

severe flooding. The continuing, persistent, frequent, and inevitable increased severe flooding caused by ODNR's actions constitutes a taking of Relators' property without just compensation. Relators now bring this mandamus action pursuant the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 19 of the Ohio Constitution, and Ohio Revised Code Chapter 163, in order to compel ODNR to honor its obligations under the Ohio and United States Constitutions and commence appropriation proceedings, within which Relators may obtain just compensation for ODNR's unlawful taking of their property.

II. STATEMENT OF FACTS

Grand Lake is a man-made lake which was built between 1837-1845 as a water source for the Miami-Erie Canal. Grand Lake was created by damming the headwaters of the Wabash and St. Marys rivers and flooding the area between. *State ex rel. Post v. Speck* (Ohio App. Dec. 4, 2006), 3rd Dist. No. 10-2006-001, 2006 WL 3477024, 2006-Ohio-6339, at ¶ 8 (“*Post*”) attached to Complaint as Exhibit A. By the early twentieth century, use of the Miami-Erie Canal had declined. At that time, the primary use of Grand Lake became recreational. *Id.* at ¶ 9. In 1949, the State of Ohio designated Grand Lake as a state park and placed it under the authority of the ODNR. *Id.* As such, ODNR is charged with, among other things, regulating the flow of water out of Grand Lake.

Grand Lake is 8.2 miles long and has a surface area of approximately 13,500 acres. *State of Ohio ex rel. Post v. Speck*, No. 01-CIV-091, December 14, 2005 Judgment Entry of the Court of Common Pleas for Mercer County at 3, attached to the Complaint as Exhibit B. Grand Lake, however, is very shallow as trees and other debris were not removed during construction. *Post*, 2006-Ohio-6339 at ¶ 8. Water discharges from Grand Lake from a western spillway into Beaver Creek, which in turn discharges into the Wabash River. *Id.* The Wabash River generally flows in

a westerly direction through Ohio into Indiana. *Id.* A gate also exists at the eastern end of Grand Lake, but the eastern gate has limited discharge capabilities. *Id.*

The dam at Grand Lake is an earthen embankment that extends 5,540 feet long and 22 feet high. *Post*, 2006-Ohio-6339 at ¶ 11. The elevation level of the top of the dam is 877 feet. *Id.* Normal pool of the lake is at 870.6 feet. *Id.* Prior to 1997, the dam had a curved 39.4-foot-long concrete overflow spillway with four, thirty-inch diameter gated outlet conduits. *Id.* Between 1981-1997, only two of the four gates were operational. *Id.*

In 1978, an inspection of the dam revealed that the western spillway could not sustain a probable maximum flood without overtopping, a situation which would result in the eventual failure of the dam. *Id.* at ¶ 12. In 1990, ODNR determined that the 39.4-foot spillway needed to be replaced with a 500-foot spillway to pass the probable maximum flood test. *Id.* at ¶ 12.

From the outset of the spillway replacement project, federal and local agencies and numerous landowners expressed concern that the replacement project would result in greater flooding downstream. *Id.* at ¶¶ 13-14, 17-18. *See also Case Leasing & Rental, Inc. v. Ohio Dep't of Natural Res.* (Ohio Ct. Cl. June 19, 2008), No. 2005-08034, 2008-Ohio 3411 at ¶¶ 15-17, 19, attached to Complaint as Exhibit C. Landowners also suggested that ODNR divert a portion of the runoff to the St. Marys River through the eastern gate to more closely model the flow conditions prior to the construction of Grand Lake. *Post*, 2006-Ohio-6339 at ¶ 15. ODNR altered the spillway design to include a 50-foot notch that was 0.9 feet lower, but rejected the landowners' suggestion to discharge some of the flow through the eastern gate. *Id.* at ¶¶ 13, 15.

Since ODNR obtained control of Grand Lake in 1945, ODNR has used the western spillway as the outlet for virtually all water flow out of the lake. *Case Leasing*, 2008-Ohio 3411, at ¶ 3. Indeed, in 1987-88, ODNR had the opportunity to modify the eastern outlet and the canal

into which it discharges to permit the discharge of flood waters during significant storms, but despite recommendations to the contrary, ODNR opted for a structure that had no flood management capacity. *Id.* at ¶ 14.

