

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

STATE OF OHIO EX REL., ) CASE NO. 1:05-CV-0818  
ROBERT MERRILL, TRUSTEE, et al., )  
)  
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, )  
)  
and )  
)  
NATIONAL WILDLIFE FEDERATION )  
and OHIO ENVIRONMENTAL COUNCIL )  
)  
Applicants for Intervention. )  
Cross-claim Defendants. )

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**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE  
BY NATIONAL WILDLIFE FEDERATION  
AND OHIO ENVIRONMENTAL COUNCIL**

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## I. INTRODUCTION

This case threatens the longstanding and well-established right of the public to the shore of Lake Erie in the State of Ohio. Specifically, the plaintiffs challenge the Public Trust Doctrine, which holds that the State of Ohio owns and holds in trust for the public the lands beneath the navigable waters of Lake Erie. The plaintiffs claim that the doctrine does not extend to the lake shore, that is to say, the strip of land between the ordinary high water mark and the water's edge. Rather, they claim that their upland holdings include the shore, and that the doctrine only applies to the land actually covered by the lake's waters at any given time.

Were the plaintiffs' claims to succeed, members of proposed intervenors National Wildlife Federation ("NWF") and Ohio Environmental Council ("OEC") would no longer be free to continue to walk along the Lake Erie shore, taking advantage of the opportunities it provides for recreational pursuits and aesthetic enjoyment. Rather, their use and enjoyment of the Lake Erie shore would be subject to the whims of individual property owners.

Although the State of Ohio is defending in this case, upholding its responsibility to keep the Lake Erie shore in trust for its citizens, the State does not walk along the shore, observe the birds and wildlife, or appreciate the scenic beauty of the lake and its environs. Individual members of NWF and OEC do. Their personal stake in preserving the public's access will not be adequately represented, however, unless NWF and OEC are permitted to intervene. Moreover, the State can only speak on behalf of its citizens, not on behalf of members of NWF or OEC who are not citizens of Ohio, but who use and enjoy the Lake Erie shore.

Under these circumstances, the well-settled law in this Circuit establishes that NWF and OEC are entitled to intervention as of right. In the alternative, the Court should permit intervention based on the common questions of law and fact between plaintiffs' claims and

NWF's and OEC's position that the Lake Erie shore belongs to the public.<sup>1</sup>

## II. BACKGROUND

### A. Statement Of The Case.

On May 28, 2004, a number of individuals and the Ohio Lakefront Group (collectively, "OLG") brought an action in state court against the State of Ohio and its Department of Natural Resources (collectively, "the State"). OLG alleged that the State unconstitutionally asserted ownership and possession of private property abutting Lake Erie below the ordinary high water mark. OLG further alleged that individual property owners own legal title to those lands, indicating that they could trace their title to individuals who had received deeds to those lands before Ohio was admitted to the Union in 1803.

The State disputes OLG's claim, filed an answer and a counterclaim, and also filed a cross-claim against the United States and the U.S. Army Corps of Engineers (collectively, "the United States") on February 23, 2005. The United States removed the case to this Court on March 28, 2005.

In the counterclaim, the State chiefly seeks a declaration that the State of Ohio owns and holds in trust for the people of Ohio the lands and waters of Lake Erie, up to the natural location of the ordinary high water mark within the territorial boundaries of the state, subject only to the paramount authority retained by the United States for the constitutional purposes of commerce, navigation, national defense, and international affairs, and that the State has so owned and held those lands and waters since statehood.

On June 3, 2005, the State filed an amended cross-claim based upon the federal Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 704. Under the QTA, the State asks the Court to declare that upon Ohio's admission to the

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<sup>1</sup> Were the Court not to grant intervention, it should allow NWF and OEC to appear as amicus curiae.

Union, it received title to the lands beneath the navigable waters of Lake Erie up to the ordinary high water mark as proprietor in trust for its citizens. The State further seeks a declaration that any pre-statehood conveyance or reservation by the United States of any portion of the lands below the ordinary high water mark to any private person or sovereign was in violation of the Constitution of the United States, federal law, and Congressional policy. Under the APA, the State asks the court to review the Corps' methodology for locating the ordinary high water mark of navigable, non-tidal bodies of water.

