



# Shoreline Views

Newsletter of the Ohio Lakefront Group

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## First Briefs Filed to the Ohio Supreme Court

### State of Ohio Attorney General

The State of Ohio, through the Attorney General is appealing two issues. First, that the AG should not have been stripped of “standing” as ruled by the Appellate Court. The AG’s opening statement summarizes his position: “Any defendant against whom judgment is entered has standing to appeal, including the State of Ohio when it is named independent of a specific agency, and including when the State’s broader interests exceed an agency’s administrative interests. In all such cases, the Attorney General represents the State, and his authority to proceed does not require case-by-case instructions from the Governor or the General Assembly.”

OLG, in its Motion filed in December 2009, essentially took no position on whether the AG should have standing. OLG argued that, should the Supreme Court overrule the Appellate Court on the AG’s standing, a remand of the case was not needed.

The second issue deals with the extent of the State’s ownership of the public trust. The AG began this portion of the brief, as every previous brief to the lower courts. He claimed that since Statehood, the Ordinary High Water Mark has been the boundary of the public trust.

Three primary arguments are made about the lower courts’ rulings. First, the idea of a moving boundary, where the water and land meet, is impractical and confusing for the public and private owners. While the State argues strongly for the public rights below the OHWM, it concludes the argument saying: “This case does not require the Court expressly to define what the public trust allows the public to do, in the sense of reviewing the extent of fishing or beach walking rights as a substantive matter. The Court need only reverse the appeals court’s holding regarding the physical border where the public trust ends, and it is for the courts below on remand, or for future cases, to define what the public may do within the public trust territory.”

The second primary argument is that the State retains title over the artificially filled lands of Lake Erie, and only gradual, natural accretion transfers title to littoral owners. The State concedes that landowners are entitled to use fill,

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### National Wildlife Federation and Ohio Environmental Council

The National Wildlife Federation (NWF) and Ohio Environmental Council’s (OEC) brief echoes the statements of the AG, arguing that the State has owned to the OHWM since Statehood. NWF/OEC however goes a step further in defining the purpose of the public trust. In their opening paragraph they state: “The public trust was originally conceived to protect navigation, commerce, and fishery, and now protects recreation and aesthetic enjoyment as well.” They refer to this as a modern definition of the public trust. They claim therefore that the Court of Appeals took away the rights of millions of Ohio citizens who would recreate on the private property of lakefront owners. NWF/OEC refer to previously provided affidavits of several people who describe their activities of walking, bird watching, picnicking, exercising, swimming, and boating from areas adjacent to public beaches or their own private property. One affidavit described a situation where a condo development constructed a fence and warned the public that the property was private and not open to the public.

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### Ohio Department of Natural Resources

ODNR reentered the case, specifying in their brief that the Appellate Court ruling brought new issues, not present at the time of the original trial in the Common Pleas Court. These two issues are: the responsibility for the Ohio Attorney General to participate in the case, after ODNR and the Governor effectively withdrew securing separate counsel and no longer filing briefs; and secondly the issue of artificial filling of submerged land.

It appears that the second named concern is truly the prime concern. Large filled areas, such as the Cleveland Lakefront Airport and the Rock and Roll Hall of Fame likely extended into the public trust therefore allowing the ODNR to charge lease fees. What is not clear in their brief is whether fill placed to restore land lost by avulsion, a littoral right, is included in their definition of the “artificial filling of submerged lands of Lake Erie”.

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## AG Cont'd

and to retain full title over the area that is filled, but only in the case when the fill is used to restore loss caused by a sudden, natural avulsion. That is, if a sudden storm event washes away land, and leaves nothing but standing water in an area that was plainly the owner's beforehand, the owner may use artificial fill to restore the previous line. The AG also stated that he must do so reasonably promptly.

The final primary argument is stated: "All parties' rights are best protected and balanced by Ohio's longstanding public trust doctrine, with the boundary properly set at the ordinary high-water mark, and while the Court need not resolve here the precise substantive scope of the overlapping rights within the State's public trust area, the lakefront owners' special littoral rights, which extend below the ordinary high-water mark, must always be protected, even against the State and the public."

