



United States of America and The United States Army Corps of Engineers,” filed June 3, 2005, for lack of subject matter jurisdiction and/or failure to state a claim upon which relief can be granted. This Court lacks subject matter jurisdiction over ODNR’s cross-claim because the United States has not waived its sovereign immunity to suit. In addition, this Court lacks jurisdiction because ODNR has not asserted a case or controversy against the Federal Defendants. Likewise, because ODNR lacks standing to assert its cross-claim. Therefore, dismissal pursuant to Fed. R. Civ. P. 12(b)(1) is appropriate.

A memorandum in support of this motion follows, and a proposed order is attached.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

STATE OF OHIO EX REL.,	)	
ROBERT MERRILL, TRUSTEE, et al.	)	CASE NO. 1:05-CV-0818
	)	
Plaintiffs-Relators	)	Judge Solomon Oliver
	)	
vs.	)	
	)	
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.	)	

**FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO DISMISS AMENDED CROSS-CLAIM**

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**STATEMENT OF ISSUES TO BE DECIDED**

1. Whether the Federal Defendants have waived their sovereign immunity to suit through either the Quiet Title Act, 28 U.S.C. § 2409a, or the Administrative Procedure Act, 5 U.S.C. § 704.
2. Whether ODNR has stated a case or controversy such that this Court has jurisdiction.
3. Whether ODNR lacks standing to assert its cross-claim against the Federal Defendants.

**SUMMARY OF ARGUMENT**

ODNR's claim against the Federal Defendants must be dismissed because ODNR has not identified a valid waiver of the United States' sovereign immunity. Further, ODNR's amended cross-claim against the Federal Defendants does not raise a case or controversy, and ODNR lacks standing, as it has not sustained a redressible injury at the hands of the Federal Defendants. Thus, this Court lacks jurisdiction to hear ODNR's cross-claim against the Federal Defendants.

## **INTRODUCTION**

Plaintiffs and the State of Ohio Defendants (“ODNR”) are embroiled in a land ownership dispute on the shores of Lake Erie that does not involve the United States or the United States Army Corps of Engineers (collectively, “Federal Defendants”). The Federal Defendants possess regulatory authority over the navigable waters of the United States, but this regulatory authority is unrelated to the underlying land ownership dispute. In particular, neither Plaintiffs nor ODNR have challenged the Federal Defendants’ determination of their regulatory jurisdiction, as calculated by the ordinary high water mark. In short, this lawsuit does not implicate or involve the Federal Defendants.

This Court should dismiss the cross-claim against the Federal Defendants because the Quiet Title Act (“QTA”) and the Administrative Procedure Act (“APA”) do not provide a waiver of the United States’ sovereign immunity in this case. Further, ODNR’s cross-claim against the Federal Defendants fails to meet the “case or controversy” requirement of Article III, Section 2, of the Constitution, and ODNR lacks standing to bring a cross-claim against the Federal Defendants. Accordingly, this Court lacks jurisdiction over this case.

## **BACKGROUND**

On July 2, 2004, in the Court of Common Pleas for Lake County, Ohio, Plaintiffs filed their First Amended Complaint, alleging that ODNR "has unconstitutionally and unlawfully asserted ownership and possession of the private property of Ohio citizens abutting Lake Erie." Am. Compl. ¶ 1. Specifically, Plaintiffs allege that under Ohio law, the State holds the waters of Lake Erie and the submerged lands below Lake Erie in trust for the people of Ohio, but ODNR has asserted that the State of Ohio owns all land lakeward of the "ordinary high water mark,"

defined as wherever the United States Army Corps of Engineers (hereinafter, the “Corps”) defines ordinary high water for purposes of federal law. *Id.* ¶¶ 8, 11. Plaintiffs allege that ODNR thus claims title to land lakeward of the ordinary high water mark, whether or not that land is actually submerged, in violation of Ohio state law. *Id.*