**B. The Public Trust Doctrine.**

Early in the Nation's history, the Supreme Court established the doctrine that the States own the land beneath the navigable waters within their boundaries, and hold it in trust for the public. The Court explained the origin of what has come to be known as the "Public Trust Doctrine" as follows:

Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. See *Shively v. Bowlby*, 152 U.S. 1, 11-14, 14 S.Ct. 548, 551-553, 38 L.Ed. 331 (1894). When the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. *Id.*, at 15, 14 S.Ct., at 553. Because all subsequently admitted States enter the Union on an "equal footing" with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union. *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845).

*Utah Division of State Lands v. United States*, 482 U.S. 193, 195-96, 107 S.Ct. 2318, 2320 (1987).

The Court also early established that the land submerged beneath the navigable waters includes the lands below the ordinary high water mark. *Shively v. Bowlby*, 152 U.S. 1, 27, 14 S.Ct. 548, 557 (1894) ("The new states admitted into the Union since the

adoption of the constitution have the same rights as the original states in the tide waters, and in the lands below the high-water mark, within their respective jurisdictions.”).

Furthermore, the Court has recognized that the lands beneath the Great Lakes were within the public trust given the new States upon their entry into the Union, subject to the federal navigation easement and the power of Congress to control navigation under the Commerce Clause. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479, 108 S.Ct. 791, 797 (1988); *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 436-7, 13 S.Ct. 110, 112 (1892) (“We hold . . . that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.”).

The Ohio Supreme Court has recognized the Public Trust Doctrine as the law of Ohio. In *State v. Cleveland & Pittsburgh Railroad Company*, 94 Ohio St. 61, 79, 113 N.E. 677, 681 (1916), the court stated that the State “holds the title to . . . [Lake Erie’s] subaqueous land as trustee for the protection of public rights.”

Under the Public Trust Doctrine as originally formulated, the State holds the bottomlands “in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.” *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. at 452, 13 S.Ct. at 118. Over time, courts have held that the interests protected by the doctrine are not limited to navigation, commerce, and fishing, but extend to recreational uses, as well. *See Borough of Neptune City v. Borough of Avon-by-the-Sea* 61 N.J. 296, 309-10, 294 A.2d 47, 55 (1972). The

Supreme Court of New Jersey has specifically held such uses to include “bathing, swimming and other shore activities.” *Id.*, 61 N.J. at 309, 294 A.2d at 54. Ohio also recognizes a right to recreation among the public rights that exist in the lands and navigable waters of Lake Erie. *See* Ohio R. Code § 1506.11(G) (“no lessee or permit holder [of the lands and waters underlying the waters of Lake Erie] shall change any structures, facilities, or buildings, make any improvements, or expand or change any uses unless the director first determines that the proposed action will not adversely affect any current or prospective exercise of the public right of recreation in the territory”).

C. **The Proposed Intervenors And Their Interests.**

The proposed intervenors in this case are two conservation organizations. NWF is a non-profit corporation organized and existing under the laws of the District of Columbia. Declaration of David B. Strauss at 2 (attached as Exhibit 1). It is a national organization with approximately 921,922 members nationwide, approximately 303,997 members in the states bordering the Great Lakes, and approximately 38,114 members in Ohio alone. *Id.* NWF’s mission is to conserve natural resources and the wildlife that depends on such resources for the use and aesthetic enjoyment of its members. *Id.*

OEC is an Ohio non-profit corporation. Declaration of Vicki Deisner at 2 (attached as Exhibit 2). It is a statewide organization with approximately 2,135 individual members and approximately 113 group members that represent thousands of citizens throughout Ohio. *Id.* OEC’s purpose is to preserve and protect the environment of the State of Ohio, and to represent the interests of its thousands of members across the state regarding environmental and conservation issues. *Id.*