The state goes on saying: "This appeal requires the Court only to resolve the issue of Lake Erie's boundary as a physical matter, that is, whether to reaffirm that the State's public trust over Lake Erie continues to extend to the ordinary high-water mark, or whether to redefine the boundary to some other point. Once the traditional boundary is reaffirmed, the Court need not proceed on to define with precision the various rights and responsibilities of the public and of adjacent landowners that overlap within the area of the public trust."

## NWF/OEC Con'd

NWF/OEC also refers to cases affecting water rights, not private property. They equate a court's decision stating that the public trust extends to the usual high water mark, further defined by the court as "that line where the water usually stands when unaffected by any disturbing cause" as hence meaning the ordinary high water mark. Other cases they use involve U.S. Supreme Court rulings and tidal waters. Lake Erie is not tidal water, and the federal courts returned this case to the State Courts, as private property is a state issue, not controlled by the federal government.

NWF/OEC, as the Ohio AG, went to a lot of effort to put words in their briefs that were not relevant to the specific issue of the limit of the public trust in the State of Ohio along the shores of Lake Erie.

## Michigan and Pennsylvania Amicus Briefs

The Attorneys General for Michigan and Pennsylvania filed a joint Amicus brief on behalf of their own States, but refer to all of the Great Lakes States. They cite Illinois, Indiana, Minnesota, New York, and Wisconsin as having different but similar laws regarding the public trust. While some of these States are low water mark and water's edge States, the OHWM is given as the equivalent.

The Pennsylvania and Michigan AGs begin their brief citing Roman Civil Law and English Common Law. Their opening statement would imply that the Romans or English established the OHWM. They state:

"Public Trust Doctrine is an ancient principle of law recognizing the importance of preserving every citizen's right to use navigable waters. To protect these rights, the public's interest in the bottomlands of navigable waters was recognized for hundreds of years under the English common law that was almost universally adopted in the United States. The boundary between bottomland and upland in navigable waters under the common law was defined by the ordinary high water mark, and every State was vested with title to bottomlands below that mark upon achieving statehood."

The best statement they make, which would seem to support OLG and consistency with Ohio law is their conclusion:

"Amici States recognize that each State is free to define its own property law, and to specify the particular activities protected by the Public Trust Doctrine, and to provide for regulation to ensure that those rights are exercised in a reasonable manner with due regard to the rights of littoral property owners and the public generally. Amici States also recognize, as does Ohio that littoral property owners have certain unique rights that are established and protected by State law."

In other words, all states have the right to determine their private property laws. And as OLG has stated many times before, references to Roman and English Common law are without merit, as they were in regard to "tidal" water. We all know that Lake Erie is not a tidal body of water.

### Do we have your correct e-mail address?

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## **Florida Property Owners Lose While Texas Property Owners Win in Court**

Two separate cases before the Courts left opposite outcomes as private property owners continue to wage their battle against State governments.

In an 8-0 decision the U.S. Supreme Court ruled that land filled by the State of Florida in front of ocean front property owners is the property of the State and that no illegal taking had occurred. The case is based on a suit filed when the State re-nourished beaches in front of private property owners where beaches had been severely damaged by hurricanes. The Court reasoned that the mean high tide line is the boundary between the State land and private property owners. Land, which is a result of accretion (gradual building up of land) to the private beach becomes the property of the owners by State law. However, land that is deposited by avulsion (sudden and rapid deposit of land) does not add to the property owners land by law. Since the State filled land that was originally submerged and it was a sudden occurrence, the Court ruled that this was an avulsion event. Therefore the State did not illegally take land from the property owners under Florida law.

In a subsequent press release by OLG President Tony Yankel he stated: "Although the "Stop the Beach Renourishment" case was a blow to private property owners in Florida, the decision made some very strong and fundamental points. Of prime importance, the U.S. Supreme Court's Decision makes it clear that state law defines property rights and not federal law. The Ohio Lakefront Group welcomes the Court's statement of the obvious—that state law defines property rights."

Ohio law is different than federal law and more importantly, Florida law. Florida law deals with "tidal" water, as Florida's shores abut the Atlantic Ocean and the Gulf of Mexico, which have tides. In stark contrast, Ohio law deals with non-tidal water, as Ohio abuts Lake Erie, which does not have a tide. Therefore, there is no relationship between this Florida decision and Ohio Law. Florida law states that private property goes to the mean high tide mark. Ohio law states that private property goes to the water's edge.