On February 23, 2005, ODNR filed an answer to Plaintiffs’ amended complaint, a counterclaim against Plaintiffs, and a cross-claim against the Federal Defendants. *See* Answer, Counterclaim, and Cross-Claim of Defendants-Respondents State of Ohio, Department of Natural Resources; Sam Speck, Director, Ohio Department of Natural Resources, and; the State of Ohio (hereinafter “Cross-Claim”). On March 28, 2005, the Federal Defendants removed this case to this Court. *See* Notice of Removal. On May 4, 2005, the Federal Defendants moved to dismiss ODNR’s cross-claim for lack of subject matter jurisdiction and/or failure to state a claim upon which relief could be granted. On June 3, 2005, ODNR filed its first amended cross-claim. *See* First Amended Cross-Claim of Defendants-Respondents for Quiet Title and Declaratory Judgment Against Cross-Claim Defendants The United States of America and The United States Army Corps of Engineers (hereinafter “Am. Cross-Claim”).

ODNR’s amended cross-claim asserts that Congress conveyed the lands beneath navigable waters to the states at statehood, and that the original grant to the state extends to the ordinary high water mark and does not depend on the ebb and flow of the tide. Am. Cross-Claim ¶¶ 1–6, 8–12, 20. ODNR’s amended cross-claim asserts two counts: to quiet title and for declaratory judgment under the APA. *Id.* ¶¶ 33–43. The QTA count asserts that the United States has an interest in a dispute over title to real property. *Id.* ¶¶ 33–36. This count alleges that “[a]ny conveyance or reservation of title by the United States to any portion of the lands

beneath the navigable waters of Lake Erie in the Territory which became the State of Ohio prior to Ohio's statehood to any other person or sovereign, such as alleged by Plaintiffs-Relators, was done in violation of Congressional policy, in violation of federal law, and in violation of the Constitution of the United States, and must be vacated." *Id.* ¶ 36.

The declaratory judgment count alleges that review is proper under the APA, and that if the Corps' methodology for locating the ordinary high water mark of Lake Erie, which ODNR relied upon, is arbitrary, ODNR will be unable to uniformly and comprehensively apply its Coastal Management Program under the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451–65. *Id.* ¶¶ 26–29, 39. ODNR also alleges that the Federal Defendants claim certain rights and interests in upland property bordering Lake Erie in Ohio to which the United States claims title, which ODNR cannot represent. *Id.* ¶¶ 41, 42. In addition, ODNR asserts that disposition of this action in the absence of the Federal Defendants will both prevent complete relief from being accorded to the parties and impair the Federal Defendants' ability to protect their rights and interests. *Id.*

### STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal of a claim if the Court lacks jurisdiction over the subject matter of the claim. Federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (internal citations omitted). In a Rule 12(b)(1) motion, the plaintiff bears the burden to show by a preponderance of the evidence that the district court has subject matter jurisdiction. *United States ex rel.*

*McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 938 (6th Cir. 1997). Where, as here, the motion properly asserts that the Court lacks jurisdiction of the subject matter of the complaint, the correct remedy is dismissal of the action. For purposes of this motion only, the facts are not in dispute. Rather, the motion is based on the facts as alleged in the cross-claim.

### ARGUMENT

ODNR's claim against the Federal Defendants must be dismissed because ODNR has not identified a valid waiver of the United States' sovereign immunity. Further, ODNR's amended cross-claim against the Federal Defendants does not raise a case or controversy, and ODNR lacks standing, as it has not sustained a redressible injury at the hands of the Federal Defendants. Thus, this Court lacks jurisdiction to hear ODNR's cross-claim against the Federal Defendants.

#### **A. The United States Has Not Waived Its Sovereign Immunity.**

As a sovereign, the United States is immune from suit except when it consents to be sued. *Lehman v. Nakshian*, 453 U.S. 156 (1981). The United States' consent to be sued must be found in a clear, unequivocal, specific jurisdictional statement found in a statute enacted by Congress. *Id.* This waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Army and Air Force Exchange v. Sheehan*, 456 U.S. 728, 734 (1982) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). "Limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States*, 352 U.S. 270, 272 (1957). ODNR's Amended Cross-Claim asserts two statutes as providing a waiver of the Federal Defendants' sovereign immunity: the QTA, 28 U.S.C. § 2409a; and the APA, 5 U.S.C. § 704. Neither statute provides ODNR with the requisite waiver of sovereign immunity.