Among the members of NWF and OEC are individuals who have walked and intend to continue to walk along the Lake Erie shore adjacent to upland property owned by private

individuals, including at least one member of NWF who is not a citizen of Ohio. Declaration of Patrick S. Hayes (“Hayes Declaration”) at 2-3 (attached as Exhibit 3); Declaration of Brian Preston (“Preston Declaration”) at 2 (attached as Exhibit 4). While walking along the Lake Erie shore, members of NWF and OEC engage in bird-watching, fossil-hunting, shell-collecting, or the study of plants, and enjoy the natural beauty of the lake and quiet contemplation, or use the shore to gain access to the waters of Lake Erie for wading, fishing, or other recreational pursuits. Hayes Declaration at 3; Preston Declaration at 2.

At least one member of NWF and OEC owns upland property adjacent to the Lake Erie shore on which he operates a Bed and Breakfast establishment. Hayes Declaration at 2. He markets it to tourists as the place “where nature lovers gather,” a place that will give them the opportunity to walk along the Lake Erie shore, where they might hunt for fossils, observe the island’s abundant wildlife, and which they might use as a base for fishing or swimming. *Id.* at 3. Individuals who have stayed at his inn have taken advantage of these opportunities, and he expects them to continue to take advantage of them.

### III. ARGUMENT

#### A. NWF And OEC Are Entitled To Intervene As Of Right.

Intervention as a matter of right is appropriate when the proposed intervenors demonstrate that: “(1) the motion to intervene is timely; (2) the proposed intervenors have a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede the proposed intervenor’s ability to protect their legal interest; and (4) the parties to the litigation cannot adequately protect the proposed intervenor’s interests.” *St. Paul Fire & Marine Ins. Co. v. Summit-Warren Industries Co.*, 143 F.R.D. 129, 132 (N.D. Ohio 1992) (citing *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)); Federal Rule of

Civil Procedure (“Fed. R. Civ. P.” or “Rule”) 24(a)(2).<sup>2</sup>

Rule 24 “should be ‘broadly construed in favor of potential intervenors.’” *Stupack-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991)). So construed, NWF and OEC are entitled to intervene as of right in this case.

1. **NWF’s and OEC’s motion to intervene is timely.**

In the Sixth Circuit, when considering whether a motion to intervene is timely, the courts assess a number of circumstances: “(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenor’s failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.” *Summit-Warren Industries Co.*, 143 F.R.D. at 132 (citing *Jansen*, 904 F.2d at 340).

The amount of time between the filing of the complaint and the motion to intervene is one of the least important circumstances. *Stupak-Thrall*, 226 F.3d at 475. “A more critical factor is what steps occurred along the litigation continuum *during* this period of time.” *Id.* (emphasis in original).

In this case, the litigation has not progressed very far at all. After the original complaint was filed, the only significant events that have occurred pertinent to OLG’s claims and the State’s counterclaim have been (1) on September 17, 2004, OLG moved for class certification on Count One of its First Amended Complaint; (2) on December 15, 2004, the state court denied the State’s motion to dismiss; (3) on January 3, 2005, the State moved for reconsideration of the

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<sup>2</sup> Fed. R. Civ. P. 24(a)(2) provides that “[u]pon timely application anyone shall be permitted to intervene in an action . . . 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.”

denial of the motion to dismiss, which was still pending when the case was removed to this Court; (4) on February 4, 2005, OLG and the State filed stipulations pertaining to class certification; (5) on February 23, 2005, the State filed its answer, counterclaim, and cross-claim; (6) on February 28, 2005, the state court stayed the class certification hearing; and (7) on March 25, 2005, OLG replied to the counterclaim and moved to strike it in part. *State of Ohio ex rel. Merrill v. State of Ohio*, No. 04-CV-001080, Docket Sheet (Court of Common Pleas for Lake County, Ohio), <http://clerk.lakecountyohio.org/clerk/>. On April 25, 2005, the State responded in this Court to the motion to partially strike the counterclaim, and on May 4, 2005, OLG replied.

