign's authority to transfer its interest in submerged or submersible lands into exclusive private ownership. *Id.*; *see also* Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts*

Colonial Ordinance, 62 Alb. L. Rev. 623, 628 (1998) (under English common law, the land beneath the seabed was held by the sovereign in trust for public navigation and fishing). The doctrine operates by dividing state ownership of submerged or submersible lands into two categories.[2] *See Shively v. Bowlby*, 152 U.S. 1, 11 (1894); Callies & Breemer, 36 Val. U. L. Rev. at 355-61. On the one hand, the doctrine establishes a public right to use and enjoy the water—the res of the trust—for certain purposes. *Shively*, 152 U.S. at 11. This is the so-called jus publicum. *Id.* On the other hand, the doctrine recognizes that traditional private property rights also exist in many such lands and waters. *Id.* This is called the jus privatum. *Id.* The doctrine balances those public and private rights by holding that the state can alienate only the jus privatum—it must reserve the jus publicum in trust for its citizens. *Id.* Thus, properly understood, the doctrine operates *first* as a "limitation on legislative power to give away resources held by the state in trust for its people"[3] and *second* as an obligation to supervise and administer the res of the trust. *Id.* at 518.

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[2] The source of the modern public trust doctrine is *Ill. Cent. R.R. Co.*, 146 U.S. 387. In that case, a railroad company claimed title to 1,000 acres of submerged lands under Lake Michigan, stretching for nearly a mile along Chicago's shoreline, which it proposed to fill and develop. The railroad obtained title under a specific fee simple grant from the Illinois legislature. Finding that navigable waters, and lands under them, were held by the state in trust for the public, the Supreme Court concluded that the state could not convey or otherwise alienate them in fee simple, free of the public trust. The state could, however, sell parcels of public trust land, the use of which would promote the public interest (*e.g.*, docks, piers, and wharves), so long as this could be done without impairing the public's right to make use of the remaining submerged land and water. *Id.* at 450-64.

[3] *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999); *see also Bowlby v. Shively*, 30 P. 154 (Or. 1892), *aff'd sub nom Shively v. Bowlby*, 152 U.S. 1 (1894) (state may dispose of lands beneath navigable waterways as it sees fit, "subject only to the paramount right of navigation and commerce"); *Morse v. Division of State Lands*, 590 P.2d 709 (Or. 1979) (public trust doctrine did not prohibit issuance of an estuarian fill permit, because "there is no grant here to a private party which results in such substantial impairment of the public's interest as would be beyond the power of the legislature to authorize").

A. Indiana's Public Trust Is Constrained by the Historical Common Law Origins of the Doctrine

Under English common law, the land beneath the seabed was held by the sovereign in trust for public navigation and fishing. Fernandez, 62 Alb. L. Rev. at 628. The public trust was limited to the land beneath the waters since the doctrine was first set forth in Roman law out of recognition that the land beneath the sea was unsuitable for private use. David C. Slade, *Putting the Public Trust Doctrine to Work* xvii (National Public Trust Study, 1990); *see also* George C. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. Envtl. Aff. L. Rev. 307, 310 (2006) (In 530 A.D. the Institutes of Justinian pronounced that watercourses should be protected from private acquisition.). This common law tradition passed to the original thirteen states at the time they attained sovereignty over the beds of the sea following the revolution. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842) (United States Supreme Court held the crown's interest in tidelands passed to New Jersey upon the American Revolution).

As had long been the rule at common law, the public trust acquired by the original thirteen states encompassed only the bed of tidal lands, and the boundary of the public trust was demarcated at the mean high tide mark, as measured over an 18.6-year period in order to account for the full lunar cycle effecting the ebb and flow of the tides. *See* Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 23 (2010). Likewise, the Supreme Court recognized that the public trust doctrine applies in the Great Lakes by the same terms as it applied historically at common law when the thirteen original states ratified the Constitution, because newly admitted states entered the Union upon equal footing with the others. *Ill. Cent. R.R.*, 146 U.S. at 434 (holding that there was no rationale for differentiating between traditional tidal water bodies and the Great Lakes given the fact that they served the same historical public purposes

of fishing and commerce-driven navigation). But, for navigable waters not impacted by tides, like Lake Michigan, early American common law generally defined the ordinary mean high watermark as the point on the shore "where the presence and action of the water are so common and usual as to leave a distinct mark." *Kilbert*, 58 Clev. St. L. Rev. at 23 (*citing Howard v. Ingersoll*, 54 U.S. 381, 427 (1852) (Curtis J., concurring); 2 Henry Farnham, The Law of Water & Water Rights § 417, at 1461 (1904); A. Dan Tarlock, Law of Water Rights & Resources § 3.09(3)(d) (1988)). That is, the water line.