**1. The QTA Does Not Waive the United States' Sovereign Immunity for this Action.**

The QTA waives the government's sovereign immunity and permits plaintiffs to name the United States "as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Therefore, ODNR must "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d). ODNR does not specify the United States' interest with any particularity, and, for that reason alone, ODNR's claim should be dismissed.

In any event, multiple hurdles exist for ODNR to have properly asserted a claim under the QTA. The QTA explicitly provides that 180 days before bringing an action, a state must notify "the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit." 28 U.S.C. 2409a(m). ODNR has not alleged that it gave the Corps the required 180 day notice. Further, ODNR's complaint makes no effort to provide a "description of the lands included in the suit."<sup>1</sup>

Further, even if ODNR had met the above requirements, the QTA simply does not give this Court jurisdiction over this case. "[T]wo conditions must be met before a district court can exercise jurisdiction over an action under the [QTA]: (1) the United States must claim an

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<sup>1</sup>Once ODNR does provide such a description, it is possible that other statutory bars may apply. For instance, subsection (h), which pertains to defense facilities of the United States, or subsection (j), which pertains to "submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments," may operate to bar ODNR's claims.

interest in the property at issue, and (2) there must be a disputed title to real property.” *Leisnoi, Inc. v. United States*, 170 F.3d 1188, 1191 (9th Cir. 1999). In this case, ODNR cannot meet either condition.

First, the United States does not have an interest in the property at issue. ODNR has not alleged that the Federal Defendants claim any ownership of the land at issue. On the contrary, ODNR’s amended cross-claim is clear that this case involves a dispute over ownership between the Plaintiffs and ODNR. The Federal Defendants’ regulatory authority over the navigable waters of the United States is not an “interest” under the QTA. *See* Am. Cross-Claim Prayer for Relief (referencing “the paramount interest and authority retained by the United States in its navigational servitude over” the navigable waters below the ordinary high water mark of Lake Erie). The Federal Defendants’ jurisdiction over the navigable waters of the United States has no bearing on this land ownership dispute, because it is unrelated to the ownership of the underlying land. The Corps’ regulations provide that federal regulatory jurisdiction and powers of improvement for navigation include all land and water below the ordinary high water mark. 33 C.F.R. § 329.11(a). Importantly, the Corps’ regulations also provide that “[o]wnership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, ***private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.***” *Id.* at 329.11(a)(2) (emphasis added). Accordingly, the Federal Defendants have jurisdiction over the land and waters below the ordinary high water mark, regardless of who owns the underlying land. Therefore, the Federal Defendants’ navigable servitude is not an “interest” in the underlying title dispute under the QTA.

ODNR alleges “[t]he United States claims an interest in real property under the [QTA] even if it has patented its title to the land’s in question, if relief requires the vacation of that conveyance.”<sup>2</sup> Am. Cross-Claim ¶ 36. This allegation, however, is contrary to case law. When the United States has conveyed title to property, it no longer claims an interest in property and the QTA is not applicable. *See Lord v. Babbitt*, 991 F. Supp. 1150, 1157 (D. Alaska 1997) (holding that when United States had already conveyed full title and interest to the lands at issue, QTA did not apply and court lacked jurisdiction); *Bay Sav. Bank, F.S.B. v. Internal Revenue Serv.*, 837 F. Supp. 150, 154 (E.D. Va. 1993) (holding that when property at issue has been sold, United States does not claim an interest). This Court should similarly conclude that it lacks jurisdiction over ODNR’s claim that the United States retains an interest in property it has conveyed.