Apart from the State's unsuccessful motion to dismiss and OLG's fully briefed motion to strike, then, no dispositive motions have been filed. The deadline for other dispositive motions is February 16, 2006. *State of Ohio ex rel. Merrill v. State of Ohio*, No. 1:05 CV 818 (N.D. Ohio Jun. 23, 2005 (case management conference order)).

The only discovery that occurred in the state court related solely to the issue of class certification, not the merits of OLG's claims or the State's counterclaim. Telephone Interview with Cynthia K. Frazzini, Attorney for State (Jul. 12, 2005). That discovery was sought by the State, not OLG, and took place while the case was still in state court. *Id.* The discovery consisted of a request for admissions, interrogatories, and a request for production of documents. *Id.* The State has received responses, but has yet to determine whether they are complete. *Id.* The parties were to exchange pre-discovery disclosures by July 5, 2005, and are required to complete discovery by January 16, 2006. *State of Ohio ex rel. Merrill v. State of Ohio*, No. 1:05 CV 818 (N.D. Ohio Jun. 23, 2005 (case management conference order)).

NWF's and OEC's motion is timely not only in light of the preliminary nature of the proceedings and limited discovery to date, but in light of their purpose for seeking intervention. They seek intervention to protect their members' right, enshrined in the Public Trust Doctrine, of

using the Lake Erie shore as a public place—a place where, among other things, they can watch birds, fish or swim in the lake, hunt for fossils, study the rare plant communities, or simply enjoy the scenic beauty of the lake.

NWF and OEC knew of this case since shortly after it was filed by OLG a little over a year ago. Even so, their intervention now will not prejudice the original parties. The case is simply not appreciably closer to preparation for trial than it was when it was filed. From here on, NWF and OEC will abide by whatever briefing or other schedules the Court establishes. As a result, NWF’s and OEC’s intervention will not delay the termination of the litigation. Under these circumstances, intervention is ordinarily allowed. 7C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916 (1986).

NWF and OEC have not identified any unusual factors militating against intervention. Accordingly, their motion to intervene is timely.

2. **Members of NWF and OEC have a significant legal interest in this case.**

Rule 24(a) does not specify the nature of the interest required for intervention as of right, but the Supreme Court held that “what is obviously meant . . . is a significantly protectable interest.” *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542 (1971). The Sixth Circuit subscribes to a “rather expansive notion of the interest sufficient to invoke intervention of right.” *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). For example, the Sixth Circuit has “noted that an intervenor need not have the same standing necessary to initiate a lawsuit . . . and cited with approval decisions of other courts ‘reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.’” *Id.* (quoting *Purnell*, 925 F.2d at 948).

NWF and OEC members have a significantly protectable legal right in this case that easily satisfies the Sixth Circuit’s expansive standard. Namely, they have the right guaranteed by the Public Trust Doctrine to the lands under the navigable waters of Lake Erie, meaning the

lands below the ordinary high water mark. That right includes the right to walk along the Lake Erie shore, and to make use of the shore for recreational pursuits and aesthetic enjoyment.

3. **Unless NWF and OEC intervene, the disposition of this case may impair the ability of their members to protect their legal interest.**

To satisfy the impairment requirement, the Sixth Circuit holds that a proposed intervenor “must show only that impairment of its substantial legal interest *is possible* if intervention is denied.” *Michigan State AFL-CIO*, 103 F.3d at 1247 (emphasis added). “This burden is minimal.” *Id.*

A ruling that the Lake Erie shore belongs to private individuals who own upland property would extinguish the right of members of NWF and OEC to use and enjoy the shore. They would be dependent for their use and enjoyment upon the permission or acquiescence of private property owners. Judging from OLG’s determination to file this case, at least some property owners can be expected to take action to keep the shore abutting their property to themselves, whether by posting “no trespassing” signs, creating obstructions, or otherwise. *See Hayes Declaration at 4.*

In short, OLG’s success would eliminate the legal interest NWF and OEC members have in the Lake Erie shore. That would not only have a direct and substantial harmful impact on their personal use and enjoyment. It would also have a direct and substantial harmful impact on their businesses that rely on tourism. *Hayes Declaration at 3-4.*

