

detailed in the attached Brief in Support, which is incorporated by reference, the State's First Amended Cross-claim is both immaterial and impertinent, warranting that it be stricken in its entirety.

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

**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 SUPPORT OF MOTION TO STRIKE
FIRST AMENDED CROSS-CLAIM**

I. Introduction.

The First Amended Cross-claim of Defendants-Respondents (the “State”) against the United States of America and the United States Army Corps of Engineers is the State’s latest frivolous effort to avoid and delay what properly is an Ohio state class action involving issues of state law that should be determined in the Ohio courts. This litigation is a property dispute between private littoral property owners along Lake Erie and the State of Ohio, and no one else. The State waited until the week before a class certification hearing in the Lake County Court of Common Pleas to file the bizarre allegations pending here against the United States with the hope that, upon the United State’s removal to this Court, the State could avoid having a state court decide the state law claims presented by Plaintiffs.

Yet this lawsuit simply does not belong here; it belongs in the Ohio courts. It has nothing whatsoever to do with the United States. The State's irrelevant and unfounded First Amended Cross-claim simply is another ploy to continue to forestall the simple declaration of what Ohio law is regarding property ownership by driving up the time and costs expended by both this Court and the Ohio courts, as well as Ohio's taxpayers, including Plaintiffs.

Because the State's initial cross-claim was devoid of merit, the United States promptly moved to dismiss. Plaintiffs similarly moved to strike the cross-claim as well as certain portions of the counterclaim also filed by the State. Instead of defending its initial cross-claim, the State continued with its delaying tactics by filing an amended cross-claim even more nonsensical than the first.¹ Once again, the United States and Plaintiffs ask this Court to reject the State's obstructionist tactics and, once it has done so, Plaintiffs request that this state court action be returned to state court.

II. The State's First Amended Cross-Claim Should Be Stricken.

A. The State's First Amended Cross-claim is Irrelevant and Impertinent to this Action.

Civ. Rule 12(f) of the Federal Rules of Civil Procedure provides that "the court may order stricken from any pleading any. . . immaterial, [or] impertinent . . . matter." Here, the State's First Amended Cross-claim is utterly irrelevant and impertinent to this lawsuit. Neither Plaintiffs nor the State challenge any property ownership of the United States. Likewise, neither Plaintiffs nor the State challenge any regulatory power of the United States. Plaintiffs simply are requesting that the Court declare that Ohio's public trust over the waters and submerged lands of

¹ Notably, the State has not amended its counterclaim against Plaintiffs. Consequently, Plaintiffs' prior *Motion to Strike Cross-Claim in Whole and Counterclaim in Part* still remains viable for the Court's consideration as it pertains to the State's unamended counterclaim.

Lake Erie does not, under Ohio law, extend beyond the waters and submerged lands of Lake Erie.² This declaration has become necessary because the ODNR has implemented a policy that ignores Ohio law by extending the public trust, and thus state ownership of non-submerged lands, beyond the waters of Lake Erie and onto what Ohio law has always considered to be privately-held property. The United States sits on neither side of this equation and claims no ownership interest in the property at issue. Consequently, the State's attempt to include the United States in this dispute is an irrelevant and impertinent diversion from the actual issues presented in this case, and the First Amended Cross-claim should be dismissed.

The State's Count I quiet title claim is based on an imaginary controversy that exists only in certain paragraphs of the State's misguided pleadings (but is directly contradicted in other paragraphs). Apparently, the State has a feeling that the United States may have transferred into private ownership some unidentified portion of the submerged lands of Lake Erie to some unidentified property owners at some unidentified time prior to Ohio's statehood in 1803, and the possibility that this may have occurred justifies a quiet title action requiring the United States' participation as a party. Yet the State's cross-claim makes clear at paragraph 14 thereof, and the United States' Motion to Dismiss confirms, that the United States has expressly disclaimed title to or ownership of any of the real property in dispute between Plaintiffs and the State. With regard to that property, the State has failed to identify any other entity or individual claiming title other than Plaintiffs and the State. As a result there is no case or controversy to be resolved by this Court under the federal Quiet Title Act.

² As discussed below, Ohio law does recognize that littoral property owners can own submerged lands of Lake Erie. Thus, while the state court can declare upon remand that Ohio's public trust does not extend beyond the waters of Lake Erie, it may include the caveat that a plat, deed or original patent could also place some part of the submerged lands of Lake Erie under private ownership.

