

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

STATE OF OHIO EX REL.)	CASE NO. 1:05 CV 0818
ROBERT MERRILL, TRUSTEE, et al.,)	
)	Honorable Solomon Oliver
Plaintiffs-Relators,)	Magistrate Judge Perelman
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents,)	PLAINTIFFS-RELATORS' REPLY
Counterclaimants, Cross-)	BRIEF IN SUPPORT OF MOTION TO
Claimants)	STRIKE CROSS-CLAIM IN WHOLE
)	AND COUNTERCLAIM IN PART
vs.)	
)	
UNITES STATES OF AMERICA, et al.,)	
)	
Cross-Claim Defendants)	

Plaintiffs-Relators, Robert Merrill, Trustee, Ohio Lakefront Group, Inc., Anthony J. Yankel, Charles S. Tilk, Sheffield Lake, Inc., Sandra L. Wade, David A. Zeber, Adrian F. Betleski, Steve Nickel, Lemarr L. & Patricia J. French, Neal Oscar Luoma, and Timothy & Kimberly Rosenberg (collectively “Plaintiffs”) hereby submit this Reply Brief in support of their motion (“Motion”) seeking an order: (1) striking in whole the Cross-claim of Defendants-Respondents (the “State”) against the United States of America (“United States”) and the United States Army Corps of Engineers (“Army Corps”) (collectively “Federal Government”), and (2) striking in part the State’s Counterclaim against Plaintiffs, and in response to the State’s Memorandum in Opposition to the Motion (“Opposition Brief” or “Opp. Brief”).

I. The State’s Cross-Claim Should Be Stricken.

A. Contrary to the State’s Arguments, the State’s Cross-claim has no Legitimate Basis.

The State’s efforts to keep the Federal Government in this lawsuit with its Cross-claim and 18-page Opposition Brief have nothing to do with any actual relief sought against the Federal Government. The State’s sole purpose is to create enough complexity and confusion to defeat certification of the clearly defined class that Plaintiffs propose. As discussed below and in Plaintiffs’ Motion, the Federal Government has no business being dragged into this lawsuit by the State, and the State’s Cross-claim should be stricken in its entirety.

The law cited by the State regarding when it is proper to strike pleadings supports Plaintiffs’ position, not the State’s. (Opp. Brief at 4-5.) The State’s cited cases indicate that a pleading should be stricken when “the allegations are clearly immaterial to the controversy and are prejudicial to the defendant.” (Opp. Brief at 4 (citations omitted).) Here, the State’s Cross-claim, if not stricken, would prejudice Plaintiffs, because it would require that Plaintiffs redefine their proposed class and would complicate Plaintiffs’ efforts to have their class certified. Similarly, the State’s Cross-claim is immaterial, impertinent, and insufficient and should be stricken under Rule 12(f) of the Federal Rules of Civil Procedure. To have a procedurally legitimate claim against a party, one actually must seek some relief against that party. The State’s Cross-claim does not seek any relief against the Federal Government; it seeks relief only against Plaintiffs. It does not challenge any property rights or regulatory authority of the Federal Government, and Plaintiffs’ Complaint does not, either. Consequently, the Cross-claim has no place in this lawsuit. Moreover, contrary to the State’s assertion, Plaintiffs do have standing to bring their Motion inasmuch as the requested relief in the Cross-claim is directed solely at Plaintiffs. *See Flast v. Cohen*, 392 U.S. 83, 99-100 (1968) (“... when standing is placed in issue

in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue. . .”).

In an effort to conjure up a reason why the Federal Government allegedly must participate in this action, the State notes that the United States had predecessor interests in the Lake Erie region 200 years ago. (Opp. Brief at 6-8.) Obviously, as a *predecessor*, those interests were extinguished long ago, and the Federal Government no longer has those interests to protect in this action. The State’s stated intention to seek “a re-affirmation of the federal law pertaining to lands beneath navigable waters prior to statehood, the upland that borders such navigable bodies of water, and the rights of the State of Ohio in Lake Erie under the equal footing doctrine at the creation of the state” does not compel the Federal Government’s participation. (Opp. Brief at 7.) Nor does the State’s allegation that “Plaintiffs-Relators have also brought these long settled principles of federal and state law into dispute . . .” mandate the Federal Government’s inclusion. (Opp. Brief at 7, 8.) Virtually every lawsuit ever filed has involved a question of federal or state law, but governmental entities do not somehow become parties in interest as a result. Joining governments as parties to every lawsuit would make absolutely no sense, and would require small armies to handle the governments’ representation. This case is no different than all others in this respect. This Court – or more accurately the state court following remand – obviously is free to “re-affirm,” or disaffirm, whatever federal or state law it sees fit in this action without having to join the Federal Government.