4. **None of the existing parties can adequately represent the interests of members of NWF and OEC.**

In the Sixth Circuit, NWF’s and OEC’s burden of showing that their interests are inadequately represented “is minimal because it is sufficient that the movant[ ] prove that representation may be inadequate.” *Michigan State AFL-CIO*, 103 F.3d at 1247 (quoting *Linton v. Commissioner of Health & Env’t*, 973 F.2d 1311, 1319 (6th Cir. 1992)); *see also Grutter v.*

*Bollinger*, 188 F.3d 394, 400 (6th Cir.1999) (a showing of potential inadequate representation is sufficient). “One is not required to show that the representation will in fact be inadequate.”

*Michigan State AFL-CIO*, 103 F.3d at 1247.

As previously explained, the rights to the lands under the navigable waters of Lake Erie must be held in trust for the citizens of Ohio by the State. Individuals who are not citizens of Ohio are entitled to share in those rights by virtue of the “right to travel” guaranteed by the Constitution of the United States. Specifically, “a citizen of one State who travels in other States, intending to return home at the end of his journey is entitled to enjoy the ‘Privileges and Immunities of Citizens in the several States’ that he visits.” *Saenz v. Roe*, 526 U.S. 489, 501, 119 S.Ct. 1518, 1525 (1999) (quoting U.S. CONST. art. IV, § 2).

In this case, the State may represent all its citizens, including those of its citizens who are members of NWF and OEC. The State does not represent members of NWF or OEC who are not citizens of Ohio, however. Unless NWF and OEC are permitted to intervene, therefore, those individuals will lack an advocate committed to vindicating their personal use and enjoyment of the Lake Erie shore.

In addition, the State’s motivation in defending this case is necessarily institutional, without regard to whether its citizens really take advantage of their right. In contrast, NWF and OEC seek to intervene to protect the interests of human beings who actually walk along the shore, hunt for fossils, observe birds and wildlife, study the plant community, swim, fish, and so on. Consequently, although the State and NWF and OEC may share the same ultimate objective, this case is personal for NWF’s and OEC’s members. As a result, the State may not litigate this case as vigorously as NWF and OEC are committed to litigating it, or the State may not appeal all aspects of an adverse ruling were one to issue.

For these reasons, the interests of NWF's and OEC's members may not be adequately represented by the State. Accordingly, NWF's and OEC's participation in this case as intervenors is necessary.

**B. Alternatively, NWF And OEC Should Be Permitted To Intervene.**

In addition to being entitled to intervene as of right, NWF and OEC also meet the requirements for permissive intervention. Rule 24 authorizes the Court to permit intervention “Upon timely application . . . when an applicant’s claim or defense and the main action have a question of law or fact in common.” Fed. R. Civ. P. 24(b)(2).

Not only is NWF's and OEC's motion to intervene timely, as shown above, but they intend to raise a defense and counterclaim that are both legally and factually related to OLG's claims. Namely, they intend to show that the scope of the Public Trust Doctrine includes the lands up to the ordinary high water mark. In addition, they intend to show that the individual plaintiffs cannot establish the existence of the rare and exceptional circumstances that might have justified the conveyance of lands below the ordinary high water mark to their predecessors in interest.

Rule 24 also requires the Court to “consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original.” Fed. R. Civ. P. 24(b). Although NWF and OEC intend to fully assert their defenses, they do not seek to expand the scope of this case by raising new issues that are unrelated to OLG's allegations. Rather, NWF and OEC will only ensure that the interests of their members are adequately protected.

**IV. CONCLUSION**

NWF and OEC have satisfied the requirements both for intervention as of right and permissive intervention under Rule 24(a)(2). Accordingly, NWF and OEC respectfully request that the Court allow them to intervene as party defendants and counterclaimants as a matter of

right or, in the alternative, permissively, and to file the Answer and Counterclaim submitted with their motion.

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DATED July 18, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on July 18, 2005, I mailed by United States Postal Service, postage prepaid, the foregoing Memorandum in Support of Motion to Intervene by National Wildlife Federation and Ohio Environmental Council to the following:

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