

Introduction

The fundamental and inviolable right to be compensated for property seized by the State cannot be sacrificed to promote recreational boating. The Ohio Department of Natural Resources and its Director (collectively “ODNR”) have physically seized the Relators’ property and flooded it with impunity, yet ODNR asks this Court to perpetually allow it to do so at the sole expense of the landowners. Since it completed construction of the western spillway on Grand Lake St. Marys (the “Lake”) in 1997, ODNR has chosen, as part of its “water level management” scheme, to cause severe and recurring flooding of the Relators’ property (including as recently as the spring of this year). Relators must now compel ODNR to compensate them for the physical invasion of their property by this severe and recurring flooding.

ODNR seeks dismissal of the Landowners’ Complaint as barred by a statute of limitations. In doing so, ODNR ignores not only the factual allegations of the Complaint establishing ODNR’s continued control of the spillway and water level management of the Lake, but also the Ohio Constitution and more than a century of legal precedent. ODNR asks this Court to endorse three erroneous and dangerous propositions of law:

- (1) that the government can illegally seize private property and, if it adversely possesses the property for a mere four years, it obtains title to the land forever without paying any compensation to the owner;
- (2) that the government plays by different, and more favorable rules, when it seizes the property of private citizens than the rules applied to all private citizens;
and
- (3) that the explicit terms of the Ohio Constitution may be ignored in order to give favorable treatment to the state in seizing private property.

This Court should reject ODNR’s request and deny its Motion for several reasons.

First, citizens of Ohio cannot be deprived of their land by the state unless they are *first* either compensated in money or a deposit of money is made for such compensation. See Ohio Constitution, Section 19, Art. I. That is a constitutional mandate. Under Section 19, Art. 1 of the Ohio Constitution, the landowner retains title to his property until the payment of compensation; therefore, the land cannot be “taken” from him by reason of a failure to initiate a mandamus action within a specific time period short of the 21-year prescriptive period. Consequently, since Relators filed their Complaint less than 21 years after the construction of the spillway and the change in the State’s water level practices, the State’s motion should be dismissed. Applying a different limitations period would permit the government to acquire title to private land by adversely possessing the property for a period of time less than the prescriptive period. Doing so would violate this Court’s holding in *State ex rel. A.A.A. Investments v. City of Columbus* (1985), 17 Ohio St.3d 151, 478 N.E.2d 773, that the government can only obtain property through adverse possession after the 21-year prescriptive period has run.

In addition, even if R.C. 2305.09’s four-year limitation period applies instead of the 21-year prescriptive period, this Court should hold ODNR’s conduct is continuing, in the nature of a continuing trespass or nuisance, such that the cause of action does not accrue until the seizure ceases or the prescriptive period runs. This Court has for over a century found that recurring flooding of one landowner’s property caused by the construction of a structure on another person’s land that alters the flow of a natural waterway is continuous in nature when the other landowner continues to allow the structure to cause the flooding. Under such circumstances, the limitations period does not begin to run until (1) tortious conduct ceases or (2) the prescriptive period has run. The same principles of law must apply to the State as apply to private actors when private property is being seized from its rightful owner. This reasoning is entirely

consistent with the common law continuous violation doctrine, which the United States Court of Appeals for the Sixth Circuit has applied to a physical takings claim. Indeed, if anything, vindication of a landowner's right to just compensation for the unconstitutional seizure of private property is of greater importance than protecting the landowner from the same intrusion by a private actor.

Here, the Complaint clearly alleges that the spillway constructed by ODNR has caused the recurring severe flooding of Relators' property, that ODNR continues to exercise control of the spillway and water level management of the Lake, and that ODNR continues through its ongoing control of the spillway and the water levels of the Lake to deliberately cause new and further damages to the Relators' property. Relators have sufficiently alleged a continuous taking of their property by the State and, thus, the limitations period for their mandamus claim has yet to run.

Finally, even if this Court agrees with ODNR that a four-year or six-year statute of limitations applies, Relators' claims are not time-barred because Relators' land had not been clearly and permanently taken four or six years prior to the filing of the instant Complaint on July 15, 2009. Relators' claims did not accrue until it became obvious that the intermittent flooding became stabilized and was a permanent situation. Based on the allegations in the Complaint, this Court cannot hold as a matter of law that the situation was stabilized six or even four years prior to the filing of this action. Accordingly, even if a four-year or six-year statute of limitations applies, the limitations period has not yet expired.

When a complaint "does not conclusively show on its face the action" is time-barred, a motion to dismiss must be denied. *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 433 N.E.2d 147, at paragraph 3 of the syllabus. For any or all of the above reasons,

ODNR's Motion should be denied. A private landowner's right to be compensated for property seized by the State is a fundamental and inviolable right. ODNR's continuous actions to promote recreational boating on the Lake should not come at the expense of involuntary and uncompensated takings of the Relators' farmland.

Factual Background

Relators own lands in Mercer County, Ohio that lie adjacent to or near Beaver Creek and/or the Wabash River near its confluence with Beaver Creek. Compl. ¶ 4. Relators' lands are located downstream from the western spillway of the Lake. Id. at ¶ 96.