Despite ODNR's apparent lack of concern for landowners downstream of the western outlet, ODNR was concerned with flooding of the south shore of Grand Lake during periods of high lake levels. *Post*, 2006-Ohio-6339 at ¶ 16. ODNR concluded that the longer western spillway would relieve some of the south shore flooding by permitting a greater discharge of water. *Id.*

ODNR approved the design and directed and oversaw the construction of the replacement spillway. *Case Leasing*, 2008-Ohio 3411, at ¶ 4. ODNR began construction of the new spillway in 1996 and completed construction by 1997. *Post*, 2006-Ohio-6339 at ¶ 19. In addition to increasing the length of the spillway by over 400 feet, the proposed new spillway permanently established a four-inch increase in the lake level which ODNR had previously and temporarily achieved by placing stop logs across the spillway for purposes of increasing recreational value to boaters. *Id.*

Prior to 1997, ODNR regulated Grand Lake by periodically lowering lake levels, thereby minimizing the frequency and severity of flooding that Grand Lake could otherwise cause. *Case Leasing*, 2008-Ohio 3411, at ¶ 23. The redesigned spillway includes two 60-inch diameter outlets near the bottom of the structure which can be opened to lower the level of Grand Lake by releasing water into Beaver Creek. *Id.* at ¶ 22. Despite its continued control of lake water levels, ODNR has not once, since the redesign, opened the 60-inch diameter outlets for management of lake levels. *Id.* at ¶ 23.

Since ODNR redesigned the spillway and changed its water level management practices, Relators have experienced and continue to experience increased and severe flooding to their lands, in terms of both extent and duration. In particular, Relators have experienced and continue to experience severe flooding of lands which had never before flooded, and severe flooding of their lands for longer periods of time. Such flooding includes recent severe flooding of Relators' lands this past Spring. As a direct result of this flooding, Relators have suffered and continue to suffer damage to their real and personal property including, but not limited to, erosion, soil compaction, the deposit of silt, sand, stones, and other debris on their lands, drainage tile failure, crop losses, the destruction of trees, bushes, shrubs, vines and saplings, the destruction of homes and buildings, equipment damage, and livestock losses. The increased and severe flooding to Relators' lands is continuing, persistent and will frequently and inevitably recur; indeed, severe flooding recurred as recently as the spring of this year. The severity and continuing, persistent, frequent and inevitable nature of the flooding has left Relators, the majority of whom have lived and worked in the area their entire lives, with no choice but to alter their farming and business practices and otherwise change their ways of life. As a result of this continuing, persistent, frequent, and inevitable increased severe flooding, ODNR presently exercises dominion and control over Relators' lands and denies Relators just compensation for ODNR's involuntary taking of their property that both the Ohio Constitution and the United States Constitution ensure them.

III. ARGUMENT

Relators are entitled to a Writ of Mandamus requiring ODNR to commence appropriation proceedings in order to determine just compensation to Relators for the property ODNR has

taken. A Writ of Mandamus is the only appropriate remedy under Ohio law to compel ODNR to perform its statutory and constitutional duties.

For a writ of mandamus to issue, Relators must show: “(1) that they have a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relators have no plain and adequate remedy in the ordinary course of the law.” *State ex rel. Cody v. Toner* (1983), 8 Ohio St. 3d 22, 22 (quotation omitted). *See also State ex rel. Duncan v. Mentor City Council* (2005), 105 Ohio St. 3d 372, 374.

Here, Relators meet those requirements. Relators have a clear legal right to the requested writ because: 1) ODNR caused increased flooding by installing the new spillway and through its lake-level water management; 2) the flooding increase resulted in damage to Relators sufficient to establish a taking; and 3) the increased flooding does and will frequently and inevitably recur. Second, ODNR has a clear legal duty to commence appropriation proceedings to compensate the Relators for the involuntary taking of their property under R.C. § 163.01 *et seq.* And last, this Court has repeatedly recognized mandamus as the appropriate action to compel public authorities to institute appropriation proceedings for an involuntary taking.

