

ORIGINAL

IN THE SUPREME COURT OF OHIO

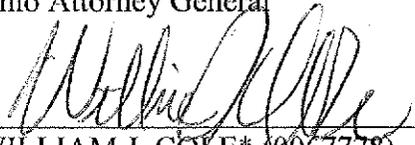
STATE ex rel. WAYNE T. DONER, et al.,	:	Case No. 2009-1292
	:	
Relators,	:	Original Action in Mandamus
	:	
v.	:	
	:	
SEAN D. LOGAN, Director,	:	
Ohio Department of Natural Resources, et al.,	:	
	:	
Respondents.	:	

**COMBINED MOTION OF RESPONDENTS
TO REFER THE ACTION TO A MASTER COMMISSIONER AND
TO AMEND THE ALTERNATIVE WRIT SCHEDULE**

Pursuant to S. Ct. Prac. R. X(11), Respondents Ohio Department of Natural Resources and Sean D. Logan, Director of the Ohio Department of Natural Resources (collectively, "ODNR"), move this Court to refer this mandamus action to a master commissioner. ODNR further moves this Court to amend the alternative writ schedule, entered by this Court on September 30, 2009, by rescheduling the deadline for filing evidence by at least 90 days. A memorandum supporting this motion follows.

Respectfully submitted:

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**MEMORANDUM IN SUPPORT OF RESPONDENTS' COMBINED MOTION TO
REFER THE ACTION TO A MASTER COMMISSIONER AND TO
AMEND THE ALTERNATIVE WRIT SCHEDULE**

This is far from the typical mandamus case. Less than three months ago, 86 landowners (“Relators”) collectively sued in this Court to compel ODNR to bring appropriation proceedings as to each of them for causing increased flooding on over 200 parcels of land. Most Relators claim they own or have an interest in multiple parcels that have been flooded by ODNR’s actions. (Complaint ¶¶ 7-15, 18, 19, 22-46, 48, 49, 51, 52, 55-64, 66, 69-92, Exs. D1-D9, D12, D13, D16-39, D41, D42, D44, D45, D48-57, D59, D62-D83, D85.) Complex and disputed issues are likely to arise in this case that concern the extent of increased flooding, both in duration and to geographic areas allegedly affected, as well as whether each Relator has standing to sue. Ownership verification through title searches for each parcel cited in the complaint will be needed. Discovery will also be necessary to verify standing. Such threshold issues and fundamental facts must be addressed and decided in this action because the only issue that may be considered in subsequent appropriation proceedings is the amount of compensation due if it is determined by this Court that a taking has occurred. See *Thormyer v. Irvin* (1960), 170 Ohio St. 276, syllabus ¶ 1.

Six days ago this Court issued an alternative writ that, inter alia, directed the parties to file any evidence they intend to present within 20 days of the date of the entry (i.e., by October 20, 2009). Within this time, ODNR must investigate, gather, and file its evidence on 86 taking claims involving over 200 parcels of land.

ODNR is proceeding diligently in this matter. For example, it has engaged a title searcher to check the ownership of each of the allegedly affected parcels. However, the present writ schedule that this Court just issued does not provide a definitive mechanism to address

disputed factual issues or give ODNR sufficient time to investigate all 86 claims of increased flooding on private lands.

Although Relators bear the burden of establishing a clear right to mandamus relief, see *State ex rel. Royal v. Columbus* (1965), 3 Ohio St.2d 154, 156, ODNR must have reasonable time to exercise its due diligence—which may necessitate discovery—to determine in good faith which Relators have standing to sue and which properties have been affected by increased flooding. ODNR cannot do so within the time allotted, even with a 10-day extension. Supreme Court Practice Rule X(7) contemplates how this complex factual scenario should be addressed. When facts are in dispute, “[a]ll other evidence shall be submitted by affidavits, stipulations, depositions, and exhibits.” Due process requires that ODNR, as well as Relators, have sufficient time to gather and present evidence necessary for the determination of this unique mandamus action.

For these reasons, ODNR requests this Court refer this mandamus action to a master commissioner to consider and decide such preliminary, threshold issues as standing to sue and the extent of properties allegedly taken. Moreover, a master commissioner will be able to assist and guide the parties in their attempts to narrow the disputed issues, which will allow the parties to reach a comprehensive agreed statement of facts pursuant to S. Ct. Prac. R. X(7). ODNR further requests this Court amend the present writ schedule by rescheduling the deadline for filing evidence by at least 90 days (i.e., from Tuesday, October 20, 2009, to **Tuesday, January 19, 2010¹**).

Simultaneously with this motion, ODNR is separately moving this Court for an expedited ruling on these motions. ODNR has not previously sought any extensions in this case.

¹ The 90th day falls on Monday, January 18, 2010, which is the Martin Luther King, Jr. holiday.

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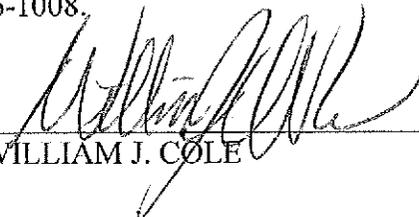
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Combined Motion of Respondents to Refer the Action to a Master Commissioner and to Amend the Alternative Writ Schedule* has been sent by regular and electronic mail on October 6, 2009 to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, and Kristi Kress Wilhelmy, VORYS, SATER, SEYMOUR AND PEASE LLP, 52 E. Gay St., P.O. Box 1008, Columbus, OH 43216-1008.



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