Likewise, ODNR cannot meet the second prong of the jurisdictional test under the QTA: that there be a disputed claim to real property. Courts have interpreted this prong as requiring a dispute in title that involves the United States. *Leisnoi*, 170 F.3d at 1192 (“For initial jurisdiction to lie, therefore, there must be a conflict in title between the United States and the plaintiff.”); *see also McMaster v. United States*, 117 F.3d 936, 939–40 (11th Cir. 1999) (noting that dispute must concern title to real property and the quality of title as between plaintiff and the United States, and citing cases). “This is because a ‘quiet title’ action is, generally speaking, an in personam proceeding, the purpose of which is to determine which named party has superior claim to a certain piece of property.” *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir.

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<sup>2</sup>ODNR has also not alleged that the proper relief in a QTA action is vacation of a prior conveyance.

1993) (internal citation omitted) (noting that the initial inquiry in a QTA case is ““Who holds superior title to the property--the plaintiff or the United States?””).

In particular, subsection (e) of the QTA requires this result. Subsection (e) provides that if, prior to trial, the United States disclaims its interest in the real property adverse to the plaintiff, the Court’s jurisdiction shall cease. 28 U.S.C. § 2409a(e). As the *Leisnoi* court held, “[t]his provision makes little sense if initial jurisdiction could be acquired simply because a plaintiff and a third party other than the United States had a dispute over title.” *Id.* at 1192; *see also McMaster*, 177 F.3d 936, 939–40 (noting 28 U.S.C. § 2409(e) as support).

Further, the statute of limitations for QTA claims enforces this conclusion. Section 2409a(g) of the QTA provides that the statute of limitations is twelve years on QTA claims, and that claims accrue “on the date the plaintiff or his predecessor in interest knew or should have known *of the claim of the United States*.” 28 U.S.C. § 2409a(g); *see, e.g., Crooks v. Placid Oil Co.*, 166 F. Supp. 2d 1104, 1109 (W.D. La. 2001) (holding that “all that is required for an action to accrue is a reasonable awareness that the government claims some interest adverse to the plaintiffs.”). Clearly, then, a claim under the QTA relies on the United States claiming some title or interest to the land. Accordingly, the QTA does not provide the requisite waiver of sovereign immunity to support jurisdiction in this case. *See Leisnoi*, 170 F.3d at 1192.

**2. The APA Does Not Waive the Federal Defendants’ Sovereign Immunity in the Case at Bar.**

The APA also does not provide the requisite waiver of sovereign immunity because ODNR does not challenge a final agency action by the United States. *See* 5 U.S.C. § 704 (providing for review of “final agency action for which there is no other adequate remedy in a court.”). The Supreme Court recently clarified the type of actions that may be challenged under

the APA: agency actions can include "five categories of decisions made or outcomes implemented by an agency—'agency rule, order, license, sanction [or] relief.'" *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2378 (2004) (citing 5 U.S.C. §551(13)). The Court noted that these must be "circumscribed, discrete agency actions." *Id.* at 2379–80. "Agency action is final when it imposes an obligation, denies a right, or fixes some legal relationship." *Action on Smoking and Health v. Dep't of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994) (internal citation omitted). ODNR bears the burden of identifying a final agency action under the APA in order to show that this Court has subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.").

ODNR's cross-claim purportedly identifies the Corps' methodology for locating the ordinary high water mark of navigable, non-tidal bodies of water as the "final agency action" under review. Am. Cross-Claim ¶ 38. The flaw in ODNR's argument is that no party has challenged the Corps' methodology in this action. Plaintiffs do not challenge the Corps' determination of the ordinary high water mark of navigable waters, or the Corps' use thereof to determine the scope of the Corps' regulatory jurisdiction. *See* Pls.' Am. Compl. Plaintiffs' complaint challenges only ODNR's use of the Corps' ordinary high water mark for ownership purposes. *See id.* ¶ 11. In addition, ODNR does not challenge the Corps' methodology for determining the ordinary high water mark of navigable waters, but, rather, seeks to uphold the Corps' determination. *See* Am. Cross-Claim ¶¶ 30–31; 39. Therefore, because the Corps' methodology in determining the ordinary high water mark of the navigable waters of Lake Erie

is not at issue, it is not final agency action under review. Accordingly, this Court lacks jurisdiction over ODNR's claims.