A. Relators Have A Clear Legal Right To The Requested Writ.

The federal and Ohio Constitutions prohibit the taking of private property for public use without just compensation. U.S. Const., Amend V. and Amend. XIV; Ohio Const., Art. I, § 19; *State ex rel. Coles v. Granville* (2007), 116 Ohio St. 3d 231, 236 (quoting *State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St. 3d 59, 63, *modified in part on other grounds*, 96 Ohio St. 3d 379). Under Ohio law, “[a]ny direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property, for which he is guaranteed a right of compensation” *City of Norwood v. Sheen*

(1933), 126 Ohio St. 482, 48 (quoting *Lake Erie & W. RR. Co. v. Commr's of Hancock County* (1900), 63 Ohio St. 23, syllabus ¶ 3). See also *State ex rel. OTR v. Columbus* (1996), 76 Ohio St. 3d 203, 207 (“[A]ny physical interference by another, with the owner’s use and enjoyment of his property, is a taking to that extent.”).

Here, ODNR’s improper management of Grand Lake water levels and its replacement of the 39.4-foot western spillway with a 500-foot spillway has caused the continuing physical invasion of Relators’ lands with flood waters from the western spillway of Grand Lake. It is well-settled that “[w]here the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th Amendment.” *United States v. Cress* (1917), 243 U.S. 316, 328 (quoting *United States v. Lynah* (1903), 188 U. S. 445, 470). See also *Masley v. City of Lorain* (1976), 48 Ohio St. 2d 334, 341 (“[W]here a municipality constructs a public improvement . . . and thereby effectively takes private property for its own use by casting surface waters upon that property, it must pay compensation for the property taken under Section 19 of the Ohio Bill of Rights.”) A taking may arise either from a “permanent condition of continual [flooding] or from a permanent condition of “intermittent but inevitably recurring [flooding]”. *Cress*, 243 U.S. at 328. See also *United States v. Dickinson* (1947), 331 U.S. 745, 751; *Post*, 2006-Ohio-639 at ¶ 58. In the latter case, the government has not taken the property in fee, but instead, has taken a flowage easement over the private property for which the landowner is entitled to compensation. *Fromme v. United States* (1969), 188 Ct. Cl. 1112, 1118 (citing *Cress*, 243 U.S. at 318, 328-29).

To establish a taking based on flooding, Relators must show that: 1) ODNR caused an increase in the extent of and duration of the flooding by installing the new spillway and lake-level water management; 2) the flooding increase resulted in damage to Relators sufficient to

establish a taking; and 3) the increased flooding is permanent or will frequently and inevitably recur. *Post*, 2006-Ohio-6339, at ¶ 60.

Two of these three elements have already been recognized by the Courts of this state in cases involving similarly situated landowners. In *Post*, neighbors of the Relators embroiled in very same a related conflict with ODNR filed a mandamus action against ODNR in the Court of Common Pleas of Mercer County, *State of Ohio ex. rel. Post v. Speck*, No. 01-CIV-091. The landowners alleged ODNR had effected a taking of their property and sought a writ of mandamus compelling ODNR to initiate appropriation proceedings. The landowners based their taking claims on the severe flooding to their property as a result of the redesign of the west spillway of Grand Lake St. Marys and ODNR's improper management of lake water levels. Ultimately, the trial court concluded "that the modification of the west spillway of Grand Lake St. Marys is burdensome and constitutes a taking of the property of the Plaintiffs." *Post*, No. 01-CIV-091, December 14, 2005 Judgment Entry at 10. Based on that finding, the trial court granted the writ of mandamus compelling ODNR to institute appropriation proceedings. *Id.*

The Sixth District Court of Appeals, sitting by designation, affirmed the decision of the trial court, concluding that the trial court properly determined ODNR's duty, the trial court's factual findings were supported by sufficient, credible evidence, and the trial court's finding that a taking had occurred was not contrary to the manifest weight of the evidence. *Post*, 2006-Ohio-6339 at ¶¶ 56, 76. Specifically, the Court of Appeals affirmed the trial court's findings that: 1) ODNR caused an increase in the extent of and duration of the flooding by installing the new spillway; 2) the flooding increase resulted in damage to landowners sufficient to establish a taking; and 3) the increased flooding will frequently and inevitably recur. *Id.* at ¶¶ 60-76.

