

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

STATE OF OHIO EX REL.,)	
ROBERT MERRILL, TRUSTEE, et al.,)	Case No. 04-CV-001080
)	
Plaintiffs-Relators and Named)	Judge Eugene A. Lucci
Class Representatives,)	
)	
and)	
)	
HOMER S. TAFT, et al.,)	
)	
Intervening Plaintiffs-Relators,)	
Pro Se,)	
)	
v.)	
)	
STATE OF OHIO, DEPARTMENT)	
OF NATURAL RESOURCES, et al.,)	
)	
Defendants-Respondents and)	
Counterclaimants,)	
)	
and)	
)	
NATIONAL WILDLIFE FEDERATION,)	
et al.,)	
)	
Intervening Defendants and)	
Counterclaimants.)	

STATE DEFENDANTS/RESPONDENTS' BRIEF REGARDING CLASS ISSUES

In response to this Court's Order to Brief Class Issues, State Defendants/Respondents provide the following answers to the Court's questions:

1) Does a certified class exist and is it maintained at this stage of the proceedings as to Count One of the First Amended Complaint?

No certified class exists. All issues pertaining to the limited class have been resolved by the decision of the Ohio Supreme Court in this matter.

2) If it no longer exists or is no longer maintained, when did it cease to exist or be maintained?

The certified class ceased to exist upon resolution of the certified issues by the decision of the Ohio Supreme Court.

The class certified in this matter was certified only in relation to limited issues pursuant to a stipulation among the parties. The issues and relief sought in Count One of the Amended Complaint are much broader than the narrow, limited issues presented by this Court's Order Certifying Class Action on Count One of the First Amended Complaint in Case No. 04-CV-001080, entered June 15, 2006. That Order did not certify a class as to all issues and claims relating to Count One of the Amended Complaint. Rather, it certified the class only as to the three specific legal issues set out in the parties' stipulation and the Order.

The three certified questions of law set out in this Court's June 15, 2006 Order Certifying Class Action on Count One of the First Amended Complaint in Case No. 04--001080 were as follows:

- (1) What constitutes the furthest landward boundary of the "territory" 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.
- (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 OGLD (1985), and does the State of Ohio hold title to all such "territory" as proprietor in trust for the people of the State.
- (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."

The Order quoted verbatim the stipulation of the parties. The three certified questions included nine sub-parts.

When this Court entered judgment on December 11, 2007, it marked that judgment as a final appealable order resolving all of the issues pertaining to the certified class. This Court specifically went through each of the certified issues laid out above, broken down into nine sub-parts. The December 11, 2007 decision provided nine distinct answers (including further subdivision of the ninth question into subparts A-F). All of the certified questions were answered by this Court's December 11, 2007 Order on the various summary judgment motions.

With nine separate answers to the various sub-parts of the certified issues, this Court's summary judgment decision left no class issue unresolved. The matter was appealed up through the courts. The Ohio Supreme Court held that the boundary of the territory in question was different than that found by this Court, but did not remand the matter for any further proceedings on the issues resolved by this Court's December 11, 2007 judgment. The September 14, 2011 Judgment Entry from the Ohio Supreme Court stated, "On consideration thereof, the judgment of the court of appeals is affirmed in part, reversed in part and remanded to the trial court for further proceedings on pending claims consistent with the opinion rendered herein." Supreme Court Judgment Entry, Exhibit A.

The Ohio Supreme Court found that all of the certified issues were resolved by its judgment. With all of the certified issues resolved, the class has ceased to exist and is no longer maintained.

3) If it still exists and is maintained, when will it cease to exist or be maintained?

No certified class exists. All issues pertaining to the limited class have been resolved by the decision of the Ohio Supreme Court in this matter.

4) Regardless of the answers to the foregoing, will a certified class be sought to be maintained as to Counts Two and/or Three of the First Amended Complaint?

State Defendants/Respondents do not seek certification of a class as to Counts Two and Three of the Amended Complaint and will oppose any request for such certification.

5) If a class is sought as to Counts Two and/or Three of the First Amended Complaint, how will it be certified, potential members notified, maintained, and/or members subclassified, and the issues common to the class and individual to the members adjudicated?

State Defendants/Respondents do not seek certification of a class as to Counts Two and Three of the Amended Complaint and will oppose any request for such certification.

6) When and how, procedurally, will this occur?

State Defendants/Respondents do not seek certification of a class as to Counts Two and Three of the Amended Complaint and will oppose any request for such certification.

Respectfully submitted,

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

CYNTHIA K. FRAZZINI (0066398)
NICOLE CANDELORA-NORMAN (0079790)
RANDALL W. KNUTTI (0022388)
CHRISTOPHER P. CONOMY (0072094)
Assistant Attorneys General
Ohio Attorney General's Office
2045 Morse Road, Building D-2
Columbus, Ohio 43229
614.265.6870 (phone) / 614.268.8871 (fax)
cynthia.frazzini@ohioattorneygeneral.gov
nicole.candelora-norman@ohioattorneygeneral.gov
randall.knutti@ohioattorneygeneral.gov
christopher.conomy@ohioattorneygeneral.gov

Counsel for Defendants-Respondents
Ohio Department of Natural Resources,
James Zebringer, Director, Ohio Department of Natural
Resources and the State of Ohio

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing **State Defendants/Respondents' Brief Regarding Class Issues** was delivered by electronic and/or regular U.S. mail, this ____ day of August 2012 to:

James F. Lang, Esq.
Fritz E. Berckmueller, Esq.
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688

*Class Counsel and
Counsel for Plaintiffs-Relators*

Homer S. Taft, Esq.
20220 Center Ridge Road, Suite 300
P.O. Box 16216
Rocky River, Ohio 44116

Intervening Plaintiff-Relator, Pro Se

L. Scot Duncan, Esq.
1530 Willow Drive
Sandusky, Ohio 44870

Intervening Plaintiff-Relator, Pro Se

Neil S. Kagan, Esq.
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104

*Counsel for Intervening Defendants
National Wildlife Federation and
Ohio Environmental Council*

Peter A. Precario, Esq.
326 South High Street
Annex, Suite 100
Columbus, Ohio 43215

*Counsel for Intervening Defendants
National Wildlife Federation and
Ohio Environmental Council*

CYNTHIA K. FRAZZINI (0066398)
NICOLE CANDELORA-NORMAN (0079790)
RANDALL W. KNUTTI (0022388)
CHRISTOPHER P. CONOMY (0072094)
Assistant Attorneys General