

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO**

STATE OF OHIO EX REL.)	CASE NO. 1:05 CV 0818
ROBERT MERRILL, TRUSTEE, <i>et al.</i> ,)	
)	Honorable Solomon Oliver
Plaintiffs-Relators,)	Magistrate Judge Perelman
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES, <i>et al.</i> ,)	
)	
Defendants-Respondents,)	
Counterclaimants, Cross-)	
Claimants)	
)	
vs.)	
)	
UNITES STATES OF AMERICA, <i>et al.</i> ,)	
)	
Cross-Claim Defendants)	

**PLAINTIFFS-RELATORS' BRIEF IN OPPOSITION TO NATIONAL WILDLIFE
FEDERATION'S AND OHIO ENVIRONMENTAL COUNCIL'S
MOTION TO INTERVENE**

I. Introduction.

The National Wildlife Federation (“NWF”) and the Ohio Environmental Council (“OEC”) are not proper parties to this class action lawsuit. They have no ripe claims against Plaintiffs-Relators (“Plaintiffs”) and otherwise lack the requisite standing to participate in this

action. This is a property ownership dispute between Plaintiffs and Defendants-Respondents (the “State”). Neither NWF nor OEC has or claims an ownership interest in the real property at issue. Their proposed Answer and Counterclaim simply is a copy-and-paste of the State’s Answer and Counterclaim, adding no substantive content to the lawsuit and identifying no rights or interests belonging uniquely to NWF or OEC or its members. As a result, the Court should deny NWF’s and OEC’s Motion to Intervene as Defendants and Counterclaimants.¹

II. Neither NWF nor OEC Has or Asserts any Actionable Interest in this Lawsuit and, Therefore, Neither is Entitled to or Permitted to Intervene as a Party.

The Federal Rules of Civil Procedure do not permit either NWF or OEC to intervene in this action as a party. Under Rule 24(a) of the Federal Rules of Civil Procedure, an entity may intervene as a party in a pending lawsuit as a matter of right only when a federal statute bestows that right or “when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” Fed. R. Civ. Pro. 24(a).

Absent the right to intervene under Federal Rule 24(a), a court has the discretion to permit an entity to intervene as a party in a pending lawsuit only when a federal statute conditionally allows that right or “when an applicant’s claim or defense and the main action have a question of law or fact in common.” Fed. R. Civ. Pro. 24(b). No federal statute gives NWF or OEC the right to intervene, unconditional or otherwise, and there are no allegations to the contrary.

¹ Plaintiffs take no position on the separate Motion by Neil S. Kagan to Appear Pro Hac Vice, except to note that the motion would be rendered moot should the Court deny the NWF’s and OEC’s Motion to Intervene.

A necessary prerequisite for either intervention of right or permissive intervention is the existence of a legal interest in the subject matter of the action held by the would-be intervenor. The proposed intervenor must demonstrate “a direct, significant and legally protectable interest in the property at issue in the law suit. The interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit. The interest must be so direct that the applicant would have a right to maintain a claim for the relief sought.” *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

Neither NWF nor OEC has a legally protectable interest in the property at issue in this action. This lawsuit is a simple question of who owns certain real property along Lake Erie: Plaintiffs or the State. This lawsuit does not involve any land ownership rights belonging to either NWF or OEC, and NWF and OEC do not show or allege in either their proposed Answer or Counterclaim any such ownership interest. *See* Proposed Answer; Proposed Counterclaim. Rather, they only conclusorily and ambiguously raise the notion that their members’ supposed right to utilize the shore depends upon the State’s ownership of the shore. *Id.* They do not raise any interest separate and apart from the State’s ownership interest, which interest may be litigated only by the State. *Id.* NWF and OEC therefore have no interest of their own to be impaired or impeded by their absence from this lawsuit. While NWF and OEC may be interested in the outcome of this lawsuit (and would be free to file an amicus brief on appeal), it does not follow that their curiosity transforms into a legally enforceable interest.