Next, the State mischaracterizes Plaintiffs’ claim that ODNR’s use of 573.4 feet IGLD (1985) as the State’s property ownership boundary against private littoral property owners along the shoreline of Lake Erie is “arbitrary.” The State would have the Court believe that Plaintiffs challenge the U.S. Army Corps of Engineers’ use of 573.4 feet IGLD (1985) to define its

regulatory jurisdiction as “arbitrary,” and seek to impact “every state in the nation.” (Opp. Brief at 8-10.) Once again, however, the State inappropriately is trying to collapse the distinction between property ownership rights and regulatory authority in order to generate class-defeating complexity. All that Plaintiffs seek in this action is a declaration of the state’s ownership rights vis-à-vis the class members as defined by Plaintiffs. Plaintiffs do not claim that the Army Corps’ regulatory use of 573.4 feet IGLD (1985) is arbitrary; what is improperly arbitrary is the State’s definition of the boundary between public and private ownership that has existed since 1803 by reference to a line of elevation adopted by the Army Corps in 1992 (using mid-1980s data). Because Plaintiffs do not challenge the Army Corps’ use of 573.4 feet IGLD (1985), the State’s argument is without merit.

The State’s next effort to defeat class certification by keeping the Federal Government in this action is its argument that permitting Plaintiffs’ lawsuit to proceed without the Federal Government will result in separate upper boundaries of Lake Erie for private littoral property owners, Ohio municipalities, and the United States. (Opp. Brief at 10.) The State makes this proclamation as though it self-evidently mandates the joinder of the Federal Government (and, by implication, all Ohio municipalities owning land along Lake Erie). However, the boundaries of lands owned by the Federal Government and Ohio municipalities are whatever the law and the parties’ deeds say they are, and although the State wishes they were, these property ownership rights simply are not at issue in this action. Plaintiffs have chosen not to champion public entities’ ownership rights in this action, nor can they be compelled to do so. Plaintiffs have narrowly defined their class, and seek a narrow declaration of the property ownership rights of class members only. Plaintiffs do not seek a declaration of any public ownership rights. Undoubtedly, this simply is a straw man ploy by the State to defeat class certification. While the

State suggests that it would be simple enough to join the Federal Government and decide the one true upper boundary of Lake Erie, the State undoubtedly would argue at the class certification stage that the participation of the Federal Government adds too many complexities to warrant class certification and thus would seek the class's defeat.

B. Contrary to the State's Assertion, the State's Cross-claim is Out of Rule and Was Filed Untimely, Without the Required Leave of Court.

The mere act of filing a motion seeking an enlargement of time for taking some required action does not supernaturally make the extension appear. Rather, a court must grant the motion for the otherwise belated act to be timely. Unless and until a court grants the motion, the parties must proceed under the time constraints set forth in the applicable civil procedure rules. Consequently, the State's argument that no deadline exists yet by which it had to file its Cross-claim simply because the court never ruled on its request for an enlargement does not pass muster. As described fully in Plaintiffs' Motion (*see* Motion at 2-3), the State's Cross-claim is out of rule and should be stricken.

II. Contrary to the State's Arguments, the Selected Allegations from the State's Counterclaim Identified in the Motion are Irrelevant and Impertinent and Should Be Stricken.

As a preliminary matter, Plaintiffs do not request that paragraphs 11 and 12 be stricken from Plaintiffs' Counterclaim, as Plaintiffs state. (Opp. Brief 12-15.) The paragraphs that Plaintiffs do request stricken (*i.e.* 10, 13, 19-20, 24-25, and 33-34) are superfluous and have no relevance to this litigation. The State's arguments that these paragraphs are appropriate are based wholly in the repeatedly flawed conflation by the State of the distinct concepts of ownership rights and regulatory authority. As stated by Plaintiffs many times before, Plaintiffs simply seek a declaration by the Court of the property line between the State and private littoral property owners along the shoreline of Lake Erie. The State's claim that a determination of

Plaintiffs' property ownership rights will somehow create, extinguish, or alter governmental regulatory authority or public rights is without merit. Governmental regulatory authority and public rights will be the same as they are now after this lawsuit concludes. As discussed fully in the Motion (*see* Motion at 3) and here, paragraphs 10, 13, 19-20, 24-25, and 33-34 of the Counterclaim all are irrelevant and impertinent to this dispute, and therefore should be stricken pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

III. Conclusion.

For the foregoing reasons, and for those stated in Plaintiffs' Motion, Plaintiffs respectfully request that the Court enter an order striking the State's Cross-claim against the Federal Government in its entirety, and strike paragraphs 10, 13, 19-20, 24-25, and 33-34 of the State's Counterclaim against Plaintiffs. Once the frivolous Cross-claim against the Federal Government has been stricken, Plaintiffs request that this Court remand this action to state court, retaining jurisdiction only for the purpose of determining the proper amount of costs and expenses to be paid by the State to Plaintiffs and the Federal Government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs-Relators' Reply Brief In Support Of Motion to Strike Cross-Claim in Whole and Counterclaim in Part was filed electronically on this 4th day of May 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/ K. James Sullivan
One of the Attorneys for Plaintiffs-Relators