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LYNNE L. MAZEIKA
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IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

JUDGE EUGENE A. LUCCI

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

**ORDER DENYING DEFENDANT-RESPONDENT STATE OF OHIO'S
MOTION TO DISMISS PLAINTIFFS-RELATORS' FIRST AMENDED COMPLAINT**

{¶1} The complaint in this case was filed on May 28, 2004, and the first amended complaint was filed on July 2, 2004.

{¶2} The court has considered the motion of the State of Ohio to dismiss plaintiffs-relators' first amended complaint, filed October 18, 2004, together with the plaintiffs' memorandum in opposition, filed September 30, 2004, and defendants' reply brief, filed October 8, 2004.¹

¹ Defendants filed their motion for leave to file a motion to dismiss on September 13, 2004. The motion for leave was granted on October 12, 2004. Thereafter, the motion to dismiss was filed on October 18, 2004. Plaintiffs – evidently anticipating that the court would grant the motion for leave – filed their brief in opposition to the motion dismiss before leave to file the

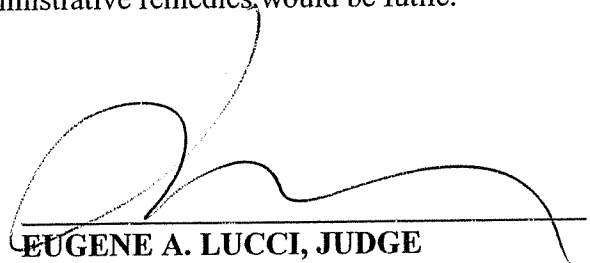
{¶3} Although exhaustion of administrative remedies is usually required in cases challenging the constitutionality of an administrative rule “as applied,” that requirement does not exist where there is no administrative remedy available or where pursuit of administrative remedies would be futile.

{¶4} In this case, plaintiffs are seeking relief that will require, in part, determining the validity and extent of the various legal descriptions in the plaintiffs’ respective deeds as they relate to and conflict with the assertion by the defendants-respondents that they own all land lakeward of ordinary high water mark. Plaintiffs’ claims will also require determining whether, for purposes of deciding plaintiffs’ encroachment claims, the proper measure of the ordinary high water mark is 573.4 feet above the International Great Lakes Datum (1985).

{¶5} Defendant State of Ohio, Department of Natural Resources has correctly stated that the Director lacks the authority under the Ohio Revised Code and the Ohio Administrative Code to determine the validity of deeds or to issue an order proclaiming the location of the landward boundary of Lake Erie as a matter of law across its entire 262 mile coast within the State of Ohio. Since the Director lacks the authority to grant the relief sought by the plaintiffs, there is no administrative remedy available and pursuit of administrative remedies would be futile.

{¶6} Therefore, the motion to dismiss is denied.

{¶7} **IT IS SO ORDERED.**



EUGENE A. LUCCI, JUDGE

c: James F. Lang, Esq., Michael T. Mulcahy, Esq., Henry G. Grendell, 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

motion to dismiss had been granted. Defendants likewise responded to the brief in opposition before leave to file the motion to dismiss had been granted. The court has considered the motion and the briefs as if they had been timely filed in the correct order.