

**IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO**

STATE OF OHIO EX REL., ROBERT MERRILL, TRUSTEE, et al.	)	Case No. 04CV001080
	)	
Plaintiffs-Relators	)	Judge Eugene A. Lucci
	)	
vs.	)	<b><u>MOTION OF THE STATE OF OHIO TO ADD NECESSARY PARTIES AND BRIEF IN SUPPORT</u></b>
	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.	)	
	)	
Defendants-Respondents, Counterclaimants, and Cross-claimants	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA, et al.	)	
	)	
Cross-claim Defendants	)	

Defendants-Respondents, Counterclaimants, and Cross-claimants, the State of Ohio, Department of Natural Resources, Sam Speck, Director, Ohio Department of Natural Resources, and the State of Ohio (hereinafter collectively “the State of Ohio” or “the State”), by and through counsel, Attorney General Jim Petro, hereby move this Court pursuant to Civil Rule 19 for an Order requiring Plaintiffs-Relators to amend their First Amended Complaint to add necessary parties. The grounds for requesting this relief are more fully set forth in the accompanying Brief in Support which is incorporated into this motion as if fully set forth herein.

**BRIEF IN SUPPORT**

Plaintiffs-Relators’ First Amended Complaint fails to properly and completely join all persons who claim title under the deeds submitted on the record to the Court. There are also claims raised in Plaintiffs-Relators’ First Amended Complaint for which the State and the Cross-claim Defendants do not have authority. In addition, there are a number of persons and entities that hold rights, title, interests, authorities, and responsibilities pertaining to Lake Erie and the upland that borders it in the State of Ohio that will be necessarily impacted in this case and that cannot be represented by Plaintiffs-Relators, the State or the Cross-claim Defendants. Accordingly, these parties must be joined as necessary parties to this action.

Plaintiffs-Relators bring this action seeking, among other remedies, Declaratory Judgment. It is well settled that “one of the requisites to the rendition of a declaratory judgment is that all necessary parties be before the court, and the absence of an interested and necessary party ‘constitutes a jurisdictional defect which precludes the court from properly rendering a declaratory judgment.’” *Cincinnati v. Whitman* (1975), 44 Ohio St. 2d 58, 59, 337 N.E.2d 773, quoting *Zanesville v. Zanesville Canal & Mfg. Co.* (1953), 159 Ohio St. 203, 111 N. E. 2d 922.

Civil Rule 19(A) defines necessary parties in terms of the following factors:

- (1) in his absence complete relief cannot be accorded among those already parties, **or**
- (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may
  - (a) as a practical matter impair or impede his ability to protect that interest, **or**
  - (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, **or**
- (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.

Civ. R. 19 (emphasis added). Further, Ohio Revised Code Section 2721.12. mandates that “when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.”

**I. Plaintiffs-Relators have failed to name, or to correctly name, all persons who purportedly hold title to the real property claimed in this action. Such persons are necessary parties to this action and must be joined pursuant to Civil Rules 19 or 20.**

The First Amended Complaint lists the following persons as Plaintiffs-Relators who claim to own upland property bordering Lake Erie in the State of Ohio: (1) Robert Merrill, Trustee; (2) Anthony J. Yankel; (3) Charles S. Tilk; (4) Sheffield Lake, Inc., Thomas O. Jordan, President; (5) Sandra L. Wade; (6) David A. Zeber; (7) Adrian F. Betleski; (8) Steve Nickel; (9) LeMarr L. and Patricia J. French; (10) Neal Oscar Luoma; (11) Timothy and Kimberly Rosenberg.