In Texas, after a 27-month battle with the \$80-billion Texas Department of Transportation backed by the Spanish corporation Cintra-Zachary, with the strong support of Texas Governor Rick Perry, property owners won an injunction to stop the confiscation of their land. Texas has a unique statute that allows for local governments to join together creating a planning commission, which then allows them to invoke coordination with state agencies. Five towns and school districts combined representing approximately 6,500 people and their jurisdiction covered 30 square miles.

The five communities would have been destroyed by the creation of the I-35 Trans-Texas Corridor, a quarter-mile wide super transportation corridor. The corridor itself

was to hold six passenger lanes for commuter travel, four truck lanes for long hauls, freight rail, and high-speed rail. The right-of-way that would be condemned for the project was a quarter-of-a-mile wide, taking 146 acres per mile from property owners. Fire stations would have been cut off from the communities they protect. School districts across the state would have to be redistricted. School buses would be adding hundreds of miles a day navigating around the limited access super highway. Residents would be forced to pay a toll to get to work. 500,000 private acres would be confiscated to accommodate not only the internationally funded highway system, but also to provide lease pads to gas, hotel and restaurant services. The people impacted in these small rural communities would suffer all the economic and social damage for this project.

It was thought that no one could stop the Trans-Texas Corridor. However, these five courageous towns and their school districts invoked coordination and took a stand equal in spirit to the Alamo, but with a much better result – property owners won.

### **The Lawsuit in Review**

On May 28, 2004, OLG along with 11 individual complainants filed suit against the ODNR and the State of Ohio in Lake County Common Pleas Court. The case was assigned to the Honorable Judge Eugene Lucci. This date is important because the State had recently passed legislation greatly limiting any lawsuit for illegal taking effective June 1, 2004. Therefore this is the one and only lawsuit that can ever be filed by property owners for illegal taking by the State.

Also filing similar suits on May 28 were Scot Duncan and Darla Duncan, and Homer Taft. These separate suits were later combined with the OLG suit, although both Duncans and Taft continued to file briefs on their own behalf.

At that same time the Michigan "Save Our Shoreline" group had just been victorious in the Michigan Courts preserving their private property rights to the waters edge. Unfortunately, this victory was later overturned in the Michigan Supreme Court and allows the public to use their private beaches.

On February 23, 2005 ODNR filed cross-claims against the United States of America and the U.S. Army Corps of Engineers on the theory that federal law should determine the extent of the state's public trust.

On April 1, 2005, the case was removed to Federal Court. At the Federal Court on May 4th, 2005, Acting Assistant Attorney General Kelly A Johnson moved to dismiss, stating that ODNR had no standing to bring the action to Federal Court. The State managed to keep motions and counter-motions going for almost one year.

On July 18, 2005 the National Wildlife Federation along with the Ohio Environmental Council filed a motion at the Court to intervene on behalf of the defendants. No one objected and the NWF/OEC remain parties to the suit.

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## **OLG 2010 Annual Meeting**

The Ohio Lakefront Group Annual Meeting was held on May 13th at Holiday Inn in Westlake. Greg Baeppler, OLG Board Chairman, began with the nomination and election of the 2010-2011 Board of Directors. The previous 11 members of the board were nominees to continue into next year. There were no nominations from the floor and the OLG Secretary cast a ballot for election by acclamation.

OLG President Tony Yankel gave a brief synopsis of our standing with the lawsuit.

Dave Powers of Michigan's SOS spoke about their lawsuit that was lost in the Michigan Supreme Court after having won in the Trial Court and Appellate Court. He gave the history of the case and discussed how the Michigan Supreme Court arrived at their decision in favor of "beach walking" and against private property rights. He continued his message about lessons learned in Michigan and what OLG can do to help prevent a similar occurrence by the Ohio Supreme Court.

Maurice Thompson, Executive Director of the 1851 Center for Constitutional Law, spoke of his involvement with constitutional issues such as private property. He spoke of several cases settled by the Ohio Supreme Court that favored private property owners. He gave a good history of private property law in Ohio and how his center strongly supports our efforts in this lawsuit.