The Lake is 8.2 miles long and has a surface area of approximately 13,500 acres. Id. at ¶ 96 (citing *State of Ohio ex rel. Post v. Speck*, No. 01-CIV-091, December 14, 2005 Judgment Entry of the Common Pleas Court for Mercer County at 3, attached to Complaint as Exhibit B). See also *State ex rel. Post v. Speck*, 3rd Dist. No. 10-2006-001, 2006-Ohio-6339, at ¶ 9 ("*Post*") attached to Complaint as Exhibit A. The primary use of the Lake is recreational. Compl. ¶ 103 (citing *Post*, 2006-Ohio-6339, at ¶ 9). The Lake has two outlets for the discharge of water. Id. at ¶¶ 100, 102 (citing *Case Leasing & Rental, Inc. v. Ohio Dep't Natural Resources*, Ct. Cl. No. 2005-08034, 2008-Ohio-3411, ¶ 3). Water discharges from the Lake from a western spillway into Beaver Creek, which in turn discharges into the Wabash River. Id. at ¶ 100 (citing *Post*, 2006-Ohio-6339, at ¶ 8). The Wabash River generally flows in a westerly direction through Ohio into Indiana. Id. at ¶ 101 (citing *Post*, 2006-Ohio-6339, at ¶ 8). A gate also exists at the eastern end of the Lake, but ODNR uses the western spillway for virtually all water flow out of the Lake. Id. at ¶¶ 102, 117 (citing *Post*, 2006-Ohio-6339 at ¶ 8; *Case Leasing*, 2008-Ohio-3411, at ¶ 3). ODNR has sole authority for the Lake and is charged with, among other things,

regulating the flow of water out of the Lake. *Id.* at ¶¶ 94, 104 (citing *Post*, 006-Ohio-6339, at ¶ 9).

After an inspection revealed that the western spillway could not sustain a probable maximum flood without overtopping, ODNR determined that the western spillway needed to be replaced. *Id.* at ¶¶ 94, 104 (citing *Post*, 006-Ohio-6339, at ¶ 12). ODNR opted for a replacement design that increased the size of the spillway from 39.4-feet to 500-feet. *Id.* at ¶ 113 (citing *Post*, 006-Ohio-6339, at ¶ 12). ODNR not only approved the design, but directed and oversaw the construction of the replacement spillway. *Id.* at ¶ 121 (citing *Case Leasing*, 2008-Ohio 3411, at ¶ 4). ODNR began construction of the new spillway in 1996 and completed construction by 1997. *Id.* at ¶ 122 (citing *Post*, 2006-Ohio-6339 at ¶ 19). In addition to increasing the length of the spillway by over 400 feet, the proposed new spillway increased the lake level by four inches. *Id.* at ¶ 123 (citing *Post*, 2006-Ohio-6339 at ¶ 16). ODNR had temporarily increased the lake level by placing stop logs across the spillway to increase the recreational value of the Lake to boaters. *Id.* (citing *Post*, 2006-Ohio-6339 at ¶ 16). The new spillway made the increased elevation permanent. *Id.* (citing *Post*, 2006-Ohio-6339 at ¶ 16).

In addition to increasing the length of the spillway by over 400 feet, increasing the lake level by four inches, and continuing to discharge virtually all water out of the western spillway, ODNR has also stopped its draw down activities. *Id.* at ¶¶ 124-26 (citing *Case Leasing*, 2008-Ohio 3411, at ¶¶ 22-23). Prior to 1997, ODNR regulated the Lake by periodically lowering lake levels using outlets in the spillway, thereby minimizing the frequency and severity of flooding that the Lake could otherwise cause. *Id.* at ¶ 124 (citing *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 the Lake by releasing water into Beaver Creek. *Id.* at

¶¶ 125 (citing *Case Leasing*, 2008-Ohio 3411, 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 ¶¶ 126 (citing *Case Leasing*, 2008-Ohio 3411, 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. *Id.* at ¶ 127. 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. *Id.* As a direct result of this flooding caused by ODNR's deliberate conduct, 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. *Id.* at ¶ 128. 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. *Id.* at ¶ 129.

Argument

I. Relators Timely Filed Their Complaint.

- A. *R.C. § 2305.04's Twenty-One Year Prescriptive Period For Adverse Possession Is The Only Limitations Period For A Physical Takings Claim That Passes Constitutional Muster.*
1. As A Matter Of Constitutional Mandate, The Relators Timely Filed Their Complaint.

The Ohio Constitution requires compensation to be made or secured first before property may be taken:

Where private property shall be taken for public use, a compensation therefor shall **first** be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Constitution, Section 19, Art. I (emphasis added). Compensation must first be “made or secured” before a taking occurs. *Miami Conservancy Dist. v. Bowers* (1919), 100 Ohio St. 317, 318, 125 N.E.2d 876; *Nichols v. City of Cleveland* (1922), 104 Ohio St. 19, 135 N.E. 291. See also *Pittsburgh & W.R. Co. v. Perkins* (1892), 49 Ohio St. 326, 31 N.E. 350. Thus, under Section 19, Art. 1 of the Ohio Constitution, the landowner retains unencumbered title to his property until the payment of compensation; the land cannot be “taken” from him by reason of a failure to initiate a mandamus action within a specific time period.