On October 29, 2004, the Court found in its Order Denying the State of Ohio’s Motion for More Definite Statement and for Compliance with Civil Rules 10(D) and 9(F), as Moot that

the following persons are listed as grantees on the deeds attached to Plaintiffs-Relators' Notice of Submittal of Attachments to the First Amended Complaint: (1) The Diane Marie Merrill Living Trust (no Trustee or other trust information provided); (2) Anthony John Yankel and Sheryle Yankel; (3) Charles S. Tilk and Roberta J. Tilk; (4) Sheffield Lake, Inc. (deeds showing no evidence of having been recorded); (5) Thomas C. Wade and Sandra L. Wade; (6) David A. Zeber; (7) The Adrian F. Betleski Trust (no Trustee or other trust information provided, deed showing no evidence of having been recorded); (8) Steven E. Nickel and Jennifer L. Nickel (deed showing no evidence of having been recorded); (9) LeMarr L. and Patricia J. French; (10) Neal O. Luoma; (11) Timothy L. Rosenberg and Kimberly B. Rosenberg.

Plaintiffs-Relators have failed to join necessary parties, and have also improperly joined parties who cannot claim legal title on the face of the deeds they have submitted in support of their allegations in this action. Such missteps must be corrected so that the Court can be assured that the persons with interest in the real property risked in this action are fully aware of this action and have a full opportunity to prosecute and defend their alleged interests.

Plaintiffs-Relators have failed to name Sheryle Yankel, Roberta J. Tilk, Thomas C. Wade, and Jennifer L. Nickel, who are listed as grantees on the deeds submitted in Plaintiffs-Relators' Notice of Submittal of Attachments to the First Amended Complaint, as parties to this action. Sheryle Yankel, Roberta J. Tilk, Thomas C. Wade, and Jennifer L. Nickel claim an interest relating to the alleged subject of the action and are so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that alleged interest. Further, R.C. 2721.12 requires that Sheryle Yankel, Roberta J. Tilk, Thomas C. Wade, and Jennifer L. Nickel be joined to this action, as their deeds purport an interest that has been put forward by Plaintiffs-Relators and will be affected by any declaratory judgment issued in this action.

Additionally, it is uncertain as to who is/are the trustee(s) of the Adrian F. Betleski Trust, but only such trustee(s), not Adrian F. Betleski as an individual, can be properly named as Plaintiff-Relator(s) to this action. It is also uncertain as to whether or not Robert Merrill is the sole trustee of the Diane Marie Merrill Living Trust. Any other trustee of the Diane Marie Merrill Living Trust must also be added as a necessary party to this action.

Therefore, Plaintiffs-Relators should be ordered to amend their First Amended Complaint to include and properly identify all parties claiming title through the deeds attached to Plaintiffs-Relators' Notice of Submittal of Attachments to the First Amended Complaint.

II. **Plaintiffs-Relators have failed to join the eight counties bordering Lake Erie in the State of Ohio. Such entities, and their auditors and treasurers, are parties necessary for a just adjudication of the issues raised in the First Amended Complaint. Such parties must be joined in order for complete relief to be accorded to the parties and to allow such parties the opportunity to protect their respective interests which would be affected by any declaration of rights in this action.**

Paragraph 12 of the First Amended Complaint presents allegations regarding real property taxes on upland property, as well as taxes on lands below the ordinary high water mark of Lake Erie being used and occupied for private use (whether or not such private use and occupation of those public lands has been authorized by a Lease pursuant to 1506.11). However, neither the State, nor the Cross-claim Defendants, have authority over such matters, and are unable to present or defend the positions of the entities that do.

Pursuant to Chapters 319 and 321 of the Ohio Revised Code, assessment and collection of real property taxes is the responsibility of the respective county auditors and treasurers in the respective counties where such real property is located, not Defendants-Respondents. There are eight counties in Ohio that border Lake Erie in the State of Ohio that contain upland parcels bordering Lake Erie, and which possess jurisdiction to assess and collect taxes on the public lands of Lake Erie that are being used for private use. Those counties are Lucas, Sandusky, Ottawa, Erie, Lorain, Cuyahoga, Lake, and Ashtabula. The county auditors of these counties are also subject to R.C. 1521.30 for reappraisal of land lost to Lake Erie erosion.