Even if this Court were to find that a party had challenged the Corps' determination of the ordinary high water mark as a final agency action, that claim would be barred by the statute of limitations. The civil action statute of limitations provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The six-year statute of limitations applies to challenges alleging procedural irregularity under the APA. *See Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988). Because the statute of limitations is a jurisdictional matter, ODNR bears the burden of establishing compliance with the limitations period. *See Clay v. United States*, 199 F.3d 876, 879 (6th Cir. 1999). ODNR has not shown that it brought its claim within six years of the Corps' determination of the ordinary high water mark of Lake Erie. Therefore, this Court lacks jurisdiction.

**B. ODNR Has Not Alleged a Case or Controversy Involving the Federal Defendants.**

It is well-established that Article III, Section 2, of the Constitution allows federal courts to act only in cases and controversies. "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). "Article III of the Constitution requires the existence of an actual case or controversy, not only upon initiation of the action, but at every phase of the proceedings." *Portis v. City of Chicago*, 347 F. Supp. 2d 573, 575 (N.D. Ill. 2004) (citing *Jones v. Sullivan*, 938 F.2d 801, 805 (7th

Cir.1991)). In this case, ODNR's cross-claim against the Federal Defendants fails to meet the case or controversy requirement. As described above, the dispute over ownership is solely between Plaintiffs and ODNR. The presence of federal law in a case alone is insufficient to establish a case or controversy against the Federal Defendants. Further, ODNR has not alleged that its interests are adverse to the Federal Defendants', except for its broad claim that any pre-statehood conveyance or reservation of title by the United States to any portion of the lands beneath the navigable water of Lake Erie should be vacated.

ODNR's amended cross-claim does not allege that there is a current dispute between ODNR and the Federal Defendants. ODNR's cross-claim against the Federal Defendants seeks a declaratory judgment that:

- (1) pursuant to federal law, the State of Ohio received at statehood and now holds title as proprietor in trust for the people of the State to the lands and waters of Lake Erie, up to the ordinary high water mark of Lake Erie, subject only to the United States' authority retained by the United States in its navigational servitude over the waters;
- (2) any "pre-statehood conveyance or reservation by the United States of any portion of the lands beneath the navigable waters of Lake Erie within the territorial boundaries of the state of Ohio" be vacated;
- (3) if the Court finds that the Corps' methodology for determining the current elevation of the ordinary high water mark of Lake Erie is an unacceptable methodology, the Court (a) declare an acceptable methodology, and (b) find that ODNR's authority to apply, and federal approval of, its Coastal Management Program is not impaired.

Am. Cross-Claim Prayer for Relief. None of these requests seeks immediate relief against the Federal Defendants. The first request does not seek relief against the Federal Defendants, but seeks an interpretation of federal law. As stated above, ODNR's second claim for relief is barred because ODNR has not met the requirements of the QTA, including the 180 day notice necessary

before a state can bring suit against a federal agency under the QTA, and therefore does not state a case or controversy against the Federal Defendants. *See* 28 U.S.C. § 2409a. Of course, ODNR has not identified title to any specific conveyance or reservation or alleged why it should be vacated.<sup>3</sup> This request, therefore, does not state a case or controversy against the Federal Defendants.

