

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

STATE OF OHIO EX REL., ) CASE NO. 1:05-CV-0818  
ROBERT MERRILL, TRUSTEE, et al., )  
)  
Plaintiffs-Relators, ) Judge Solomon Oliver  
)  
vs. )  
)  
STATE OF OHIO, DEPARTMENT )  
OF NATURAL RESOURCES et al., )  
)  
Defendants-Respondents, )  
Counterclaimants, and )  
Cross-claimants, )  
)  
vs. )  
)  
UNITED STATES OF AMERICA et al., )  
)  
Cross-claim Defendants, )  
)  
and )  
)  
NATIONAL WILDLIFE FEDERATION )  
and OHIO ENVIRONMENTAL COUNCIL )  
)  
Applicants for Intervention. )

---

**REPLY IN SUPPORT OF MOTION TO INTERVENE  
BY NATIONAL WILDLIFE FEDERATION  
AND OHIO ENVIRONMENTAL COUNCIL**

---

## I. INTRODUCTION

This case will resolve whether the ownership of the shore of Lake Erie in the State of Ohio is public or private. If the former, members of the public, including members of proposed intervenors National Wildlife Federation (“NWF”) and Ohio Environmental Council (“OEC”), will be able to continue to use the shore for recreation and aesthetic enjoyment; if the latter, the plaintiffs (collectively, “OLG”) will be able to bar such use as a “trespass on private property.” See Plaintiffs-Relators’ Brief in Opposition to National Wildlife Federation’s and Ohio Environmental Council’s Motion to Intervene at 5.

OLG opposes the motion to intervene on the grounds that NWF and OEC lack standing, that they do not have a significant legal interest in the subject matter of this lawsuit, and that their interest is adequately represented by the State. OLG does not contest the timeliness of the motion to intervene, nor does it contend that NWF’s and OEC’s intervention will cause undue delay or prejudice.

The opposition to the motion to intervene fails on all counts. In the Sixth Circuit, standing is not necessary for intervention; NWF and OEC nevertheless have representational standing because their members would suffer real and personal injury were OLG successful in terminating their current and intended use and enjoyment of the Lake Erie shore. The members’ interest in perpetuating such use and enjoyment is a significant legal interest protected by the Public Trust doctrine, as NWF and OEC explained in their opening memorandum in support of intervention. The State cannot be counted on to represent that interest of members of NWF or OEC who are not citizens of Ohio because the State’s obligations run only to its own citizens. The State may find it expedient (1) to settle this lawsuit on grounds that would be unacceptable to members of NWF or OEC who are not citizens of Ohio, or (2) to accept an adverse ruling that such members of NWF or OEC would appeal. For these reasons, and those NWF and OEC gave

in their opening memorandum, they are entitled to intervention as of right.

In any event, permissive intervention is appropriate. OLG's contention that permissive intervention depends on the existence of a significant legal interest is both unsupported and wrong. All that NWF and OEC must demonstrate for purposes of permissive intervention is that their "claim or defense and the main action have a question of law or fact in common." Federal Rule of Civil Procedure 24(b)(2). OLG did not contest NWF's and OEC's demonstration that their claim has questions of law and fact in common with OLG's claims, so the Court should allow NWF's and OEC's intervention.

## II. ARGUMENT

### A. Although Standing Is Not Necessary For Intervention, NWF And OEC Have Standing.

OLG asserts that NWF and OEC do not have standing to intervene as defendants or raise a counterclaim. The short answer to OLG's assertion is that "a party seeking to intervene need not possess the standing necessary to initiate a lawsuit." *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). In *Purnell*, two illegitimate children sought to intervene in a wrongful death action brought by the administrator of their father's estate. *Id.*, 925 F.2d at 942. The court rejected the administrator's argument that to intervene the children had to have standing necessary to initiate the lawsuit. *Id.*, 925 F.2d at 948.

Even were NWF and OEC obliged to establish standing, they have. An organization "has standing to sue on behalf of its members when 'its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *American Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 540 (6th Cir. 2004) (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693 (2000)). A member of an organization would have

standing to sue in his own right when he has suffered a concrete and particularized, actual or imminent injury in fact, one which is fairly traceable to the defendant's actions, and which would be redressed by a favorable decision. *Id.*; *Ailor v. City of Maynardville, Tennessee*, 368 F.3d 587, 596 (6th Cir. 2004).