Indeed, a reading of NWF’s and OEC’s proposed Answer demonstrates that NWF and OEC have no actionable dispute with Plaintiffs and, therefore, no standing to defend against Plaintiffs’ First Amended Complaint. NWF and OEC do not directly deny any of the allegations in their proposed Answer; instead, they simply recite systematically that they “are without

knowledge or information sufficient to form a belief as to their truth.” *See* Proposed Answer. They lack knowledge because the allegations are not directed at them; the allegations are directed solely at the State. *See* First Amended Complaint.² Indeed, the only denials that are not qualified by stated ignorance are the conclusory denials of Plaintiffs’ requested relief against the State. *Id.* at ¶ 42. If the claims truly were directed at NWF and OEC, then they should be able to admit or deny straightforwardly at least several of the 40-plus allegations in the First Amended Complaint. The proposed Answer alone shows the NWF and OEC do not belong in this lawsuit.

Likewise, the proposed Counterclaim against Plaintiffs demonstrates NWF’s and OEC’s lack of an actionable stake in this lawsuit. NWF and OEC suggest an interest in public access to the shore, but their requested relief carefully mimics the relief requested by the State in its Counterclaim. NWF and OEC do not state any claim specific to them; instead, they merely copy-and-paste the State’s Counterclaim. *See* Proposed Counterclaim; State’s Counterclaim. Significantly, the Request for Relief in the Proposed Counterclaim seeks judgment *in the State’s favor*, not NWF’s or OEC’s favor. *See* Proposed Counterclaim at Request for Relief. There is no explicit mention in their Request for Relief of their members’ purported right to trespass upon private beaches.³ NWF and OEC clearly have no standing to assert the State’s alleged rights, and their efforts to intervene therefore should be rejected.

Although they never specifically request it in their proposed Counterclaim, NWF and OEC appear to want their members to have the unfettered right to walk along the Lake Erie shore (*i.e.* on the land between the Army Corps of Engineer’s Ordinary High Water Mark (“OHWM”))

² Obviously, the writs of mandamus sought in the alternative in Counts Two and Three of the Amended Complaint can be issued only against the State, not NWF or OEC.

³ If particular NWF or OEC members actually are restrained from accessing land at some point in the future after the resolution of this lawsuit, then perhaps the NWF or OEC will have ripe claims to bring at that time against the allegedly offending party. No such claims currently exist or are alleged.

and the water's edge), even on property that is outside of Ohio's public trust and owned by private individuals. *See* Proposed Counterclaim at ¶ 3. Under Ohio Revised Code Section 1506.10, which codifies the extent of Ohio's public trust, the public trust consists "of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada." Ohio Rev. Code § 1506.10. The public trust therefore by definition does not include the land between the southerly shore and OHWM. *See id.*; *see also* Ohio Admin. Code § 1501-6-10 ("(T) 'Shore' means the land bordering the lake. (U) 'Shoreline' means the line of intersection of lake Erie with the beach or shore.") (emphasis added). NWF's and OEC's Michigan counsel apparently is unaware that there simply is no right under Ohio law to trespass on private property that is not part of Ohio's public trust simply because it is located on the shores of Lake Erie. The freedom to walk along the Lake Erie shore exists at designated public beaches, not on private beaches. No Ohio law provides otherwise. Consequently, NWF's and OEC's purported "right" to recreate outside of the public trust is illusory and is no basis for intervention in this lawsuit.

Contrary to their assertions, NWF's and OEC's members do not have any interest in the Lake Erie shoreline that is somehow different from the public as a whole. NWF and OEC have not identified any interest that one or more of their members have that all citizens do not enjoy. To the contrary, NWF and OEC purport to advocate "a subject of public concern to the whole people of the State." Proposed Counterclaim at ¶ 30(5). Lacking an individual interest in the action, neither NWF nor OEC have standing to intervene as parties; only the State, as trustee of public trust lands under Ohio Revised Code Section 1506.10, has standing to assert the alleged public interests at issue in this lawsuit.

