

FILED

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

2005 JAN -4 P 3:52

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.,	)	
	)	JUDGE EUGENE A. LUCCI
Plaintiffs-Relators,	)	
	)	
vs.	)	
	)	
STATE OF OHIO, DEPARTMENT OF	)	
NATURAL RESOURCES, et al.,	)	
	)	
Defendants-Respondents.	)	

**PLAINTIFFS-RELATORS' RESPONSE TO MOTION OF THE STATE OF OHIO  
FOR EXTENSION OF TIME, FOR CONTINUANCE OF HEARING, AND FOR  
PREHEARING CONFERENCE**

The Motion for Extension of Time, for Continuance of Hearing, and for Prehearing Conference ("Motion") filed by the Defendants-Respondents (collectively, the "State") further signals the State's desire to delay facing the substantive issues presented in this case. Although Plaintiffs<sup>1</sup> are not opposed to a reasonable extension to allow the State to fairly conduct discovery in advance of the class certification hearing, Plaintiffs believe that the State's proposal for an additional ninety days of discovery is excessive. Because the factual issues presented by the class certification motion are extremely limited, Plaintiffs suggest that an additional thirty

<sup>1</sup> This Response is filed on behalf of all Plaintiffs-Relators in Case No. 04CV001080.

days is sufficient. Of course, this extension is in addition to the time already made available to the State. With this extension, the Court's hearing date can be retained.

Plaintiffs propose that, as a courtesy to the State, the Court grant the State's Motion as follows:

Parties identify stipulations of fact and identify disputed factual issues for hearing	February 4, 2005
State files brief in opposition to Plaintiffs' motion for class certification	February 11, 2005
Plaintiffs file reply brief in support of motion for class certification	February 23, 2005
Hearing date: motion for class certification	March 4, 2005

Although Plaintiffs fail to understand what valid purpose can be served by the State's proposal to serve a full panoply of written discovery plus depose every purported class representative, Plaintiffs also will agree, as a further courtesy to the State, to expedite responses to the State's written discovery requests to the extent that they are reasonable and relevant. Of course, the State should be required to provide the same courtesy to Plaintiffs. Provided the State does not engage in gamesmanship, Plaintiffs expect that written responses can be provided within 10 days of service via e-mail upon Plaintiffs' counsel.<sup>2</sup> Curiously, the State has not commenced any discovery efforts to date.

Certain language in the State's Motion suggests that the State continues to be confused by the core issue raised by Plaintiffs' Complaint, which is where the State's trust ownership of the submerged lands of Lake Erie ends and private ownership begins. The specific language of an upland owner's deed is irrelevant as long as the upland owner is indeed an upland owner, *i.e.*, as long as the private land owner's property abuts the territory claimed by the State. As long as one of the purported class representatives owns property abutting that territory,<sup>3</sup> certification is

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<sup>2</sup> Given the State's recent difficulties with the U.S. Postal Service, as evidenced by their misplacing of the Court's December 15th entries and their delay in delivering their Motion to the Court, Plaintiffs believe that service of discovery requests via e-mail may prove more efficient.

<sup>3</sup> Indeed, all names Plaintiffs are owners, either individually or jointly, of property abutting Lake Erie. See First Amended Complaint ¶ 3.

appropriate to decide the question of whether the State, through ODNR, is violating state law by defining the boundary of that territory as the elevation of 573.4 feet IGLD (1985). In fact, the State itself already has argued that several of the named Plaintiffs are owners of property abutting the State's claimed territory. Thus, provided the State remains focused on the limited issues presented by Plaintiffs' Motion for Class Certification, certification itself should be an extremely simple process requiring very little, if any, discovery as no factual issues are seriously in question.

Three additional statements in the State's Motion deserve comment. First, because Plaintiffs are not intending to introduce expert testimony during the class certification hearing, the State's suggestion that it will require additional time for its expert to respond is irrelevant. Second, while the State indicates its "concern" that Plaintiffs have failed to join indispensable parties, it has failed to identify those parties. Plaintiffs await the State's identification of any parties believed indispensable by the State. Indeed, Plaintiffs also await the State's Answer to Plaintiffs' Complaint. Third, Plaintiffs take no position on the State's request for a prehearing conference regarding the status of the State ex rel. Taft case. Of course, should the State wish to discuss any procedural or substantive matter with Plaintiff's counsel without requiring the Court's involvement, the undersigned easily can be reached via telephone or e-mail.

Respectfully submitted,

  
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Counsel for Relators/Plaintiffs

**CERTIFICATE OF SERVICE**

A copy of the foregoing Response was served, via facsimile and regular U.S. mail, upon the following, this 4th day of January, 2005:

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\_\_\_\_\_  
One of the Attorneys for Plaintiffs-Relators

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**ORDER AMENDING BRIEFING SCHEDULE**  
**FOR CLASS CERTIFICATION ISSUES**

{¶1} On December 15, 2004, the court established a briefing schedule for class certification issues. On December 16, 2004, the court issued a hearing notice setting a class certification hearing for March 3, 2005 at 9:00 a.m. On December 30, 2004, defendants-respondents filed a Motion of State of Ohio for Extension of Time, for Continuance of Hearing, and for Prehearing Conference and Brief in Support. Upon review of defendants-respondents' motion and the

response filed by plaintiffs-relators on January 4, 2005, the Court grants defendants-respondents' motion in part and amends the briefing schedule as follows:

Parties identify stipulations of fact and identify disputed factual issues for hearing	February 4, 2005
State files brief in opposition to Plaintiffs' motion for class certification	February 11, 2005
Plaintiffs file reply brief in support of motion for class certification	February 23, 2005

{¶2} The class certification hearing date remains set for March 4, 2005 at 9:00 a.m.

{¶3} **IT IS SO ORDERED.**

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**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