In this case, NWF and OEC have submitted the declarations of two members, one a resident of Ohio, the other a resident of Michigan. Both averred that they have personally used and enjoyed, and intend to continue to use and enjoy, the Lake Erie shore, that is to say, the strip of land between the ordinary high water mark and the water's edge. See Declarations of Patrick S. Hayes ("Hayes Declaration") and Brian Preston ("Preston Declaration") (attached as Exhibits 3 and 4 to Memorandum in Support of Motion to Intervene by National Wildlife Federation and Ohio Environmental Council). While walking along the Lake Erie shore, one or the other engages in bird-watching, fossil-hunting, shell-collecting, or the study of plants, and enjoys the natural beauty of the lake and quiet contemplation, or uses the shore to gain access to the waters of Lake Erie for wading, fishing, or other recreational pursuits. Hayes Declaration at 3; Preston Declaration at 2. Mr. Hayes also operates a Bed and Breakfast on upland property he owns adjacent to the Lake Erie shore; his guests walk along the shore and fish or swim from it. Hayes Declaration at 2-3. Messrs. Hayes and Preston averred their concern that OLG's success in this lawsuit would cut off their personal use and enjoyment of the Lake Erie shore and its natural resources, and the use and enjoyment of Mr. Hayes' guests, to the detriment of his business. Hayes Declaration at 3-4; Preston Declaration at 2-3.

These declarations establish imminent, concrete, and individualized injuries which are directly traceable to OLG's initiation of this lawsuit. These injuries would be redressed by a judgment rejecting OLG's claims of private ownership of the Lake Erie shore, and declaring that the State of Ohio owns and holds the Lake Erie shore in trust for the public. In addition, the

interests of NWF's and OEC's members in using the shore for recreation and aesthetic enjoyment are germane to NWF's and OEC's purposes, which are to conserve and protect natural resources for the use and aesthetic enjoyment of their members. See Declarations of David B. Strauss and Vicki Deisner (attached as Exhibits 1 and 2 to Memorandum in Support of Motion to Intervene by National Wildlife Federation and Ohio Environmental Council). Finally, neither the intervention sought nor the relief requested requires the participation of individual members of NWF or OEC in the lawsuit. Under the standing doctrine prevailing in the Sixth Circuit, then, NWF and OEC have established standing on behalf of their members.

Turning to OLG's specific contentions that NWF and OEC do not have standing to intervene, OLG argues first that the proposed Answer demonstrates a lack of standing because it contains denials based on a lack of knowledge or information. Such denials, in and of themselves, have no bearing on the issue of standing. Moreover, such denials are expressly authorized by Federal Rule of Civil Procedure 8(b) ("If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state *and this has the effect of a denial.*") (emphasis added).

OLG argues that the proposed Counterclaim also demonstrates a lack of standing because it does not state a claim specific to NWF and OEC, and seeks judgment in favor of the State. On the contrary, NWF and OEC claim that their members use and enjoy the Lake Erie shore and that "[a] ruling that the Lake Erie shore is not owned and held in trust by the State of Ohio, but rather belongs to private individuals who own upland property, would extinguish the right of members of NWF and OEC to use and enjoy the shore." Answer and Counterclaim of National Wildlife Federation and Ohio Environmental Council at 9, ¶¶ 3-4. Furthermore, the declaratory relief NWF and OEC seek would operate in their members' favor by preserving their access to and continued use and enjoyment of the shore.

OLG argues finally that the interest of NWF's and OEC's members does not differ from the interest of the public at large, and that the lack of an individual interest demonstrates a lack of standing. OLG is mistaken, rendering all the cases it cites in support of its argument inapposite.<sup>1</sup> All citizens have the right to use and enjoy the Lake Erie shore, but as recounted above, members of NWF and OEC actually exercise that right. It is their personal interest in continuing to exercise that right that NWF and OEC seek to protect by intervening in this case.

**B. NWF And OEC Are Entitled To Intervene As Of Right.**

**1. NWF AND OEC have a significant legal interest in the subject matter of this litigation.**

OLG asserts that NWF and OEC do not have the interest required by Federal Rule of Civil Procedure 24(a)(2) because neither group owns or asserts any ownership of the land comprising the shore of Lake Erie. OLG bases its assertion on a decision handed down by the Seventh Circuit; in that case, the court stated "A proposed intervenor must demonstrate a direct, significant and legally protectable interest in the *property* at issue in the law suit." *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) (emphasis added).

Unlike the Seventh Circuit, the Sixth Circuit does not limit intervention to those with an interest in property. Rather, it construes the term "interest" liberally, refusing to hold that Rule 24(a)(2) requires a specific legal or equitable interest. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Thus, the Sixth Circuit has granted intervention as of right where the proposed intervenors had an interest other than an interest in property. For instance,