B. The Demarcation Line Between Public Trust and Private Property Is Constant, Regardless of Modern Uses

Accordingly, Indiana attained a public trust in the land beneath Lake Michigan upon its admission into the Union, and the scope of that trust was no greater than the scope of the public trust recognized at common law at the time the Constitution was ratified in 1787. *Ill. Cent. R.R.*, 146 U.S. at 436-37. As such, this Court should reject any demarcation line which expands the public trust beyond its historical common law scope, because Indiana's sovereign powers can be no greater than those of the original states. Any expansion of the public trust, beyond the scope of the powers originally acquired on equal footing, would redefine the public trust and annihilate private property rights along the Lake's shore in violation of the Fifth Amendment.

The limitations of the public trust doctrine at the time of the American Founding were drawn from English common law, expanded only to accommodate one particular interest of the new nation. Under English common law, the public trust existed only for two limited public purposes: (a) fishing and (b) navigation. *Smith & Sweeney*, *supra*, at 312 ("[T]he public trust doctrine officially emerged as an instrument of federal common law to preserve the public's interest in free navigation and fishing."). As the public trust doctrine was applied in the original thirteen states, a third use was

understood as bound up with the doctrine as well: commerce. Janice Lawrence, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138, 1140 (1982) ("Traditionally, the doctrine allowed the public to use trust lands, even if privately owned, for navigation, commerce, and fisheries."). Commerce was vital to the development of our young nation, and was conducted largely through navigation over the waters of the United States, which served as natural public highways connecting the states and foreign nations. As such, commerce was naturally associated with the already recognized public use of navigation in public trust waters.

Those were the three recognized uses of the public trust at the time the Constitution was ratified, and thus the only three public uses upon which the Lake Michigan public trust may be based. *Kilbert*, *supra*, at 6. Though the public may now desire to use the Lake for recreational purposes, or restrict its use to further environmental goals, these modern concerns simply have no bearing upon the rules for demarcation of the public trust, which were established long ago.

II

EXPANDING PUBLIC TRUST BEYOND ITS EXTENT AT THE TIME THE U.S. CONSTITUTION WAS RATIFIED WOULD ABROGATE CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY RIGHTS

A. Public Trust Cannot Intrude onto Private Property Without Running Afoul of the Fifth Amendment

The question of where the public trust ends and where unencumbered private property begins must be resolved in a manner consistent with the Fifth Amendment of the United States Constitution, which provides that government may not take private property without just compensation. U.S. Const. amend. V. Here, the State asks the Court to grant the public the right to enter property upland from the water's edge. The right to exclude others from entering upon one's land is universally held

to be one of the most fundamental rights associated with the ownership of private property. *See Nollan v. California Coastal Comm'n*, 483 U.S. at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (A physical invasion of private property will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using his or her property, which is "perhaps the most fundamental of all property interests."). Indeed, the right to exclude is so essential to private property that the United States Supreme Court has held that, to the extent that the government authorizes the public to cross over an individual's land, the government destroys all of the essential rights thereto and constitutes a categorical taking. *Loretto*, 458 U.S. at 435.

It is unsurprising, therefore, that several courts faced with the same arguments as those advanced by the State here have concluded that creating an easement over private property upland from a public trust water would effect a taking. In *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), for example, the Maine Supreme Judicial Court held that an attempt to expand the state's public trust doctrine to allow the public to traverse private lands to reach public land for recreational purposes resulted in a taking of private property. Similarly, the Massachusetts Supreme Judicial Court refused to expand statutory declarations of public trust to grant access across private land to reach intertidal lands, explaining

> The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitution of the Commonwealth and of the United States. . . . The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others.

Opinion of the Justices, 313 N.E.2d 561, 568 (Mass. 1974).

Several opinions of the New Hampshire Supreme Court exhibit similar skepticism toward expansions of the public trust that intrude on private property. Responding to a new statute that provided for access to a public trust shoreline across abutting private land, that court held:

> When the government unilaterally authorized a permanent, public easement across private lands, this constitutes a taking requiring just compensation . . . Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation. Although the State has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take property rights without compensation through legislative decree.

Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604, 611 (N.H. 1994) (citations omitted). The court drove home the same points in *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999). There, forty beachfront property owners sued the state, alleging a taking of their property when the state established a statutory boundary line defining public trust lands further inland from the mean high watermark. The Court was succinct, explaining that the State could not do so without compensating the affected landowners, as otherwise the State would violate the Fifth Amendment. *Id.* at 447 (citations omitted) (citing *Opinion of the Justices*, 649 A.2d 604).

These cases recognize that, although, as a general matter, property rights are determined by state law, the background principles of property law cannot be changed in such a way as to negate previously recognized rights without the state incurring liability for a constitutional taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 (1992) ("We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.").