In the absence of these eight counties complete relief with regard to the assessment and collection of real property taxes on the upland property of Plaintiffs-Relators, as well as any public lands of Lake Erie that are subject to taxation due to private use by Plaintiffs-Relators, cannot be accorded among those already parties. For that reason and for the additional likelihood that each of these counties holds title to upland property bordering Lake Erie, and improvements or developments in Lake Erie, these eight counties most certainly claim interests relating to the

subject of this action, and are so situated that the disposition of this action in their absence may as a practical matter impair or impede their ability to protect those respective interests. Accordingly, these counties have or claim an interest which would be affected by any declaratory judgment in this action, and R.C. 2721.12 requires that they be made parties to this case.

**III. Any declaration of rights under Plaintiffs-Relators' First Amended Complaint will necessarily affect the rights, title, interests, duties and authorities of various other local authorities pertaining to Lake Erie in the State of Ohio. The State is unable to represent the respective interests and authorities of these local authorities, and such entities should be joined to allow such parties the opportunity to protect their respective interests.**

Along with the eight counties referenced above, the municipal corporations and the port authorities that border Lake Erie in the State of Ohio also have upland property rights, title, and interests, as well as jurisdictional responsibilities and authorities, that will necessarily be impacted by the outcome of this litigation. In addition, these local authorities have financial interests in the outcome of this action pertaining to the leasing of the lands of Lake Erie.

Pursuant to R.C. 721.04 through 721.11, municipal corporations that border Lake Erie in the State of Ohio have certain rights, interests and jurisdiction over the lands and navigable waters of Lake Erie within their respective jurisdictional boundaries. Such municipal corporations may also hold title to upland property bordering Lake Erie in the State of Ohio or have leases from the State for improvements or developments upon the lands of Lake Erie pursuant to R.C. 1506.11. If these municipal corporations are not under the jurisdiction of the port authority, they must also provide determinations to the State under R.C. 1506.11(B) or (D) in order for the State to issue a lease requested thereunder.

Pursuant to Chapter 4582 of the Ohio Revised Code, the port authorities bordering Lake Erie in the State of Ohio have certain rights, interests and jurisdiction over the lands and navigable waters of Lake Erie within their respective jurisdictional boundaries. Such port authorities may also hold title to upland property bordering Lake Erie in the State of Ohio or have leases from the State for improvements or developments upon the lands of Lake Erie pursuant to R.C. 1506.11. These port authorities must also provide determinations to the State under R.C.

1506.11(B) or (D) in order for the State to issue a lease requested thereunder.

Further, the local authorities responsible for making the determinations required under R.C. 1506.11(B) or (D), whether such designated local authority is a county, municipal corporation, port authority, receives fifty per cent of each rental received by the State under the terms of each lease granted under R.C. 1506.11.

The municipal corporations and port authorities who border Lake Erie, have jurisdiction over Lake Erie, and receive compensation for the private use and occupation of Lake Erie within their respective boundaries, most certainly claim interests relating to the subject of this action, and are so situated that the disposition of this action in their absence may as a practical matter impair or impede their ability to protect those respective interests. Accordingly, these entities have or claim an interest which would be affected by any declaratory judgment in this action, and R.C. 2721.12 requires that they be made parties to this case.

#### **CONCLUSION**

For all the reasons stated herein, the State respectfully requests that the Court grant this Motion to Add Necessary Parties. A proposed order granting this Motion is attached hereto for the Court's consideration pursuant to Paragraph {3} of the Honorable Judge Eugene A. Lucci's Order of Procedure (Civil) (Revised 10/28/2003).

Respectfully submitted,

**JIM PETRO**  
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**CERTIFICATE OF SERVICE**

We hereby certify that a copy of the foregoing **Motion of the State of Ohio to Add Necessary Parties and Brief in Support** was sent by regular U.S. mail, postage prepaid, this 28<sup>th</sup> day of February, 2005 to:

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