

FILED

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ROBERT MERRILL
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

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

ORDER CERTIFYING CLASS ACTION ON COUNT ONE OF THE FIRST AMENDED COMPLAINT IN CASE NO. 04-CV-001080

{¶1} The court has reviewed and considered the Notice of Joint Stipulation to Class Certification on Count One of the First Amended Complaint filed by the parties in State ex rel. Merrill et al. v. State of Ohio, Department of Natural Resources, et al., Case No. 04-CV-001080 (hereinafter "Merrill") on June 8, 2006. The Stipulation seeks on Order certifying a class in this lawsuit limited to Count I of the First Amended Complaint, which seeks a declaratory judgment from this court. For good cause shown, the Stipulation is well-taken and is granted under the terms set forth herein.

Class Action Definition

{¶2} As stipulated by the parties, the class shall consist of “all persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property¹ bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio” (hereinafter “the Class”). To the extent that governmental entities are included in the class, they are included solely in their proprietary capacity as property owners and not for any purpose or capacity implicating their governmental authority or jurisdiction.

1. Civ.R.23(A)(1)

{¶3} The court finds that the class is so numerous that joinder of all members is impracticable. As stipulated by the parties, the shore of Lake Erie in the State of Ohio extends approximately 312 miles, eight counties in the State of Ohio abut the shore of Lake Erie (Ashtabula, Lake, Cuyahoga, Lorain, Erie, Sandusky, Ottawa, and Lucas), and approximately 14,000 parcels of littoral property abut Ohio’s Lake Erie shore. Owners of littoral parcels of land may be ascertained from available property records.

2. Civ.R.23(A)(2)

{¶4} Pursuant to the stipulation of the parties, the court hereby finds that the following questions of law are common to the class:

- (1) What constitutes the furthest landward boundary of the “territory” as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms “southerly shore” in R.C. 1506.10, “waters of Lake Erie” in R.C. 1506.10, “lands presently underlying the waters of Lake Erie” in R.C. 1506.11, “lands formerly underlying the waters of Lake Erie and now artificially filled” in R.C. 1506.11, and “natural shoreline” in RC. 1506.10 and 1506.11.
- (2) If the furthest landward boundary of the “territory” is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and

¹ The parties have stipulated that “upland property” is defined as real property bordering a body of water and that, in Ohio, “littoral property” is defined as upland property that borders an ocean, sea, lake, or a bay of any of these water bodies, as opposed to “riparian property” which is defined as upland property that borders a river, stream, or other such watercourse.

does the State of Ohio hold title to all such “territory” as proprietor in trust for the people of the State.

- (3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the “territory.”

3. Civ.R.23(A)(3)

{¶5} Pursuant to the stipulation of the parties, the court hereby finds that the claims or defenses of the named Plaintiffs in Merrill are typical of the claims or defenses of the class. Each of the named Plaintiffs in Merrill is either a member of the class or, with respect to Named Plaintiff Ohio Lakefront Group, Inc., a non-profit corporation representing its members who are members of the class. All of the named Plaintiffs in Merrill seek a declaratory judgment that resolves the questions of law common to the class. All members of the class have the same interests in a declaratory judgment that resolves the questions of law common to the class.

4. Civ.R.23(A)(4)

{¶6} Pursuant to the stipulation of the parties, the court hereby finds that the named Plaintiffs in Merrill will fairly and adequately protect the interests of the proposed class. No named Plaintiff in Merrill seeks rights that will prejudice any other member of the class. The named Plaintiffs in Merrill collectively are committed to the vigorous prosecution of this class action litigation. The court further finds that class counsel - Calfee, Halter & Griswold LLP - consists of over 170 lawyers who are members in good standing of the bar of the State of Ohio and have the experience and financial ability to protect the interests of the class.

5. Civ.R. 23(B)(2)

{¶7} Pursuant to the stipulation of the parties, the court finds that the allegations contained within the First Amended Complaint and Counterclaim in Merrill have demonstrated that actual and justiciable controversies exist, thereby making appropriate declaratory relief with respect to both the State and to the proposed class as a whole.

Class Action Certification

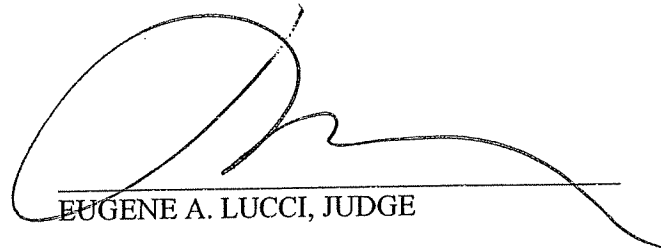
{¶8} As authorized by Civ.R. 23(C)(1) and 23(C)(4), the court determines that a class action shall be maintained on Count I of Plaintiffs-Relators’ First Amended Complaint upon the common questions of law found herein, and hereby certifies that class action under the provisions of Civ.R. 23(B)(2). The two remaining counts of Plaintiffs-Relators’ First Amended Complaint – “Count II - Mandamus/Inverse Takings Compensation” and “Count III - (In the

Alternative) Mandamus/Inverse Takings Compensation” – are hereby bifurcated pending final resolution of Count I.

{¶9} The class certification hearing in Merrill, scheduled for June 9, 2006 at 9:00 a.m., is no longer necessary and is cancelled.

{¶10} The parties in Merrill have requested that the consolidated case of State ex rel. Taft et al. v. State of Ohio, Department of Natural Resources, et al., Case No. 04-CV-001081 (hereinafter “Taft”), be stayed pending final resolution of the class action in Merrill, with the consent of counsel in Taft. The court will consult with all counsel in Taft before rendering a decision on this issue.

{¶11} IT IS SO ORDERED.



EUGENE A. LUCCI, JUDGE

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