Shaun Newsome, a marina owner on the Vermilion River, spoke about the recent ODNR attempt to designate the Vermilion River as a "scenic river" without consultation with any property owners along the river. As a scenic river, the ODNR has virtual control of the land from the river's edge to at least 1000 feet on both sides of the river. He told the story of their fight and concluded that ODNR backed off from their plan.

Senator Tim Grendell gave a rousing talk about what has happened since the suit was filed in 2004 and what we must be prepared to do to win this case at the Supreme Court. He likened the case to a horse race, "it doesn't matter who is ahead in the backstretch or the final turn, but all that matters is who crosses the finish line first." Horses need to be fed, just as our suit needs to be fed to assure we have sufficient resources to bring all we need to the table. We need better public outreach by our members to attract more property owners, both on the Lake Erie shore and inland, to join our cause and become proactive with us.

## **The Lawsuit in Review – Cont'd**

Finally, on February 14, 2006 the case in Federal Court was dismissed by Judge Oliver and remanded back to the Lake County Court of Common Pleas.

On June 9, 2006, Lake County Court of Common Pleas Judge Eugene Lucci certified our lawsuit as a class action, which included approximately 14,000 parcels of land along Lake Erie.

On December 11, 2007 Judge Lucci issued an order granting partial summary judgment for the plaintiffs (OLG and individuals) after nearly a year and a half of discovery, and motion and countermotion briefs. Judge Lucci ruled that the private property extended to the water's edge and further reformed all deeds to that mark when the deeds were filed. He left open the question of filled lands due to natural or unnatural causes. He also ruled that the State of Ohio has no authority to require landowners to pay leases for deeded property landward of the water's edge. Finally he declared that the public has the rights of fishing, boating, and recreation in the waters of Lake Erie only to the water's edge.

The defendants filed a Notice of appeal with the Court on January 9th, 2008. Motions began on January 21st and continued for the next 9 months to the Ohio 11th District Court of Appeals in Painesville. Oral arguments before the three Appellate Court Judges were held on November 18, 2008. Nearly 100 property owners filled the courtroom to witness the oral arguments.

The Appellate Court rendered their decision on August 24th, 2009 upholding the lower court ruling. The Appellate Court issued two additional findings. First, it vacated Judge Lucci's decision reforming all deeds to the water's edge. Second, the Court ruled that the State Attorney General had no standing in the appeal, since his clients, ODNR and the Governor, withdrew from the case during the original Common Pleas Court trial.

On October 8, 2009 AG Cordray appealed the case to the Ohio Supreme Court joined a few days later by NWF/OEC. His appeal was to confirm his standing before the Court as the chief legal protector of the people of Ohio as well as to try to overturn the lower court's ruling on defining the water's edge as the extent of the public trust. Motions began to be filed on December 8th. The Ohio Supreme Court accepted the case for review on March 3, 2010 after another series of motions and counter-motions. The defendants filed initial briefs on July 14th. A number of Amicus briefs were filed at the same time including the briefs from the States of Pennsylvania and Michigan.

Briefs from OLG and consolidated plaintiffs Duncan and Taft are due on August 31st." to say "Briefs from OLG and consolidated plaintiffs Duncan and Taft are due on September 20th. Additional briefs will be filed before the Court schedules oral arguments.

Oral arguments will be heard in Columbus. We do not know when these hearings will be scheduled, but we doubt that it will be this year.