Granting ODNR’s Motion would permit it to take private property for a public use without paying compensation to the landowner when Section 19, Art. 1 clearly mandates that compensation first be paid or secured to the landowner. That violates the Constitution. Consequently, as to physical takings, R.C. § 2305.09(E)’s four-year limitations period for physical and regulatory takings is invalid. The only limitation period that can apply to a mandamus action to compel payment of compensation is the 21-year prescriptive period found in R.C. § 2305.04. Applying that limitations period to such mandamus actions makes sense. Only when the 21-year prescriptive period has run has title or another property interest in the private property passed from the private property owner to the government. *State ex rel. A.A.A. Investments v. City of Columbus* (1985), 17 Ohio St.3d 151, 152-53, 478 N.E.2d 773 (holding that a public or governmental entity may acquire title to land by adverse possession). Indeed, importantly, prior to the creation of Section 19, Art. 1 in the 1912 Constitution, Ohio law had established that the limitations period for actions to compel a condemnor to commence

appropriation actions for a physical taking was the 21-year prescriptive period. *Lawrence RR Co. v. O'Harra* (1891), 48 Ohio St. 343, 28 N.E. 175, at paragraph 1 of the syllabus. The framers of the 1912 Constitution are presumed to have known about *O'Harra*. In mandating that no taking shall occur without first compensation secured to the private landowner the framers resoundingly affirmed that the government cannot take title to or an interest in private property short of obtaining such interest through adverse possession (thereby converting private property to public use) without first securing compensation to the private owner.

2. The Discussion In The Plurality Opinion In *R.T.G. v. State of Ohio* On Limitations Period Cannot Apply To Physical Takings.

Admittedly, just two years before the Ohio legislature's 2004 amendment to R.C. § 2305.09 to add a four-year limitations period for physical and regulatory takings, a plurality of this Court stated that rather than Ohio's 21-year prescriptive period, the six-year limitations period for an implied contract applied to a *regulatory* takings claim. *State ex rel. R.T.G. v. State of Ohio* (2002), 98 Ohio St.3d 1, 2002-Ohio-6716, 780 N.E.2d 998 at ¶¶ 29-31. However, only two Justices concurred with this opinion. Three Justices dissented and one Justice concurred only in the Syllabus and the Judgment. The Syllabus announced only a rule of law concerning the consideration of coal rights as part of the relevant parcel for purposes of a takings analysis. *Id.* at syllabus. Since only three Justices agreed with the discussion in the plurality opinion on the statute of limitations, that discussion is *obiter dictum*.

However, to the extent the plurality opinion's discussion of the statute of limitations has any precedential value, it ought to be limited to regulatory takings.¹ This makes sense because once the State designated the property of R.T.G. as unsuitable for mining, R.T.G.'s property was

¹ Indeed, the Court of Appeals in *R.T.G.* distinguished between a limitations period for regulatory takings and physical takings. *State ex rel. R.T.G., Inc. v. State of Ohio* (2001), 141 Ohio App. 3d 784, 793, 2001-Ohio-4267, 753 N.E.2d 869.

taken by regulation. At that moment, the government had impliedly promised to pay R.T.G. compensation should the regulation be determined to constitute a taking. In contrast, where there has been a physical seizure and occupation of private property, there is no tacit understanding. Rather, the government is physically taking a private landowner's property "against the will" of the owner. *Norwood v. Horney* (2006), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 68. A contract theory of regulatory takings may make sense because a business or property owner enters into a social contract with the government under which the business or property owner receives certain benefits from the government in exchange for agreeing to be regulated by the government. The same does not hold true for a physical invasion taking by the government of private property. The right to be free from physical invasions of a person's private property is "inviolable" and fundamental. *Id.* It should be "trodden lightly." *Id.* at ¶ 38. In light of the inviolable nature of the right to be free of physical invasions, the right to pursue just compensation when deprived it by the government is not akin to pursuing a breach of an implied contractual promise, but to the ouster of an invader seeking physical occupation of a landowner's property through adverse possession. As such, that right should be subject only to the prescriptive period, not a limitations period for implied contracts.

Only this reading of the plurality's discussion in *R.T.G.* is consistent with this Court's precedent concerning a public entity's entitlement to acquire title to land by adverse possession. In *A.A.A. Investments*, this Court rejected a landowner's claim that it was still entitled to just compensation despite more than twenty-one years lapsing since the government first possessed its property. 17 Ohio St.3d at 153. The landowner had recently purchased a property at an intersection in Columbus. *Id.* at 151. It subsequently discovered that the city streets covered a portion of its property. *Id.* The location of the city streets had not changed in more than twenty-

one years. *Id.* In finding that the landowner was not entitled to just compensation, this Court held that Columbus has acquired title to the property through adverse possession. *Id.* at 152. The Court reasoned that Section 19, Article I's requirement that compensation shall be paid when property is "taken" did not apply. *Id.* It explained:

In the case of adverse possession, property is not taken. Rather, once the statutory period enunciated in R.C. 2305.04 has expired, the former title-holder has lost his claim of ownership and the adverse possessor is thereafter maintaining its possession, not taking property.