With regard to ODNR's third prayer for relief, as stated above, ODNR does not seek to have the Corps' methodology overturned. Instead, ODNR seeks to have the Corps' methodology and, specifically, ODNR's reliance on the Corps' methodology, upheld. ODNR's third request for relief, to the extent that it requests relief against the Federal Defendants at all, is contingent on this Court's finding that the Corps' methodology for determining the current elevation of the ordinary high water mark of Lake Erie is arbitrary. At this point in time, however, there is no controversy between ODNR and the Federal Defendants. Even ODNR's request that the Court find that federal approval of ODNR's Coastal Management Program not be impaired asks for confirmation that seeks to preserve rather than overturn or modify the Federal Defendant's approval of the State's Coastal Management Program under the federal Coastal Zone Management Act.<sup>4</sup> In addition, ODNR's amended cross-claim completely fails to allege how a finding that ODNR's use of the ordinary high water mark for purposes of ownership would

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<sup>3</sup>Nevertheless, should this Court determine that the United States executed a pre-statehood conveyance or reservation of title to the lands beneath the navigable waters of Lake Erie within the territorial boundaries of the State of Ohio, any claim ODNR might have against the United States would ripen and could be brought at that time.

<sup>4</sup>The Secretary of Commerce, and particularly the National Oceanic and Atmospheric Administration, is charged with carrying out the federal Coastal Zone Management Act. *See* 16 U.S.C. § 1453; 15 CFR Part 930.

affect its Coastal Management Program approval. Further, even if ODNR's Coastal Management Program lost federal approval, ODNR has not shown how that action would lead to a conflict with the Federal Defendants. ODNR's cross-claim, therefore, fails to allege a case or controversy against the Federal Defendants.

Nor have Plaintiffs asserted claims against the Federal Defendants and have not attempted to include any of the Federal Defendants as a party.<sup>5</sup> Plaintiffs claim that ODNR's use of the Corps' determination of the ordinary high water mark to delineate the State of Ohio's ownership of land abutting Lake Erie is arbitrary, but do not allege that the Corps' determination and use of the ordinary high water mark for its regulatory purposes is arbitrary. *See* Am. Compl. ¶ 11 (alleging that ODNR asserts that the State of Ohio owns all land lakeward of the ordinary high water mark, as defined by the Corps, "contrary to established Ohio law . . . regardless of whether that property is submerged and regardless of whether that property is privately owned."). Rather, Plaintiffs allege that ODNR has violated Ohio law. According to Plaintiffs, Ohio law provides that the State only owns land that is actually submerged beneath the waters of Lake Erie. Am. Compl. ¶¶ 8, 11, 32. Plaintiffs allege that "Ohio law . . . has long recognized that the lakeward property line of a littoral owner whose ownership extends to Lake Erie is a 'moveable freehold' in that it can move either lakeward or landward by virtue of accretion, erosion, or reliction." Am. Compl. ¶ 8. Therefore, according to Plaintiffs, because ODNR claims state ownership of lands beneath the ordinary high water mark, as defined by the Corps,

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<sup>5</sup>Although ODNR states that the United States claims title to certain upland property bordering Lake Erie, that claim of title would not align the Federal Defendants as a plaintiff in this matter even if this matter is certified as a class action, because Plaintiffs' defined class includes "the approximately 15,500 private littoral owners" of property abutting Lake Erie. The United States is not a "private" owner of property.

regardless of whether that land is actually submerged, ODNR is violating state law. Thus, Plaintiffs have not argued that the Corps' determination of the ordinary high water mark, but merely ODNR's use of that mark to determine ownership.

In short, neither Plaintiffs nor ODNR have alleged that the Federal Defendants have violated federal law at this point in time. Neither has ODNR alleged a claim against the Federal Defendants in this case sufficient to establish a case or controversy. This Court, therefore, lacks jurisdiction to decide ODNR's cross-claim.

**C. ODNR Lacks Standing to Raise a Claim Against the Federal Defendants.**

Similarly, ODNR lacks standing to raise a claim against the Federal Defendants because it has not sustained an injury that can be remedied by the requested relief. The Article III, Section 2 "case and controversy" requirement also includes a requirement that a party have standing to raise its claim. The party invoking federal jurisdiction bears the burden of proving the existence of standing. *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 915 (6th Cir. 2002). A party seeking to show that it has standing must demonstrate three things: (1) "'injury in fact' — a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical'"; (2) "causation — a 'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant" ; and (3) "redressability — a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41, 45 (1976)); see also *Markva v. Haveman*, 317 F.3d 547, 557 (6th Cir. 2003). ODNR cannot demonstrate any of these factors.