The U.S. Supreme Court recently underscored that point in *Stop the Beach Renourishment*, 130 S. Ct. at 2601, 2614. Writing for a plurality of the Court, Justice Scalia concluded that "[t]he Takings Clause is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor." *Id.* (Scalia, J., plur. op.) Thus, when a court "declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 2602. To hold otherwise would render the constitutional prohibition against takings without meaning. *Id.* ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.") Justice Kennedy's concurring opinion echoed the same concerns, but suggested that the Due Process Clause is the proper method for setting aside a "judicial decision" that "eliminates an established property right." *Id.* at 2614 (Kennedy, J., concurring) ("The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause."). At a minimum, Justice Kennedy opined that due process must accompany the redefinition of settled property rights. *See id.* at 2614 ("It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights."). Whether the Takings Clause or the Due Process Clause governs, a majority of the U.S. Supreme Court agreed that a court's power does not include the ability "to eliminate or change established property rights." *Id.*

Here, the trial court held that the public trust extends all the way to the administratively created "ordinary high watermark"; however, that demarcation line encroaches upon property previously recognized as private and unencumbered, and thereby takes property without

compensation, in violation of the Fifth Amendment. The trial court's failure to grapple with this basic constitutional principle constitutes reversible error.

B. The Trial Court Effected A Taking Without Compensation

While the State may confine its public trust to the land presently submerged by water, or to any point below where the water line makes a mark, it may not expand the public trust upland of that mark without effecting a taking in violation of the Fifth Amendment. *Barney v. Keokuk*, 94 U.S. 324, 338 (1876) (The states determine the rights and title in the soil below the ordinary high watermark of navigable waters.). Because the State attained its sovereign powers under the equal footing doctrine, it can assert dominion over submerged lands only to the extent that the original states historically had that ability at common law. Since Lake Michigan is a non-tidal waterway, the State is confined to a high watermark "where the presence and action of the water are so common and usual as to leave a distinct mark. *Kilbert*, *supra*, at 23.

Lake Michigan, like the other Great Lakes, is distinct from traditional public trust waters because it is only marginally affected by lunar tides—it is, in fact, considered to be non-tidal. Unlike traditional tidal waters, Lake Michigan does not fluctuate drastically throughout the day, absent extreme events. *See* footnote 1, *supra*, at 3. As a result of these differences in character, the shores of the Lake, unlike the shores of traditional tidal waters, can be put to productive private uses, which do not interfere with the historically recognized public uses of the trust. *See Lawrence*, *supra*, at 1148.

Historically, the rationale supporting demarcation at the mean high tide mark for tidal waters was based upon the fact that the land below that mark was submerged multiple times throughout the day by saltwater. *Id.* ("[B]ecause of their high salt content, tidelands cannot be used for many

purposes other than those incident to navigation . . . .") As such, the land below the mean high tide mark was viewed as unsuitable for private use, but the land below Lake Michigan's administratively created "high watermark" is perfectly suitable for private use to the point where the water meets the land because the water does not rise and fall drastically, absent extreme events. *Id.*

As such, the shores of the Lake have historically been used for such productive private purposes down to the water's edge, in a way that the beaches of traditional tidal waters could not have been used. *See, e.g., Hogg v. Beerman*, 41 Ohio St. 81, 98-99 (1884) (discussing historical private uses along the water's edge of Lake Erie including the construction of structures and agricultural uses).

CONCLUSION

Amici Ray Cahnman and Pacific Legal Foundation respectfully request that this Court determine the scope of the Lake Michigan public trust in a manner consistent with the historical common law doctrine, as recognized by the original thirteen states at the time they entered the Union, so as to avoid negating previously recognized property rights in contravention of the Fifth Amendment. In doing so, the Court should reverse the trial court's judgment with directions to enter judgment for Gunderson.

DATED: October 9, 2015.

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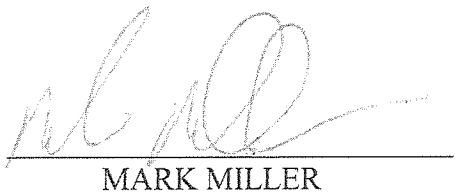

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was filed with the Clerk this 7th day of October, 2015, via Federal Express. I further certify that a true and correct copy of the foregoing brief has been served this day via first-class mail, postage prepaid, upon each of the following:

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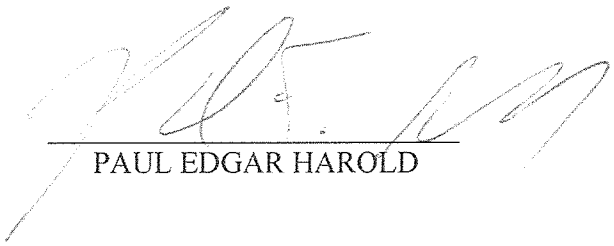

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