Id. (emphasis added). Based on this reasoning and because Columbus had been in possession for over 21 years, this Court concluded that "[Columbus] therefore did acquire title by adverse possession *as the appellant did not commence an action to recover title or possession of the property within twenty-one years after the cause accrued. R.C. 2305.04.*" *Id.* at 153 (emphasis added). In 2008, this Court reiterated the "well established" rule that to obtain title by adverse possession, the prescriptive period must pass. *Evanich v. Bridge* (2008), 119 Ohio St.3d 260, 2008-Ohio-3820, 893 N.E.2d 481, ¶ 7.

Applying the discussion of the plurality opinion in *R.T.G.* on the limitations period in the regulatory takings context to physical takings would conflict with this Court's decision and reasoning in *A.A.A.* and *Evanich*. In fact, doing so would result in permitting the government to obtain title to property by adversely possessing property for as little as four years (as under R.C. § 2305.09(E)) or six years (as under R.C. § 2305.07) versus twenty-one years as this Court held in *A.A.A.* This Court's decision in *A.A.A.* makes clear that Section 19, Article I compels finding such possession a taking as the landowner still has title to the property. Accordingly, the only limitations period for physical takings consistent the Ohio Constitution and this Court's decision in *A.A.A.* is the 21-year prescriptive period.

3. The Conclusion That The Prescriptive Period Is The Only Applicable Limitations Period Is Supported By Persuasive Out-Of-State Authority.

The highest courts of many other states have found their similar constitutional provisions to Ohio's Section 19 Article 1 to be limited only by the prescriptive period. These courts have held that no amount of delay short of the prescriptive period can defeat a landowner's action for compensation for a physical taking. *A.W. Sundell v. Town of New London* (1979), 119 N.H. 839, 409 A.2d 1315, 1321 (holding that the only limitation period for an inverse condemnation action is the 20-year limitation period for the recovery of real estate, i.e., before the prescriptive period runs); *V.J. Drabek v. City of Norman* (Ok. 1996), 946 P.2d 658, 659-62 (finding that 15-year prescriptive period applied to physical takings inverse condemnation claim and reasoning that to hold otherwise would "allow the taking entity to effectively gain title, or some property interest, short of the prescriptive period"); *Highline Sch. Dist. No. 401, King County v. Port of Seattle* (Wash. 1976), 87 Wash.2d 6, 548 P.2d 1085, 1088-89 & n. 3 (holding that ten-year prescriptive period is the limitations period for inverse condemnation actions); *Maricopa County Mun. Water Conservation Dist. No. 1 v. Warford* (1966), 69 Ariz. 1, 206 P.2d 1168, 1173 (holding that ten-year prescriptive period applies for a physical taking of private property); *City of Kenai v. Burnett* (Alaska 1993), 860 P.2d. 1233, 1240, n. 13 (affirming a previous ruling that the appropriate limitations period for an inverse condemnation action is the period for adverse possession or ejectment, whichever applies). *See also Rutledge v. State* (1966), 100 Ariz. 174, 412 P.2d 467, 471-72 (affirming *Warford's* holding that prescriptive period is limitations period for inverse eminent domain actions based on physical takings of property). These courts' holdings offer persuasive authority that the only limitations period consistent with Section 19,

Art. 1 is the 21-year prescriptive period – otherwise the State gains a property interest it otherwise could not obtain until 21 years has passed.

For all of the above reasons, since Relators filed their Complaint less than 21 years after the construction of the spillway in 1997 and subsequent change in the State’s water level practices, the State’s motion should be dismissed.

B. *The Recurring Flood Is A Continuous Taking Caused By ODNR’s Continued Control Of The Spillway And Water-Levels For The Lake.*

1. A Physical Taking Can Be Continuous So As To Toll The Limitations Period.

Even if R.C. § 2305.09 applies to Relators’ mandamus action for ODNR’s physical takings, under century-old case law, the Relators’ Complaint is not time-barred. By treating takings claims as akin to a tort against real property, the General Assembly has unmistakably recognized that takings claims for statute of limitations purposes are subject to tolling pursuant to established concepts in tort law of trespass and nuisance. *Sexton v. City of Mason* (2008), 117 Ohio St.3d 275, 279-80, 2008-Ohio-858, 883 N.E.2d 1013 (citing and quoting extensively *Valley Ry. Co. v. Frantz* (1885), 43 Ohio St. 626, 4 N.E. 88). Where trespasses and nuisances are continuing, the limitations period (now codified in R.C. § 2305.09) is tolled until the tortious conduct ceases. *Id.* at 275, 280, 284. In *Sexton*, this Court held that continuing trespasses “occur [] when there is some continuing or ongoing allegedly tortious activity attributable to the defendant.” *Id.* at 282. Relying on *Valley Railway* and appellate decisions, this Court reasoned that an important factor in determining if tortious activity is ongoing is whether the tortfeasor retains control over the property. *Id.* at 280-82. The Court also cited to *State v. Swartz* (2000), 88 Ohio St.3d 131, 723 N.E.2d 1084, a decision which held that for criminal prosecution for unlawfully obstructing or impeding a passage of a stream, as long as the nuisance “...remains,

and is within the control of the actor, the nuisance constitutes a continuing course of conduct tolling the limitations period.” *Id.* at 282-83.