First, ODNR cannot show “injury in fact.” As discussed above, ODNR has not alleged any actual injury from the Federal Defendants’ conduct. To the extent that ODNR may have alleged any injury at all, it is purely hypothetical, because an injury could only be triggered if the Court made certain findings. Because ODNR’s alleged injury is not concrete, actual, and imminent, it lacks standing to assert a cross-claim against the Federal Defendants. *See Vermont Agency*, 529 U.S. at 771. Likewise, ODNR has not alleged any causation between the alleged injury and the purported conduct of the Federal Defendants. Rather, the harm ODNR alleges will occur stems from Plaintiffs’ claims against ODNR’s conduct. This is insufficient to establish standing to bring an action against the Federal Defendants. *See Yeager v. General Motors Corp.*, 265 F.3d 389, 394 (6th Cir. 2001) (“To satisfy Article III’s cases-or-controversies requirement there must be a causal relationship between the challenged conduct and the injury.”) To the extent that ODNR alleges that its Coastal Management Program would lose federal approval, ODNR has completely failed to demonstrate any connection between this injury and the Federal Defendants’ conduct. Indeed, the amended cross-claim is completely lacking in any detail regarding why a determination that ODNR’s use of the Corps’ ordinary high water mark for ownership purposes would lead to a violation of its Coastal Management Program. Allegations of a speculative future injury are insufficient to seek redress of the predicted injury. *See Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O’Shea v. Littleton*, 414 U.S. 488 (1974)

Finally, ODNR lacks standing because it has not alleged an injury caused by the Federal Defendants that would be remedied if the Court grants the requested relief. To demonstrate redressability, ODNR must demonstrate “that a decision in [its] favor ‘will produce tangible, meaningful results in the real world.’” *See Pritikin v. Dep’t of Energy*, 254 F.3d 791, 799 (9th

Cir. 2001) (quoting *Common Cause v. Dep't of Energy*, 702 F.2d 245, 254 (D.C. Cir.1983)). If ODNR prevails in this case against the Plaintiffs, it would not receive any relief against the Federal Defendants. ODNR's cross-claim is based, in large part, on the alleged presence of questions of federal law, and on ODNR's alleged inability to represent the Federal Defendants' interests in this case. Because ODNR has not alleged an injury caused by the Federal Defendants that could be remedied by the requested relief, it lacks standing.

### CONCLUSION

For the foregoing reasons, the Federal Defendants request that this Court dismiss ODNR's cross-claim.

Respectfully submitted this 17th day of June, 2005.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned counsel certifies that the foregoing Memorandum is 17 pages in length and within the limitations of an unassigned case.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2005, a copy of the foregoing **FEDERAL DEFENDANTS' MOTION TO DISMISS AMENDED CROSS-CLAIM** was filed electronically. 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. Parties may access this filing through the Court's system.

/s Devon M. Lehman

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

STATE OF OHIO EX REL.,	)	
ROBERT MERRILL, TRUSTEE, et al.	)	CASE NO. 1:05-CV-0818
	)	
Plaintiffs-Relators	)	Judge Solomon Oliver
	)	
vs.	)	
	)	
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.	)	

**[PROPOSED] ORDER**

This matter having come before the Court on FEDERAL DEFENDANTS' MOTION TO DISMISS AMENDED CROSS-CLAIM and the Court being advised in the premises,

IT IS HEREBY ORDERED that the Federal Defendants' motion is GRANTED.

IT IS FURTHER ORDERED that the First Amended Cross-Claim of Defendants-Respondents for Quiet Title and Declaratory Judgment Against Cross-Claim Defendants The

United States of America and The United States Army Corps of Engineers is DISMISSED.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2005.

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United States District Court  
Northern District of Ohio