---

<sup>1</sup> All but one of those cases was decided by a court in the Seventh Circuit, which takes a strict view of what qualifies as a substantial interest, not the expansive view the Sixth Circuit takes. Compare *United States v. 36.96 Acres of Land*, 754 F.2d 855, 860 (quoting *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir.1982)) ("Rule 24(a) demand[s] 'rigor in the requirement that the interest be direct and substantial.'" ) with *Michigan State AFL-CIO v. Miller*, 103 F.3d at 1245 ("This circuit has opted for a rather expansive notion of the interest sufficient to invoke intervention of right."). In the remaining case, the court observed that the economic interest of the proposed intervenors, representatives of small businesses, was shared by all businesses, but of perhaps greater significance was the court's holding that the economic consequences of the regulations at issue were irrelevant to the subject matter of the case. *Fisher Foods, Inc. v. Ohio Dep't of Liquor Control*, 555 F. Supp. 641, 649-50 (N.D. Ohio 1982).

the court found a substantial legal interest where students of various races intending to apply for admission to a university sought to maintain the use of race as a factor in the university's admissions program. *Grutter v. Bollinger*, 188 F.3d 394, 397, 398-99 (6th Cir. 1999). The Sixth Circuit has even granted intervention as of right where the interest of the proposed intervenor was more general, namely where an organization sought to vindicate legislation that it had previously supported. *Michigan State AFL-CIO v. Miller*, 103 F.3d at 1247.

NWF and OEC have identified a specific interest in the subject matter of this case: their members' interest in preserving access to the shore of Lake Erie so they might continue to use it for recreation and aesthetic enjoyment. Contrary to OLG's claim, that interest is significant even though it depends on the operation of the Public Trust doctrine, which depends in turn on Ohio's ownership of the shore. This is not a close case, but even if it were, the Court should resolve it in favor of recognizing NWF's and OEC's interest. *Grutter v. Bollinger*, 188 F.3d at 399 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d at 1247) (“[C]lose cases should be resolved in favor of recognizing an interest under Rule 24(a).”).

2. **The State cannot adequately represent the interests of members of NWF and OEC.**

OLG asserts that NWF and OEC have failed to establish that the State cannot adequately represent the interests of their members. OLG argues that the State, as trustee, has an obligation to vigorously advocate for its citizens' rights under the Public Trust doctrine. That is precisely the problem. The State's duty is only to its citizens, not to the members of NWF or OEC who are citizens of other states, but who nonetheless share the right of Ohio's citizens to the Lake Erie shore by virtue of the constitutional right to travel. Unless NWF and OEC intervene on behalf of such members, no one will speak specifically for them or ensure that their interest will not be compromised or abandoned.

C. Alternatively, NWF And OEC Should Be Permitted To Intervene.

In their opening memorandum, NWF and OEC demonstrated that their claim is diametrically opposed to OLG's claims. NWF and OEC claim that the Lake Erie shore is owned by the State and held in trust for the public, while OLG claims the Lake Erie shore is owned by private individuals who own parcels adjoining the ordinary high water mark. Consequently, NWF's and OEC's claims necessarily have questions of law and fact in common with OLG's claims.

OLG failed to contest NWF's and OEC's demonstration. OLG also failed to contest the timeliness of NWF's and OEC's motion, or to complain that NWF's and OEC's intervention will cause undue delay or prejudice. Accordingly, the Court should at the least permit NWF and OEC to intervene.

III. CONCLUSION

For the foregoing reasons, and the reasons NWF and OEC gave in their opening memorandum, the Court should grant the motion to intervene.

Respectfully submitted,

  
\_\_\_\_\_  
Neil S. Kagan  
National Wildlife Federation  
Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
Telephone: (734) 769-3351  
Fax: (734) 769-1449  
[Kagan@nwf.org](mailto:Kagan@nwf.org)

Motion to Appear Pro Hac Vice Pending

DATED August 15, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2005, I mailed by United States Postal Service, first-class mail postage prepaid, the foregoing Reply in Support of Motion to Intervene by National Wildlife Federation and Ohio Environmental Council to the following:

James F. Lang  
Michael T. Mulcahy  
K. James Sullivan  
CALFEE, HALTER & GRISWOLD LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688

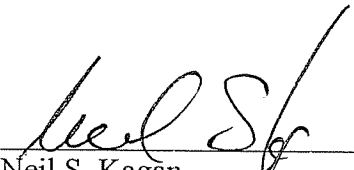
Counsel for Plaintiffs-Relators

Cynthia K. Frazzini  
John P. Bartley  
Daniel J. Martin  
Assistant Attorneys General  
Ohio Attorney General's Office  
Environmental Enforcement Section  
2045 Morse Road, Building D-2  
Columbus, Ohio 43229-6693

Counsel for Defendants-Respondents

Devon M. Lehman, Trial Attorney  
U.S. Department of Justice  
Environment & Natural Resources Division  
Natural Resources Section  
P.O. Box 663  
Washington, D.C. 20044-0663

Counsel for Cross-claim Defendants

  
\_\_\_\_\_  
Neil S. Kagan  
National Wildlife Federation  
Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
Telephone: (734) 769-3351  
Fax: (734) 769-1449  
[Kagan@nwf.org](mailto:Kagan@nwf.org)