These cases along with the Court’s reaffirmation of their principles in *Sexton* control and dictate that ODNR’s Motion should be denied. The same principles of law must apply to the State as apply to private actors when private property is being seized from its rightful owner. All ODNR musters to support its contrary position is an Eleventh District Court of Appeals decision concerning an alleged *regulatory* taking caused by the single administrative decision of issuing a building permit. *Painesville Mini Storage, Inc. v. Painesville*, 11th Dist. No. 2008-L-092, 2009-Ohio-3656, ¶¶ 2-6. ODNR cannot seriously suggest that a case concerning a regulatory taking caused by a single administrative act is comparable to severe and recurring flooding of farmland deliberately caused by ODNR’s construction and continuing control of the spillway and its continuous management of the water-level for the Lake. Indeed, *Painesville* cannot be reasonably read as suggesting that the limitations period for a takings cannot be tolled where the taking consists of more than a single act, i.e., the granting of a building permit.

Moreover, the rationale for tolling the limitations period for a continuous trespass and nuisance claim that the defendant maintains the ability to “rectify the situation” applies equally to physical takings. *See Sexton*, 2008-Ohio-858, at n.2. The government could acknowledge its taking and pay just compensation to rectify its physical invasion. Likewise, it could take steps to end the physical invasion. Either of these possibilities are why the limitations period should be tolled for a physical takings claim where the taking is ongoing and within the control of the government. Thus, where a public entity continues to occupy, use, and exert control over private property without paying just compensation, the limitations period in R.C. § 2305.09 for a takings claim is tolled. Each day the public entity exerts control over the property and exerts control

over it without paying just compensation is “an additional cause of action” against it. *Cf., Valley Ry.*, 43 Ohio St. at 88; *Swartz*, 88 Ohio St.3d at 134-35 (“Where one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action”) (quoting *Kansas Pacific Ry. Co. v. Muhlman* (1876), 17 Kan. 224, 231) .

Just compensation is an “inviolable right” and constitutional mandate. *Norwood* 110 Ohio St. 3d 353 at ¶ 68. The right to obtain it should not be second-rate as compared to a landowner’s right to damages for property injuries caused by a private actor. Tolling the limitations period for mandamus actions related to physical takings where the government retains control of the property or the ability to stop the take ensures that the right to just compensation is not relegated to a second-class right.²

2. Finding A Physical Taking To Be Continuous Is Consistent With The Common Law Regarding Continuing Violations.

Finding that a takings claim can be tolled as long as the government maintains control to rectify the situation is not only fully consistent with prior decisions of this Court involving trespass and nuisance, but also consistent with United States Supreme Court precedent and the

² Finding that some takings are continuous and toll the limitations period does not at all eviscerate R.C. § 2305.09(E) for physical takings. As ODNR acknowledges, takings can be temporary, see Mot. to Dismiss, at 10, and, thus, the control by the government of the situation is brief. An example is a takings for a temporary easement near a highway for a temporary construction workspace as the Ohio Department of Transportation (“ODOT”) improves the highway. Once the improvements are complete, ODOT relinquishes control of the site and the takings ceases. If ODOT did not compensate the landowner for the temporary taking, the landowner would have four years from the date ODOT relinquished control of the site to initiate a mandamus action for just compensation. Another example, is when a contractor for ODOT operates and/or parks heavy construction equipment on portions of landowners’ parking lots during roadway improvement work that impairs access and causes substantial damage to the lots, as the contractor did in *State ex rel. Blank v. Beasley* (2009), 121 Ohio St.3d 301, 2009-Ohio-835, 903 N.E.2d 1196, ¶¶ 2, 31. The landowners would have only four years from the date the contractor removed the equipment from the property to obtain compensation.

common law regarding continuing violations. In *United States v. Dickinson* (1947), 331 U.S. 745, 67 S.Ct. 1382, the Supreme Court rejected “procedural rigidities” in determining the limitations period for when “the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events.” *Id.* at 749. *Dickinson* concerned the U.S. government’s construction of dam on a river and the creation of a deeper channel above the dam. *Id.* at 746. This activity raised the river pool level thereby causing both permanent and intermittent flooding of abutting landowners’ property and erosion to the new bank of the river pool now located on the abutting landowners’ property. *Id.* at 746-47. The United States Supreme Court rejected the government’s contention that the plaintiffs’ suit was time-barred because they had filed it more than six years after their property became “partially submerged for the first time.” *Id.* at 747-49. In doing so, it reasoned that the “source of the entire claim – the overflow due to rises in the level of the river – is not a single event; it is continuous.” *Id.* at 749. Because the increased level of the river was continuous, the Court determined that “[a]n owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.” *Id.* Thus, the Supreme Court recognized that the statute of limitations for a takings claim should be tolled when the taking is continuous.