Two of the conclusions in *Post* are equally applicable here: 1) ODNR caused an increase in the extent of and duration of the flooding by installing the new spillway; and 2) the increased flooding will frequently and inevitably recur. Like the landowners in *Post*, the Relators in this action have suffered the same increased severe flooding as a direct result of the redesigned spillway and ODNR's lake level management practices. And like the landowners in *Post*, the flooding experienced by Relators in this action is continuing, persistent and will frequently and inevitably recur; indeed such flooding has occurred as recently as this spring. These conclusions from *Post* have preclusive effect and cannot be relitigated by ODNR. *See Hicks v. De La Cruz* (1977), 52 Ohio St. 2d 71, 74 (Pursuant to the doctrine of collateral estoppel "if an issue of fact or law is litigated and determined by a valid and final judgment, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. A party precluded under this principle from relitigating an issue with an opposing party likewise is precluded from doing so with another person unless he lacked full and fair opportunity to litigate that issue in the first action")

Moreover, like the landowners in *Post*, Relators in this action satisfy the third element: the increased flooding resulted in damage to landowners sufficient to establish a taking. Here, Relators have suffered damage from the increased severe flooding sufficient to constitute a taking of their property. Relators have attested to and can further detail the physical invasions to their property and the resulting damage to their real and personal property including, but not limited to, erosion, soil compaction, the deposit of silt, sand, stones, and other debris on their lands, drainage tile failure, crop losses, the destruction of trees, bushes, shrubs, vines and saplings, the destruction of homes and buildings, equipment damage, and livestock losses. Thus, on the same operative principles of the *Post* decision, this Court should compel ODNR to fulfill

its clear legal duty to initiate appropriation proceedings to satisfy Relators' rights to a jury assessment of compensation and damages owed to them for the taking of their property interests without just compensation.

Furthermore, in 2005, another similarly situated landowner and business owner filed suit against ODNR in the Court of Claims asserting claims of negligence, nuisance, trespass, absolute nuisance/nuisance per se, and taking, *Case Leasing*, 2008-Ohio 3411. At trial, the landowner contended that ODNR was negligent in the design and management of the 500-foot spillway that was completed in 1997, that it did not comply with accepted engineering practices, that it failed to consider other economically feasible designs, and that ODNR knew or should have known that the installation of the replacement spillway would result in more frequent and more severe flooding to downstream landowners. *Id.* at ¶ 5.

While the Court of Claims acknowledged the utility of ODNR's safety objective in redesigning the spillway, "balanced against the gravity of the foreseeable and avoidable harm caused," the Court concluded "that the manner in which ODNR implemented its objective was unreasonable and negligent." *Id.* at ¶ 26. Specifically, the Court determined that ODNR's failure to "undertake a thorough investigation of the historical storm and lake-level data before designing and installing the replacement spillway . . . was unreasonable." *Id.* at ¶ 27. The Court also concluded that ODNR's failure to conduct "a sensitivity analysis to determine the best spillway design . . . was unreasonable." *Id.* Likewise, the Court determined that "ODNR's failure to adequately consider cost-effective alternative measures that would also have met its safety objectives was unreasonable in light of the known potential for increased flooding and significant property damage that could have been avoided had it done so." *Id.* Further, the Court concluded "that ODNR's post-1997 management of lake levels was unreasonable in light of the

foreseeable damage that could have been avoided had it utilized manual draw-down alternatives.” *Id.*

In summary, the Court granted judgment against ODNR on the landowner’s negligence claim, concluding: “[B]ased upon the data that was available to it at the time, ODNR knew or should have known that the installation of the replacement spillway as designed would result in more frequent and more severed flooding to downstream landowners. Therefore, its design choice and subsequent lake level management were unreasonable.” *Id.* at ¶ 28. In concluding ODNR was negligent, the Court determined that ODNR owed the landowner a duty, ODNR had breached that duty, and ODNR’s breach proximately caused the landowner’s injuries. *Id.* at ¶ 7. In other words, the Court in *Case Leasing* determined that ODNR was negligent in redesigning the western spillway, was negligent in maintaining lake water levels, and that ODNR’s negligence proximately caused severe and increased flooding and extensive property damage.

