

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

STATE ex rel. ROBERT MERRILL,)	CASE NO. 04CV001080
TRUSTEE et al.)	
)	
Plaintiffs-Relators)	JUDGE EUGENE A. LUCCI
)	
and)	
)	
HOMER S. TAFT et al.)	
)	
Intervening Plaintiffs)	
and Plaintiffs-Relators, Pro Se)	
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES et al.)	
)	
Defendants-Respondents)	
and Counterclaimants)	
)	
and)	
)	
NATIONAL WILDLIFE FEDERATION et al.)	
)	
Intervening Defendants)	
and Counterclaimants)	
)	

**NATIONAL WILDLIFE FEDERATION et al.’s
STATEMENT OF REMAINING CLAIMS AND ISSUES**

Introduction

Intervening Defendants and Counterclaimants National Wildlife Federation (“NWF”) and Ohio Environmental Council (“OEC”) submit the following in response to this court’s order to file a statement setting forth NWF’s and OEC’s statement of each and every claim or issue which remains pending and needs to be determined or resolved by the court.

Plaintiffs' First Amended Complaint

Count One

This court certified a class action on Count One, finding three questions of law to be common to the class. Neither these questions nor any other requests for declaratory relief under Count One remain pending and they do not need to be resolved by this court.

First Question of Law Common to the Class

The first question of law the court found to be common to the class was the following:

(1) What constitutes the furthest landward boundary of the “territory” of Lake Erie as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to interpretation of the terms “southerly shore” in R.C. 1506.10, “waters of Lake Erie” in R.C. 1506.10, “lands presently underlying the waters of Lake Erie” in R.C. 1506.11, “lands formerly underlying the waters of Lake Erie and now artificially filled” in R.C. 1506.11, and “natural shoreline” in R.C. 1506.10 and 1506.11.

State ex rel. Merrill v. Ohio Dept. of Natural Resources (2006), Lake C.P. No. 04CV001080 (Order Certifying Class Action on Count One of the First Amended Complaint in Case No. 04-CV-001080) (“Order Certifying Class Action”) at ¶4.

The Supreme Court of Ohio has resolved this first question of law, holding: “The territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes.” *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, Slip Opinion No. 2011-Ohio-4612, at paragraph three of the syllabus, ¶¶4, 59, 62, 63, 65. This line is not the ordinary high-water mark, *id.* at ¶ 50; not the line at which the water meets the shore from moment to moment as the water rises and falls, *see id.* at ¶48, 57; and not the low-water mark. The supreme court’s resolution of this first question of law common to the class means that it does not remain pending and does not need to be resolved by this court.

Moreover, in resolving the first question of law, the supreme court disposed of the Plaintiffs’ request under Count One for a declaratory judgment (1) that they own fee title to the boundaries described in their deeds and original patents, and (2) that the interest of the state as trustee over the public trust does not apply to or include “non-submerged” lands. Specifically, in addition to ruling that the State of Ohio holds in trust the land lakeward of the line at which the water usually stands when free from disturbing causes, the supreme court reaffirmed its statement in *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 337, 33 O.O. 161, 82

N.E.2d 709, “that ‘[t]he littoral owners of the upland have no title beyond the natural shoreline.’” *Merrill* at ¶62. Taken together, these rulings mean that the Plaintiffs own fee title only to the natural shoreline, regardless of the boundaries described in their deeds, and that the public trust applies to lands below the natural shoreline, even when they are not actually covered by water.

The text of the supreme court’s opinion includes a statement that it does not “interfere[] with the presumptively valid deeds of the lakefront owners.” *Merrill* at ¶ 62. This statement merely reflects the supreme court’s restraint in ruling on the validity of any particular deed, not a determination that that deeds describing boundaries below the natural shoreline are valid. However, to the extent the statement constitutes such a determination, the syllabus conflicts with this statement, because the syllabus holds that the natural shoreline is the boundary of the public trust, and the text of the opinion also contains the conflicting statement that a littoral owner has no property rights lakeward of the natural shoreline. *Merrill* at paragraph 3 of the syllabus, ¶¶54, 62. The conflict, if any, must be resolved in favor of the syllabus, as Rule 1 of the Ohio Supreme Court Rules for the Reporting of Opinions expressly states:

(B)(1) The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.

(2) If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls.

(Emphasis added.) Accordingly, any deed describing a boundary lakeward of the natural shoreline conveys no title to the owner of the deed.

Finally, the supreme court’s decision that the natural shoreline, not the ordinary high-water mark, is the boundary of the public trust moots the Plaintiffs’ request for a declaratory judgment that submerged land leases between the Plaintiffs and ODNR are void and invalid with respect to land below the ordinary high-water mark.

Second Question of Law Common to the Class

This court also found the following question of law to be common to the class:

(2) If the furthest landward boundary of the “territory” is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such “territory” as proprietor in trust for the people of the State.

Order Certifying Class Action at ¶4.

The supreme court's decision that the furthest landward boundary of the "territory" is not the ordinary high-water mark makes this second question of law moot. Consequently, this second question of law common to the class does not remain pending and does not need to be resolved by this court.

Third Question of Law Common to the Class

This court also found the following question of law to be common to the class:

(3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the "territory."

Order Certifying Class Action at ¶4.

The decisions of the supreme court and the court of appeals in this case resolve this third question of law. With respect to the class members, the supreme court reaffirmed its statement in *Squire*, 150 Ohio St. at 337, "that "[t]he littoral owners of the upland . . . have only the right of access and wharfing out to navigable waters." *Merrill* at ¶62. With respect to the State of Ohio, the supreme court ruled that the Fleming Act, now renumbered as R.C. 1506.10, conformed to the prior decisions of the court. *Merrill* at ¶52. The statute provides that the State of Ohio holds the territory as proprietor in trust for the people of the State, and that the Department of Natural Resources "is hereby designated as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section." R.C. 1506.10.