Essentially, the State has once again improperly conflated ownership with regulatory authority, as it insists on doing in every document it files in this lawsuit. Quiet title actions determine disputes of title (*i.e.* ownership), not disputes over regulatory authority. The State has failed to identify any entity claiming title to the property in dispute other than Plaintiffs and the State. This is because no one claims an ownership interest in the property except for Plaintiffs and the State.

The State's further assertion that land conveyed or reserved prior to Ohio's statehood must be vacated simply is contrary to law and untenable. The State brazenly makes this claim despite clear and uncontroverted Ohio law to the contrary. See Hogg v. Beerman, 41 Ohio St. 81 (1884). Indeed, the Ohio Attorney General recently noted that any such conveyances were perfectly legitimate. See 2000 Opinion No. 2000-047 (2000 Ohio AG LEXIS 48) (“[P]rior to the admission of the State of Ohio to the Union, the United States conveyed to private owners title to parcels within the territorial boundaries of Lake Erie.”). If the State's position is that the United States must be a party to this action because it may have been a transferor of property prior to 1803, this would result in the equally absurd necessity to join as parties to this lawsuit not only the federal government but all sellers in the chain of title of all property dating back to the 18th century, along with the State of Connecticut, which made most of the original land grants in this region.

The State's Count II, which requests a declaratory judgment, is equally meaningless and inapposite to Plaintiffs' case. As briefed very ably by the United States in its motion to dismiss, no one is challenging the United States Army Corps of Engineers' (“Corps”) authority to choose whatever methodology it wishes for defining ordinary high water marks in carrying out its regulatory functions. The State's claim that Plaintiffs are challenging the Corps' methodology as

“arbitrary” is false. See First Amended Cross-claim at ¶ 39. The only conduct that Plaintiffs challenge as arbitrary is the State’s use of the Corps’ high water mark designation to redefine over 200 years of Ohio private property ownership. This abuse by the State contravenes nearly 200 years of Ohio law, including the Ohio Attorney General’s 1993 opinion, which specifically rejected ODNR’s claim to ownership beyond the water’s edge. See Ohio Atty. Gen. Op. 93-025 (citing R.C. 1506.10 and opining that the littoral owner holds title to property lying between the high water mark fixed by the Army Corps and the water’s edge).

Count II further claims that the United States should be a party to the lawsuit because it owns title to certain upland property bordering Lake Erie. This is incorrect. Plaintiffs have limited their proposed class to private littoral property owners along Lake Erie, specifically choosing not to include governmental entities as class members. Plaintiffs’ choice to not champion the property interests of the governmental units should be respected, and the State should not be permitted to hijack the Plaintiff’s case by creating issues that simply do not exist and to destroy the case’s current posture for class certification. Because the State’s First Amended Cross-claim sets forth wholly irrelevant and impertinent matters to the justiciable issues in this lawsuit, the First Amended Cross-claim should be dismissed pursuant to the directives of Civil Rule 12(f).

B. The State’s First Amended Cross-claim is Not Permitted, because the State’s Original Cross-claim was Out of Rule and Was Filed Untimely, Without the Required Leave of Court.

The State should not be permitted to maintain its First Amended Cross-claim because its original Cross-claim was out of rule under Ohio’s Rules of Civil Procedure, which governed this action at the time. The State had 14 days after the state court denied its Motion to Dismiss on December 15, 2004 in which to file its Answer, and a cross-claim is to be filed with a party’s responsive pleading. *See* Ohio R. Civ. Pro. 12(A)(2), 13(G). Otherwise, the State was required

to seek leave to bring in the United States and the Army Corps of Engineers as parties, and only upon proof of excusable neglect. *See* Ohio R. Civ. Pro. 6(B). The State was required to file its Cross-claim no later than January 3, 2005 if it wished to do so without leave. The State did not do so, but rather, chose to wait until February 23, 2005 to file the Cross-claim without leave in order to interrupt the class certification hearing then scheduled for March 4, 2005. The State did not make any attempt to explain to the Court how its dilatory conduct was the result of excusable neglect, and could not have done so. Consequently, the Cross-claim was out of rule and it follows that the proposed First Amended Cross-claim also is improper and must be dismissed. It would be inequitable to allow the State to circumvent its untimeliness simply by filing an amended pleading.

III. Conclusion.

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order striking the State's First Amended Cross-claim in its entirety and remanding this action for further proceedings in state court.

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' Motion to Strike First Amended Cross-Claim* was filed electronically on this 18th day of June 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