The Supreme Court’s holding is consistent with the “continuous violation” doctrine. That doctrine is “rooted in general principles of common law and is independent of any specific action.” *Hensley v. City of Columbus* (C.A.6, 2009), 557 F.3d 693, 697. The Sixth Circuit has found continuous violations to exist when: (1) the defendants engage in continuing wrongful conduct; (2) the injury to the plaintiffs accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided. *Id.* In fact,

contrary to ODNR's contentions, the United States Court of Appeals for the Sixth Circuit has ruled that the continuing violations doctrine can apply to physical takings. *McNamara v. City of Rittman* (C.A.6, 2007), 473 F.3d 633, 639-40; *see also Hensley*, 557 F.3d at 697-98 (recognizing that *McNamara* found a continuous violation for a physical takings claim).

In *McNamara*, the Sixth Circuit determined that the initial drilling of multiple wells and continuous operation of those wells by the City constituted a continuous violation because if the operations were stopped the plaintiffs' aquifer would be replenished. *Id.* at 635, 639-40. Finding a continuous violation, the Sixth Circuit affirmed the dismissal of the claim solely because the landowner had not first pursued Ohio's mandamus proceedings. *Id.* at 639-40. The Sixth Circuit's reasoning for finding a continuous violation, that the government maintained the control to rectify the situation, i.e., by operating or stopping the operation of the wells, is similar to this Court's analysis for continuous trespasses and nuisances. The Sixth Circuit's continuous violations analysis for physical takings provides persuasive support for this Court's own rule of law tolling the limitations period for continuous physical invasions of real property.

3. Relators Have Alleged A Continuous Taking Caused By ODNR's Continuing Control Of The Spillway And The Lake's Water-Level.

The question then is simply whether the Relators have alleged a continuing course of conduct and control by ODNR that tolls the statute of limitations. The answer is yes. Relators allege that ODNR has been and is responsible for dams in Ohio, including maintenance of the western spillway of the Lake and for water-level management for the Lake. Compl. ¶¶ 94, 104, 117, 126. As part of ODNR's responsibilities, it constructed the spillway in 1997 and adopted water level management policies and practices that have caused and continue to cause recurring flooding of Relators' property. Compl. ¶¶ 5, 7-92, 117, 121-22, 127-28, 137, 150. The recurring flooding has been caused by not only the spillway, but by ODNR's "ongoing" lake-level

management practice. Id. at ¶¶ 5, 7-92, 124-28, 137, 150. Such recurring flooding has occurred as recently as the spring of 2009. The flooding has caused substantial damages to the Relators' real and personal property. Id. at ¶¶ 127-28. These factual allegations state a claim for a continuous taking.

In fact, ODNR acknowledges the Relators' allegations that ODNR maintains ongoing control of the Lake's water level. Mot. to Dismiss, at 3, 10. It claims, however, that such ongoing control does not constitute a continuing taking, but at most a failure to remediate existing flooding. Id. at 10-11.³ In an attempt to support its contention, ODNR selectively quotes from the Complaint. Id. When read in its entirety, the Complaint includes several

³ Specifically, ODNR contends that “[a] government’s failure to remediate existing flooding is not a taking.” Mot to Dismiss at ¶ 11. Unlike the cases cited by ODNR for that proposition, this is not a situation in which the government has merely failed to protect landowners from existing flooding. *Nicholson v. United States* (2007), 77 Fed. Cl. 605, 619-21 (concluding that the government’s decision not to rebuild or replace the levee system in New Orleans prior to Hurricane Katrina to withstand a Category 5 hurricane did not give rise to a takings claim; “omissions or claims that the Government should have done more to protect the public do not form the basis of a valid takings claim.”); *Hyashai v. Alameda Cty. Flood Control & Water Conservation Dist.* (1959), 167 Cal.App.2d 584, 334 P.2d 1048, 1053 (concluding plaintiffs could not recover for inverse condemnation where government’s failure to repair break in levee resulted in flooding of plaintiffs’ land as opposed to flooding caused by the government “carrying out a deliberate plan with regard to the construction of public works”). Rather, this is a situation where the affirmative acts on the part of the government (specifically, ODNR’s design and construction of the spillway and lake level maintenance practices) have actually exacerbated the flooding. Compl. ¶¶ 5, 7-92, 124-28, 137, 150-51. See *Nicholson*, 77 Fed. Cl. at 620-22 (suggesting that plaintiffs’ takings claim would have survived had plaintiffs been able to show that the floodwalls erected by the government inevitably exacerbated the flooding to plaintiffs’ property). Indeed, it is a situation where ODNR made a deliberate calculated decision to proceed with construction of a particular spillway design and alter its practice of periodically drawing down lake levels despite knowledge of increased severe flooding to landowners downstream from the spillway. The facts here support a claim of inverse condemnation. See *Arreola v. County of Monterey* (2002), 99 Cal.App.4th 722, 122 Cal.Rptr.2d 38, 53-54 (distinguishing *Hayashi* and concluding that government’s failure to keep channel clear which caused levee to fail during storm supported claim for inverse condemnation; holding “[s]o long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed.”).

allegations that it is not only the construction of the new spillway in 1997 that is causing the continuous taking of the Relators' property, but ODNR's water-level management practices, including ODNR's continuous failure since 1997 to draw down the Lake's water levels. Compl, at ¶¶ 5, 7-92, 117, 123-28, 137, 146, 149-50. It is the combination of the two that has caused the Relators to experience increased and severe flooding to their lands, in terms of both extent and duration.