## ASK THE PRESIDENT

- Q. What impact does the Florida “Stop the Renourishment” case have on our lawsuit?
- A. It shouldn’t have any impact. Not only are the cases significantly different, the laws in Florida are different than Ohio. In the Florida case, the State added sand to beaches damaged by hurricanes against the wishes of property owners. In Ohio, the State claims it owns privately deeded property and wants to charge private property owners rent for the land their deeds say they already own. Florida law deals with “tidal” water, because Florida abuts the ocean. Accordingly, Florida’s private property extends only to the “mean high tide mark.” As Lake Erie does not have a tide, Ohio law deals with non-tidal water. Ohio law says private property extends to the “water’s edge.” It is important to remember that the U.S. Supreme Court made clear that state law is paramount in matters of private property rights. Florida’s laws are different, and what happened in Florida shouldn’t affect us. Moreover, Ohio’s laws are clear, despite the activists’ deceptive efforts to muddy the waters.
- Q. Since the Florida case ended up in the United States Supreme Court, is it possible that our lawsuit may be escalated after the Ohio Supreme Court ruling is handed down?
- A. While anything is possible, I believe it unlikely that the U.S. Supreme Court would hear our case. Our case was sent to the Federal Courts in 2005 at the motion of the Ohio Attorney General. The U.S. Attorney immediately moved to have the federal case dismissed. After a year of review, Federal Judge Simon Oliver agreed with us and ruled to dismiss the federal lawsuit and our lawsuit was remanded back to the State Courts. This would indicate that the Federal Court views this case as one of private property rights and therefore should be settled in the State Court.
- Q. What are your greatest fears with respect to our case being before the Ohio Supreme Court?
- A. I have two fears. My greatest fear is the same as the environmentalist’s and sportsmen’s greatest hope—that the Supreme Court will become “activist” and change the law in Ohio. We have our deeds that go back over 200 years, before Ohio became a state. There are about 150 years of Ohio Supreme Court decisions in our favor. However, like in Michigan, it is possible for the Court to simply turn that all upside down. Attorneys General Marc Dann and Richard Cordray know what the law has been; they have just pushed for a change in that law. My other fear is that we will simply run out of money to pay our attorneys for representing us in the lawsuit. The Attorney General is funded via our taxes. But we can only rely on donations. And if the donations stop coming in, the lawsuit ends and we lose.
- Q. Will the Ohio Supreme Court hear our case before the end of the year or before the November elections?

- A. It’s possible, but unlikely, that the Supreme Court will hear oral arguments prior to the November elections or this year. Our opponents filed their initial briefs on July 12<sup>th</sup>. Our initial briefs are due soon, absent any extensions of time. There are more rounds of briefs due after that.
- Q. Three Supreme Court seats are up for election in November. If the Court won’t decide our case prior to the elections, what can we do to be comfortable that the new Court will act with jurisprudence in our case?
- A. As our case is before the Court, it is inappropriate to talk to any of the judicial candidates or current Justices about how they would vote on a specific case. However, these are political candidates that speak at many events and hold fundraisers. Go to these events. Introduce yourself to these candidates and ask their position on property rights and other issues that may be of concern to you. Hopefully their responses will be clear enough for you to determine who to support and who to vote for. Let your voice – and – vote be heard.

## ODNR Cont’d

In the brief they state: “While ODNR takes no position as to whether the courts below correctly interpreted the statutory definition of the landward boundary of the public trust, it does believe that the trial court correctly held that the public trust encompasses all lands formerly beneath the waters of Lake Erie up to the landward boundary, notwithstanding subsequent artificial filling of those lands.

Under the trial court's holding, the definition of "territory" does not include lakefront land that is not part of the public trust, which is suddenly lost due to avulsion. If the property owner restores the land in a timely manner, the property owner may retain title.” ODNR supports the principle of a limited right of littoral owners to restore property landward of the natural shoreline by using artificial fill to regain land suddenly lost to avulsion. The issue here is whether the extensive artificial filling beyond the natural shoreline along many waterfronts and properties has removed such areas from the territory, effectively removing any title or interest of the public to those lands.

As with the AG’s argument regarding fill, the question is whether the fill was used after an avulsive event and how long a period of time is considered “timely”.

## Special Member Recognition

Our OLG special member recognition is for those who have given significant contributions to help us support our lawsuit. We now have a total of 253 members who have reached this goal. In fact, we are adding a new level for members who have contributed over \$10,000 since OLG was founded.

The levels are: Gold for members who have contributed at least \$1000, Platinum for those who have contributed at least \$2500, and Diamond for those who have contributed at least \$5000 and Double Diamond for those who have contributed \$10,000 or more. We publish this list in each Newsletter to recognize these dedicated members.

