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IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL.)	CASE NO. 04CV001080
ROBERT MERRILL, TRUSTEE, et al.,)	
)	JUDGE EUGENE A. LUCCI
Plaintiffs-Relators,)	
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents.)	

STATE OF OHIO EX REL.)	CASE NO. 04CV001081
HOMER S. TAFT, et al.,)	
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STATE OF OHIO, DEPARTMENT OF)	
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Defendants-Respondents.)	

PLAINTIFFS-RELATORS' MEMORANDUM CONTRA (1) MOTION OF THE STATE OF OHIO FOR RECONSIDERATION AND (2) MOTION OF THE STATE OF OHIO FOR EXTENSION OF TIME TO ANSWER

It is sad the lengths to which the State of Ohio will go in its desperation to avoid answering for its abuses of power. The most recent entries in a long and tiresome series of delaying tactics — the State's Motion for Reconsideration and Motion for Extension of Time to Answer Plaintiffs-Relators' First Amended Complaint (collectively, the "Motions") — continue to argue that the State cannot be held to answer for its sins because it is not responsible for what it does. The absurdity of the State's position is apparent; the cure for the State's intransigence is

obvious. Plaintiffs respectfully request that this Court deny the Motions and direct the State to file its answer to the First Amended Complaint within 10 calendar days of the Court's entry of its order.

The State was given a full and complete opportunity to brief its arguments in support of its Motion to Dismiss, and it devoted a total of 27 pages to its view that the ODNR's declared ownership and control of portions of thousands of privately-owned parcels abutting Lake Erie cannot be challenged in a court of law except in an administrative appeal from a leasing dispute. The State does not dispute, as it cannot, that ODNR has abusively extended the State's trust ownership of the submerged lands of Lake Erie far beyond the boundary established by state law. The State does not dispute, as it cannot, that ODNR's policy inflicts a present and definite harm on each of these upland properties. Thus, for all the reasons set forth in Plaintiffs' Memorandum in Opposition, the Court's decision to deny the State's Motion to Dismiss was consistent with Ohio law.¹

The State's argument that Plaintiffs' claims are not ripe because ODNR has not taken a "final definitive action" with respect to each of the Plaintiffs is nonsense, as a simple example should make clear. The Plaintiffs' declaratory judgment action is akin to an action to quiet title as between the littoral owners and the State. In such an action, the opposing party need only claim ownership of the land at issue in order for the dispute to present an actual, concrete dispute for court resolution.² Likewise, Plaintiffs and the State disagree over the boundary of the submerged lands of Lake Erie as defined by Ohio law. The State's claim of ownership itself creates a cloud on Plaintiffs' title — because of the unique character of real property ownership, the claim itself, without more, is all the "action" required to create a justiciable controversy that is appropriate for resolution under R.C. Chapter 2721. That controversy exists regardless of

¹ Notably, the Court could have simply denied the State's Motion to Dismiss without comment. However, the State now complains that the Court did not discuss its reasons for rejecting the State's arguments regarding Counts II and III of the First Amended Complaint. Yet the Court is not obligated to waste its time educating the State's counsel — the briefing already done is explanation enough.

² See R.C. § 5303.01. If the opposing party is actively using the disputed parcel, then a separate action in ejectment may be necessary. However, in order to maintain an action to quiet title, a plaintiff need not prove that the opposing party is exerting control over the parcel, or, as one example, is forcing the plaintiff to lease the parcel.

whether the director of ODNR has issued a rule setting forth ODNR's interpretation of R.C. § 1506.10. Moreover, the State has done more than simply claim ownership. Among other things, it has claimed that the public may trespass upon the littoral owners' private lands without consequence and it has instructed title companies to alter deed language in the State's favor. A declaratory judgment action is the appropriate remedy to define the parties' property boundary consistent with Ohio law.

Plaintiffs have every right to bring this action to obtain a declaration of their rights and legal relations arising under the Constitution and laws of Ohio.³ If one followed the State's reasoning, an action such as this would be non-justiciable unless and until the opposing party sought to compel the plaintiff to lease the disputed land from the opposing party. Throw in the State's further claim that the plaintiff cannot challenge ownership until the director of ODNR chooses to issue a final decision approving the lease (at which time there is nothing left to challenge), and must exhaust its administrative appeal seeking relief that the State agrees is unavailable, and we have entered the twilight zone in which the State's counsel currently resides. Remarkably, the State admits that none of the Plaintiffs in this case, whether those misleadingly labeled as "Unaffected Parties" by the State or those who have had contact with the State regarding submerged land leasing, could obtain the full and complete declaration of their legal rights sought in this case by following the futile administrative process offered by the State.⁴ Thus, the Court properly denied the State's Motion to Dismiss.

All of the procedural complexities invented by the State in its Motions are nothing more than a smokescreen to avoid responding to the substance of Plaintiffs' complaint. The fact that

³ See R.C. § 2721.03. See also Civ. R. 57 (The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.)

⁴ With regard to those Plaintiffs (Sheffield Lake, Inc., Mr. and Mrs. Rosenberg, and Mr. Nickel) who have had dealings with ODNR regarding ODNR's submerged lands leasing program, the State has not demonstrated, and cannot demonstrate, that the relief sought here via declaratory judgment was or is available via administrative appeal. Regardless, none of the extraneous materials submitted by the State in making its claims regarding these Plaintiffs can be considered by the Court under Civ. R. 12(B)(6). Because the alleged failure to exhaust administrative remedies is not a jurisdictional defect and cannot be asserted under Civ. R. 12(B)(1), Jones v. Village of Chagrin Falls, 77 Ohio St. 3d 456 (1997), syll. ¶ 1, the Court properly decided the State's Motion to Dismiss based solely upon the allegations of the First Amended Complaint.

the State filed the Motions is simply one more in a long line of examples of the State's unbounded arrogance. The proposed Order, which is attached hereto, constitutes a small step toward reining in the State's continued abuse of its citizens, which this Court can and should bring to an end.

Respectfully submitted,



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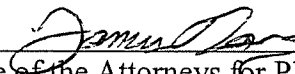
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum Contra was served, via regular U.S. mail, upon the following, this 12th day of January, 2005:

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**ORDER DENYING DEFENDANTS-RESPONDENTS' MOTION FOR
RECONSIDERATION AND MOTION FOR EXTENSION OF TIME TO ANSWER
PLAINTIFFS-RELATORS' FIRST AMENDED COMPLAINT**

{¶1} The Court has considered defendants-respondents' motion for reconsideration and motion for extension of time to answer plaintiffs-relators' first amended complaint, filed January 3, 2005, together with the plaintiffs' memorandum in opposition, filed January 12, 2005.

{¶2} The motions are denied.

{¶3} Defendants-respondents are ordered to file an answer to the First Amended Complaint of plaintiffs-respondents within 10 calendar days of the date of this order.

{¶4} **IT IS SO ORDERED.**

EUGENE A. LUCCI, JUDGE

c: James F. Lang, Esq., Michael T. Mulcahy, Esq., Attorneys for Plaintiffs/Relators in Case No. 04CV001080
Homer S. Taft, Esq., and L. Scot Duncan, Esq., Plaintiffs/Relators Pro Se in Case No. 04CV001081
Cynthia K. Frazzini, Esq. and John P. Bartley, Esq., Assistant Attorneys General for Defendants/Respondents