ODNR's attempt to re-write the Complaint to cast the taking as a "single, one-time governmental act" is transparently disingenuous. This action is instead about a governmental entity's continuous conduct and control deliberately causing recurring flooding to the Relators' property and, despite its continued control of the spillway and water-levels of the Lake, continuing to cause the flooding to occur. Accordingly, Relators state a valid continuous takings claim.

Both *Valley Railway* and *Swartz* are particularly instructive on determining whether ODNR's taking is continuous. In *Valley Railway*, a railway constructed a dam and channel on its own land that diverted the stream's natural channel. 43 Ohio St. at 625. In doing so, it turned the course and current of the river against and over the plaintiff's property. *Id.* The railway constructed the dam and channel in 1874, but the plaintiff did not commence an action for damages until 1881. *Id.* The railway asserted that the action was time-barred as it was filed more than four years after the railway had changed the stream so that it flowed against the plaintiff's land. *Id.* This Court held that the action was not time-barred. *Id.* at 628. In doing so, it concluded that when an owner,

puts in action or directs a force against or upon, or that affects, another's land . . . and [if] such force if so continued, is continued by the act of such owner and actor...it may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him, and is an additional cause of

action; and, until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action.

Id. at 627.

The Court then applied this rule of law to the facts and found that the railway's conduct as alleged in the petition stated a cause of action for a continuous trespass or nuisance. Id. at 628. It emphasized that after the railway company diverted the stream and cut the new channel, it continued to own the land upon which it diverted the stream and continued to control and direct the stream. Id.

Similarly, in *Swartz*, the Court held that an applicable statute of limitations for unlawfully obstructing or impeding the passage of a navigable waterway was tolled so long as the criminal actor remained in control of the nuisance causing the obstruction. 88 Ohio St.3d at 134-35. The defendant in *Swartz* in 1992 had erected a concrete bridge and twenty-four inch culvert over a stream that ran across his property. Id. at 131. The bridge and culvert caught debris during heavy downpours that caused repeated flooding of a neighbor's property. Id. at 131-32. The continued existence of the bridge and culvert "created a recurring condition of flooding." Id. at 135. During the period of recurring flooding, defendant "allegedly continued to maintain control over the bridge and culvert to cause damage to [the neighbor's] property." Id. Based on the complaint of the neighbor, in 1998, the State charged the defendant for obstructing a navigable waterway. Id. at 132. The defendant moved to dismiss the complaint as barred by a two-year statute of limitations that applied to criminal obstruction of navigable waterways. Id. The trial court granted the motion to dismiss and the State appealed. Id. On appeal, the State acknowledged the two-year limitation period, but argued that a new offense occurred each time neighbor's property is flooded. Id. at 133. The court of appeals affirmed, holding that the

tortious act was completed when he constructed the bridge and culvert in 1992 or in 1995 when the neighbor tried to find out why the water was flooding his property and contacted the county engineer. *Id.* This Court disagreed. *Id.* Relying in *Valley Railway*, the Court found that the defendant's conduct constituted a continuing course of conduct that tolled the limitations period. *Id.* at 133-35. As in *Valley Railway*, the Court emphasized that the defendant was alleged to have maintained control over the bridge and culvert and allegedly continued to allow the bridge and culvert to cause the flooding of his neighbor's property. *Id.* at 134-35.

Further, the allegations here are analogous to those in *McNamara*. In both situations, the government maintained the ability to rectify the situation through control over the operation of wells as in *McNamara*, or in this action, through control over the spillway and water-level management practices for the Lake. 473 F.3d at 639-40. In contrast, the Sixth Circuit in *Hensley* determined that no continuous taking had occurred when the City of Columbus, in order to create a dry trench for a sewer line, pumped groundwater out from the plaintiffs' property causing the plaintiffs' wells to run dry. 557 F.3d at 697-98. The Sixth Court reasoned that the City's actions were not continuous because the City no longer had control to rectify the situation – the wells were dry and the water levels of the wells did not “depend on any continual intervention by the state [sic]”. *Id.* Here, as the Complaint alleges, the recurring flooding remains in the control of the State and the extent of it is dependent upon the continued intervention and conduct of the State. Certainly, the allegations in the Complaint do not conclusively show the action to be time-barred. *Velotta*, 69 Ohio St.2d 376 at paragraph 3 of the syllabus.

C. *Relator's Claims Did Not Accrue Four Or Even Six Years Prior To The Filing Of The Instant Complaint On July 15, 2009.*

Alternatively, even if this Court agrees with ODNR that a four-year or six-year statute of limitations applies, Relators' claims are not time-barred because the Relators' land had not been clearly and permanently taken four or six years prior to July 15, 2009.