While this Court need not find that ODNR was negligent in order to conclude that ODNR’s actions constitute a taking, the *Case Leasing* decision is instructive on the element of causation – that ODNR caused increased flooding by installing the new spillway and through its water level management. For the same reasons ODNR was negligent in *Case Leasing*, ODNR was negligent in redesigning the western spillway and in maintaining lake water levels in this case. And just as ODNR’s negligence in *Case Leasing* proximately caused the landowner to suffer increased severe flooding and extensive property damage, those same actions by ODNR have caused Relators to suffer continuing, persistent, frequent, and inevitable increased severe flooding and extensive property damage.

Thus, for this additional reason, Relators have a clear legal right to the relief requested.

B. ODNR Has A Clear Legal Duty To Commence Appropriation Proceedings To Compensate Relators For The Property Taken.

ODNR has the authority to appropriate property in the State of Ohio for public use pursuant to R.C. § 1501.01. When exercising this authority, ODNR has a clear, legal duty to initiate appropriation proceedings in accordance with R.C. § 163.01 *et seq.* See R.C. 163.02(A); (“All appropriations of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code”); *see generally Coles*, 116 Ohio St. 3d 231; *Post*, 2006-Ohio-6339, at ¶ 56 (“The Ohio Department of Natural Resources has a duty under statutory law to initiate appropriation proceedings if a portion of the relators’ properties were in fact appropriated by the action of department.”).

Here, because portions of Relators’ properties have been taken by ODNR, *see* § III.A, ODNR has a clear, legal duty to commence appropriation proceedings against Relators to compensate Relators for the property taken by ODNR’s actions.

C. Relators Have No Plain And Adequate Remedy In the Ordinary Course Of The Law.

Ohio law does not permit a direct “inverse condemnation” action by a landowner to obtain compensation for the taking of his or her property. As noted above, however, this Court has consistently held that “[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.” *Coles*, 115 Ohio St. 2d at 236 (quoting *Shemo*, 95 Ohio St. 3d at 63). *See also State ex rel. Gilmour Realty, Inc. v. Mayfeld Heights*, 119 Ohio St. 3d 11, 13-14 (2008); *Duncan*, 105 Ohio St. 3d at 374.

Accordingly, here, where Relators allege an unconstitutional taking of their property by ODNR, Relators' only remedy under Ohio law is to petition for a writ of mandamus to compel ODNR to institute appropriation proceedings to compensate Relators for the taking.

D. To The Extent There Are Disputed Facts Regarding The Damage Suffered By Individual Relators, This Court Should At Least Issue An Alternative Writ Of Mandamus.

Relators' entitlement to a Writ of Mandamus is clear based on the *Post* and *Case Leasing* decisions. To the extent, however, that ODNR contends it can contest facts concerning whether certain individual Relators have suffered damage sufficient to establish a taking, any contested facts regarding damage should be decided by issuing an alternative writ of mandamus.

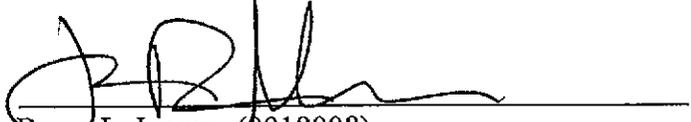
As relevant here, Supreme Court Practice Rule X, § 6 provides: "When an alternative writ is issued, the Supreme Court will issue a schedule for the presentation of evidence and the filing and service of briefs or other pleadings." This Court has issued alternative writs for submission of evidence and briefs in proceedings when there is a disputed question of fact whether a taking has occurred.

IV. CONCLUSION

ODNR's actions in redesigning the spillway and improperly controlling lake water levels has forever altered Relators' lives. For these Relators, the flooding is not a one-time event; it is a continuing, persistent, frequent, and inevitable threat to their land, their businesses, their homes, and their lives. Simply put, Relators have suffered a taking for which the United States and Ohio Constitutions demand just compensation. For the foregoing reasons, this Court should issue a Writ of Mandamus to ODNR, requiring ODNR to initiate appropriation proceedings as to all Relators.

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Respectfully submitted,



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