## **DOUBLE DIAMOND**

Joan & Stan Ross – Columbus  
Cedar Point Property Owners – Sandusky

## **DIAMOND**

Michael Bockrath – Sandusky  
Jerome & Mary Fritz – Bay Village  
Kent & Marilyn Hampton – Findlay/Port Clinton  
Leo & Dolores Leiden – Madison  
Robert A. Liebert – New Albany/Marblehead  
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Hugh & Elly Windsor – Sheffield Lake  
Long Beach Association – Oak Harbor  
Lost Lake Development – Port Clinton  
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## **PLATINUM**

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Crist & Barbara Winterstein – Vermilion  
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Linwood Park Company – Vermilion  
Sand Beach Association – Oak Harbor  
Save Our Shoreline (Ohio) – Mentor  
West Harbor Shores Assn Pt Clinton – Marblehead  
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Terry & Patricia Tomlinson – Kettering  
Anthony & Carol Tricomi – Akron  
Paul & Dorothy Tusko – Lorain  
Roger & Mary Fran Urban – Sheffield Lake  
Thomas & Sandra Wade – Port Clinton  
Frances Wainio – Marblehead  
Ronald Wallace – Huron  
Deborah Watson – Cream Ridge NJ  
Laurel Webster – Madison  
Anthony & Twila Whitmore – Sandusky  
Gage & Susan Williams – N Ridgefield/Sheffield Lake  
William & Sarah Williams – Port Clinton  
Jeff Yakovich – Bay Village  
Anthony & Sheryle Yankel – Bay Village  
John & Joan Yeager – Vermilion  
Christine Zimmer – Huron  
Donald & Dorothy Zito – Madison  
BVC Erosion Control – Avon Lake  
Bar Harbor Association – Marblehead  
Catawba Point Association – Port Clinton  
Cove Park Property Owners Assn – Cleveland  
Cumings Homestead Condo Assn – Geneva  
Feick LLC – Sandusky  
Harbor Island Association – Port Clinton  
Kennykirk Homeowners Association – Fostoria  
North Side Marshes – Sandusky  
Save Our Shoreline, Inc. – Bay City, MI  
The Village at Rivers Edge – Port Clinton  
Vermilion Lagoons Association – Vermilion  
West Willow Beach Association – Oak Harbor

## I Will Join OLG and Fight ODNR

Establish or renew your annual membership now to continue your support of the OLG lawsuit against the ODNR. The cost is \$50 per household, plus a suggested \$50 per \$100,000 tax value of your property.

There are 3 ways to donate to the Ohio Lakefront Group:

1. Donate by mail with your MC or Visa or a check. Fill out the Membership form and mail it to:

**Ohio Lakefront Group**

**P.O Box 2084**

**Sheffield Lake, OH 44054**

2. Donate by phone with your MC or Visa. Call 888-502-3224 and give us your name, phone number, card number, expiration date and the amount of your donation.
3. Visit [www.ohiolakefrontgroup.com](http://www.ohiolakefrontgroup.com)  
Click on a "Donate" button and then follow the step-by-step instructions. You will be directed to a secure PayPal website.

See gift premiums at right. E-mail your choice to [ohiolakefrontgroup@att.net](mailto:ohiolakefrontgroup@att.net)



**OHIO LAKEFRONT GROUP**

**P.O. Box 2084**

**Sheffield Lake, OH 44054**

**In This Issue:**

**Supreme Court Briefs Filed**

**Lawsuit in Review**

**Membership Meeting**

**Private Property Battles Elsewhere**

**Ask the President**

**Diamond, Platinum & Gold Members**

## Membership Form

Name: \_\_\_\_\_

Mail Address: \_\_\_\_\_

City, State, and ZIP: \_\_\_\_\_

Phone: \_\_\_\_\_

Shoreline City \_\_\_\_\_

Email: \_\_\_\_\_

Annual Dues: \$50.00

Plus requested donation (\$50 per \$100K value) \$ \_\_\_\_\_

Total \$ \_\_\_\_\_

Credit Card: VISA \_\_\_ MC \_\_\_ Check Number \_\_\_\_\_

Card Number: \_\_\_\_\_

Expiration Date: \_\_\_\_\_ Code on card back: \_\_\_\_\_

Choose your gift premium (add note on form):

\$100 – ODNR Stop Taking Our Property T-shirt (red)

\$200 – Polo Shirt (men) Sleeveless Polo (women) OLG Logo

\$500 – OLG Windbreaker (men) Sweater-Set (women)

Size(s): S M L XL XXL (note women or men)