The United States Supreme Court in *Dickinson* explicitly recognized the quandary faced by property owners where the government leaves the taking of property "to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy." 331 U.S. at 748, 67 S.Ct. at 1384. *See also Boling v. United States* (C.A. Fed. 2000), 220 F.3d 1365, 1370 ("[I]n cases where the government leaves the taking of property to a gradual physical process, rather than utilizing the traditional condemnation procedure, determining the exact moment of claim accrual is difficult.") On the one hand, if property owners bring suit on the first sign of flooding, they risk the uncertainty of the damage and the doctrine of res judicata preventing recovering later for damage as yet uncertain. *Id.* at 749. On the other hand, if they wait, they risk the statute of limitations running and their claim expiring. *Id.* The Court discouraged the strict application of accrual principles in such cases. *Id.* at 748 ("The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' -when they are born, whether they proliferate, and when they die.")

The Supreme Court in *Dickinson* rejected the government's argument that the plaintiff's taking claim based upon intermittent flooding by the government accrued immediately upon the first inundation of water. *Id.* at 747-49. Rather, the Court concluded that "procedural rigidities should be avoided" and that a plaintiff in such a situation may postpone bringing suit until the

flooding became permanent and the situation became “stabilized.” *Id.* at 749 (holding “when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really ‘taken’” and thus claim had not accrued six years prior to filing of complaint). *See also Boling*, 220 F.3d at 1370 (“[T]he key date for accrual purposes is the date on which the plaintiff’s land has been clearly and permanently taken.”).

Here, similar to the situation in *Dickinson*, ODNR placed the burden on Relators to determine the decisive moment that a taking of their property had manifested as a result of ODNR’s actions in redesigning the spillway and its current management practices. And here, like *Dickinson*, Relators’ claims did not accrue until it became obvious that the intermittent flooding became stabilized and was a permanent situation. Based on the factual allegations in the Complaint, this Court cannot, as a matter of law, conclude that the flooding suffered by Relators became stabilized four years or six years prior to the filing of this suit on July 15, 2009. Rather, the Complaint evidences only that after the flooding in the spring of 2009 (Compl. ¶ 129), Relators believed the situation had become permanent and stabilized (i.e., that ODNR was not going to lower lake levels; ODNR was not going to make any changes to the western spillway; ODNR was not going to release any water out the eastern spillway; ODNR would inevitably continue to cause the flooding to occur; and ODNR was not going to take any action to voluntarily compensate landowners for the flooding suffered).

“Experience indicates that most people will not sue for modest damages or inconvenience, even when they suspect that another person is at fault. Most people understand that modest damages and inconvenience are a part of life.” *Sexton v. Mason* (2008) 117 Ohio

St.3d 275, 288, 883 N.E.2d 1013, 1024 (Pfeifer, J., dissenting; joined by O'Donnell, J.).

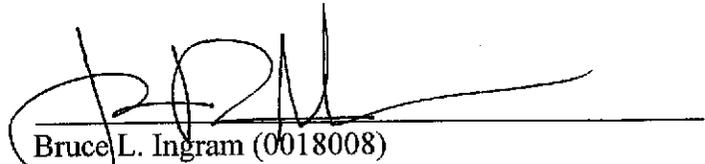
Relators should not be punished for not immediately running to the courthouse doors at the first sign of flooding, but instead waiting until the situation stabilized and waiting for ODNR to take action to resolve the problem. Just compensation, after all, is a fundamental and “inviolable right”, *Norwood*, 110 Ohio St. 3d 353 at ¶ 68. To preserve that right, this Court should err on the side of the landowners and not find as a matter of law that Relators’ claims accrued four or six years prior to July 15, 2009. Certainly, at a minimum, the Complaint “does not conclusively show on its face” that the action is time-barred. *Velotta*, 69 Ohio St.2d 376, at paragraph 3 of the syllabus.

Conclusion

In 1997, ODNR made a choice – promote boat recreation on the Lake regardless of any flooding caused to farmer landowners downstream from the Lake’s new western spillway and ODNR’s new water-level management practices. Since then, ODNR has continued to exercise that choice by operating the spillway and managing the Lake water-level so as to cause flooding for the farmers down-stream. ODNR continues to do so despite knowledge of causing the severe, recurring flooding to the Relators’ property. With their Complaint, Relators have sufficiently stated a timely claim for this Court to order ODNR to initiate appropriation actions to compensate Relators for the ongoing physical taking of their property. Certainly, at a minimum, the Complaint does not conclusively on its face show that the action is time-barred. For this reason and each and every reason set forth herein, ODNR’s Motion to Dismiss should be denied in its entirety.

Dated: August 20, 2009

Respectfully submitted,



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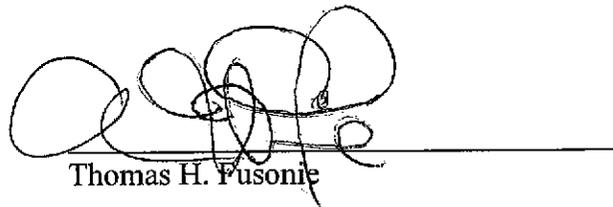
Attorneys for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via U.S. Mail postage pre-paid, this 20th day of August, 2009:

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