With respect to the people of the State of Ohio, the court of appeals acknowledged that the public has broad access to the territory, as subsequently defined by the supreme court, including "all legitimate uses, be they commercial, transportation, or recreational." *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 11th Dist. Nos. 2008-L-007, 2008-L-008, 2009-Ohio-4256, at ¶89 (quoting *State ex rel. Brown v. Newport Concrete Co.* (1975), 44 Ohio App.2d 121, 128). This includes the right to walk in the territory. *Id.* The supreme court affirmed the court of appeals in this regard, because the court of appeals' judgment is consistent with the supreme court's decision. *Merrill* at ¶65. Consequently, this third question of law common to the class does not remain pending and does not need to be resolved by this court.

Counts Two and Three

Under Counts Two and Three of the First Amended Complaint, the Plaintiffs sought a writ compelling ODNR to commence appropriation proceedings to determine the amount of compensation the Plaintiffs are due for the temporary taking of land below the ordinary high-water mark. This request is moot for land below the natural shoreline, but it may not be moot

with respect to any land leased by the state that might be in a strip between the ordinary high-water mark and the natural shoreline. Before any claim for compensation can be adjudicated, however, the location of the line where the water usually stands when free from disturbing causes must be determined on a case-by-case basis.

That determination must be made in the first instance by ODNR, not this court, because the agency has been delegated the responsibility to care for, protect, and enforce the public trust. R.C. 1506.10. ODNR has all the powers expressly conferred by the legislature, as well as any additional powers necessarily implied to effectuate the powers expressly granted. *See Waliga v. Bd. of Trustees of Kent State Univ.* (1986), 22 Ohio St.3d 55, 57, 488 N.E.2d 850, 22 Ohio B. Rep. 74. ODNR is thus empowered to determine the location of the line where the water usually stands when free from disturbing causes. If any dispute arises over ODNR's determination, recourse may be had to this court after the agency makes the determination.

ODNR's and State of Ohio's Counterclaim

In their counterclaim, ODNR and the State of Ohio sought a declaratory judgment that the State holds title as trustee up to the ordinary high-water mark; that the State has retained title to land below the ordinary high-water mark; that lakefront owners hold certain littoral rights; that the Plaintiffs have no title or exclusive right below the ordinary high-water mark; that the location of the ordinary high-water mark was not arbitrary; and that the Plaintiffs are required to get authorization from the State for any improvements or developments on lands lakeward of the ordinary high water mark. All of these requests have been resolved or mooted by the supreme court's decision in *Merrill*, as explained above, except for the last. The request for declaratory relief with respect to improvements or developments remains pending and needs to be resolved by this court with respect to land lakeward of the natural shoreline. This is a legal issue, making discovery and an evidentiary hearing inappropriate.

National Wildlife Federation's and Ohio Environmental Council's Counterclaim

In their Counterclaim, NWF and OEC sought the same declaratory relief sought by ODNR and the State of Ohio. Consequently, their requests for such relief should be treated the same as the requests of ODNR and the State of Ohio.

Conclusion

For the foregoing reasons, the only claim or issue that remains pending and needs to be determined or resolved by the court is ODNR's, the State of Ohio's, NWF's, and OEC's request for declaratory relief with respect to the Plaintiffs' obligation to get authorization from the State

for any improvements or developments on land lakeward of the natural shoreline. This is a legal issue, making discovery and an evidentiary hearing inappropriate.

Respectfully submitted,

/s Neil S. Kagan for

Peter A. Precario, Bar #0027080
Attorney at Law
2 Miranova Place
Suite 500
Columbus, Ohio 43215
Telephone: (614) 233-4813
Fax: (614) 228-0146
Precariolaw@aol.com

/s

Neil S. Kagan, Pro Hac Vice
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104
Telephone: (734) 887-7106
Fax: (734) 887-7199
Kagan@nwf.org

DATED: November 11, 2011

CERTIFICATE OF SERVICE

I certify that on November 11, 2011, I sent by electronic mail and mailed by first class through the U.S. Postal Service, postage prepaid, the foregoing National Wildlife Federation *et al.*'s Statement of Remaining Claims and Issues to the following:

CYNTHIA K. FRAZZINI
Assistant Attorney General
Ohio Attorney General's Office
Environmental Enforcement Section
2045 Morse Road, Building D-2
Columbus, Ohio 43229-6693
cynthia.frazzini@ohioattorneygeneral.gov

KATHLEEN M. TRAFFORD
Porter, Wright, Morris & Arthur, LLP
41 S. High Street
Columbus, Ohio 43215
ktrafford@porterwright.com

JAMES F. LANG
FRITZ E. BERCKMUELLER
Calfee, Halter & Griswold LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
jang@calfee.com

HOMER S. TAFT
20220 Center Ridge Road, Suite 300
P.O. Box 16216
Rocky River, Ohio 44116
hstaft@yahoo.com

L. SCOT DUNCAN
1530 Willow Drive
Sandusky, Ohio 44870
scotduncan@alum.mit.edu

_____/s

Neil S. Kagan (*pro hac vice*)
Senior Counsel
National Wildlife Federation
Great Lakes Regional Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104
734-887-7106
734-887-7199 fax
kagan@nwf.org

*Counsel for National Wildlife Federation
and Ohio Environmental Council*