If NWF or OEC could intervene in this action to enforce an alleged public right, then so could any other individual who may ever visit the Lake Erie shores. As one court stated, “Rule 24(a)(2) is not a device through which cases raising issues of public importance may be opened up for public debate.” *Fox Valley Reproductive Health Care Center, Inc. v. Arft*, 82 F.R.D. 181, 182 (E.D. Wis. 1979). Courts routinely have disallowed public interest organizations without actual direct interests in the subject matter of a lawsuit from intervening as parties. *See, e.g., United States v 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985) (although not-for-profit corporation has intense concern for Indiana Dunes National Lakeshore and represents its members’ personal, aesthetic, conservational, and recreational interests in property, that interest is not direct, substantial, or legally protectable so as to justify intervention as of right under Rule 24(a) in condemnation action by United States); *American Nat’l Bank & Trust Co. v Chicago*, 865 F.2d 144 (7th Cir. 1989) (plumbers’ union had no right to intervene in suit brought by developers challenging constitutionality of zoning ordinance because protection of health and safety of city’s citizens was same interest as that of city-defendant and the fact that union might have particular expertise was no grounds since if it were every potential intervenor would meet interest requirement); *Fisher Foods, Inc. v Ohio Dep’t of Liquor Control*, 555 F Supp 641 (N.D. Ohio 1982) (various beverage associations were not entitled to intervene in action by corporate operator of retail grocery store chain against state liquor control commission challenging regulations enacted by the commission because interest of applicants for intervention is general economic interest, same as every seller and distributor); *Keith v Daley*, 764 F.2d 1265 (7th Cir. 1985) (anti-abortion organization does not have direct and substantial interest sufficient to support intervention in suit brought by group of physicians who perform abortions challenging

constitutionality of state statute regulating abortion, notwithstanding that organization was chief lobbyist in state legislature in favor of legislation at issue).

NWF's and OEC's claim that their membership contains non-Ohioans and that they therefore somehow are entitled to represent those individuals' interests in this lawsuit sets up a false dilemma. There is no suggestion that non-Ohioans would have different public access rights from Ohio citizens. NWF and OEC have not alleged, nor can they, that their non-Ohio members have either superior or inferior rights to Ohio members. To allow intervention here would make no sense and would open virtually all lawsuits to intrusion by parties without legitimate interests in the action. In short, the NWF's and OEC's purported interests in this lawsuit simply lack a sufficient level of substance and ripeness.

Similarly, NWF's and OEC's claim that the State cannot protect their members' interests because it is an institutional entity and not a human being that actually will "walk along the shore, hunt for fossils, observe birds and wildlife, study the plant community, swim, fish, and so on" is disingenuous. NWF and OEC fail to note that they too are institutions and not human beings. Indeed, it is the State's statutory duty to ensure that its citizens' public trust rights are enforced. Specifically, Ohio Revised Code Section 1506.10 designates the ODNR (*i.e.* the State) as the trustee entity that represents Ohio's citizens in all matters pertaining to the care, protection, and enforcement of Ohio's public trust rights. As the fiduciary of the public trust, the State is required to vigorously advocate for the interests of the public. It currently is doing so by advocating for the theft of littoral property owner's private property in favor of the "public." By contrast, NWF and OEC have no such fiduciary obligations and it cannot be said that they will more adequately represent the public trust than the statutorily designated trustee itself.

IV. Conclusion.

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order denying NWF's and OEC's Motion.

Respectfully submitted,

s/ James F. Lang

JAMES F. LANG (0059668)
MICHAEL T. MULCAHY (0038270)
K. JAMES SULLIVAN (0074211)
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)
JLang@Calfee.com
MMulcahy@Calfee.com
KJSullivan@Calfee.com

Counsel for Relators/Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiffs-Relators' Brief In Opposition To National Wildlife Federation's And Ohio Environmental Council's Motion To Intervene* was filed electronically on this 5th day of July, 2005. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail, postage prepaid. Parties may access this filing through the Court's system.

s/ James F. Lang
One of the Attorneys for Plaintiffs-Relators