

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO EX REL.  
WAYNE T. DONER, ET AL.,

Relators,

v.

SEAN D. LOGAN, DIRECTOR  
OHIO DEPARTMENT OF  
NATURAL RESOURCES, ET AL.,

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

FILED  
APR 19 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

**RELATORS' MEMORANDUM IN OPPOSITION TO  
MOTION OF RESPONDENTS FOR AN ORDER REGARDING THE ADMISSIBILITY  
OF CERTAIN EVIDENCE AND FOR PROCEEDING WITH EXPERT DISCOVERY**

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## I. PRELIMINARY STATEMENT

Respondents' latest motion amounts to nothing more than an effort by Respondents to reargue Relators' Motion for Extension, a Motion which this Court granted and which gave the parties an additional sixty days to gather evidence. Dissatisfied with that result, Respondents again ask this Court to prevent Relators from 1) gathering and submitting any rebuttal expert testimony attacking Respondents' expert reports; 2) gathering and submitting any evidence of recent flooding; and 3) preventing Relators from deposing Respondents' experts. Respondents simply want to prevent this Court from fulfilling its paramount obligation: getting to the truth of the matter. Respondents do not want this Court to learn the extent and severity of the flaws in Respondents' expert report. Nor do Respondents want the Court to see photographs like the one attached hereto as Exhibit A-1 and the video like the one attached hereto as Exhibit A-2 which show that as recently as last month ODNR caused a direct encroachment of water onto some of Relators' lands and, thus, subjected the land to a public use that excluded or restricted the Relators' dominion and control over it. *See Ex. A, Supplemental Aff. of Carl Sutter.*

Respondents ignore Relators' lead reason for requesting the extension: developing and gathering rebuttal expert evidence. Relators did not claim to need the extra sixty days for the purpose of organizing and photocopying their evidence. That is all Respondents would permit Relators to do. Their position is ridiculous and disingenuous. While Respondents specifically asked that the extension be limited to the completion of errata sheets, this Court did not place any limitation on the work that could take place during the time period of the extension. Moreover, prior to Relators' request for the extension, Respondents even acknowledged the need for rebuttal testimony. *See Exhibit A to Relators' Mot. to Extend by 60 Days the Deadlines for Presentation of Evidence & Merit Briefing, at Ex. 1, at March 2, 2010 Cole Email to Fusonie.*

Only after Respondents determined they needed to stop discovery, did they oppose Relators' efforts to develop rebuttal evidence. Respondents had the opportunity to attack Relators' expert evidence because Relators had produced their expert affidavits over two months before the supposed expert deadline. Relators, however, did not receive Respondents' expert reports until the day of the supposed expert deadline, and then, Respondents were not entirely forthcoming as to the contents of that report. Relators should be given an equal opportunity to attack Respondents' expert reports.

Similarly, Respondents disingenuously seek to prevent Relators from introducing evidence of recent flooding. Apparently, evidence of 2009 flooding is relevant to Relators' claims, while evidence of 2010 flooding is not. Respondents lack any basis for making this distinction. Indeed, earlier this year, but before the recent flooding, Respondents admitted the relevance of 2010 flooding when during depositions, Respondents inquired of Relators and their fact witnesses as to whether Relators' properties had flooded in 2010. *See, e.g.,* Deposition of Michael Post at 29:20-22, attached hereto as Exhibit B. Now that flooding has actually occurred, however, Respondents have conveniently changed their tune. Relators submit that Respondents' actions during these depositions are telling and that all evidence of flooding that has occurred since 1997 (i.e., subsequent to ODNR's redesign of the spillway and altered and ongoing lake level management decision-making practices) is relevant to the issue of whether a taking has occurred.

Finally, Respondents seek to prevent Relators from deposing Respondents' experts. Again, Respondents ignore Relators' lead reason for requesting the extension: developing and gathering rebuttal expert evidence. Relators propose that both parties be permitted to take expert depositions and that those depositions be completed by May 7, 2010.

## II. BACKGROUND

On March 17, 2010, Relators moved this Court for an extension of the deadline for the presentation of evidence from April 1, 2010 to June 1, 2010. In that Motion, Relators set forth three reasons for the extension. First, Relators asserted the need for additional time to conduct expert discovery. In this regard, Relators specifically noted the need for additional time “to obtain rebuttal evidence to Respondents’ contentions concerning [the work of Relators’ expert].” Relators’ Mot. to Extend by 60 Days the Deadlines for Presentation of Evidence & Merit Briefing at 8. Second, Relators stated that many Relators had recently experienced flooding and that Relators needed additional time to prepare and produce evidence related to that flooding. *Id.* at 9. And, third, Relators needed time to review and correct or clarify numerous transcripts of depositions taken by Respondents. *Id.*

Respondents opposed Relators’ motion on grounds nearly identical to those advanced in Respondents’ current motion. Respondents argued that no extension was necessary because: 1) the parties had allegedly agreed on an expert deadline of March 1, and that date had passed; and 2) evidence of recent flooding was immaterial to Relators’ claims of “permanent continuing taking of their land.” Memo of Respondents in Opp’n. to Relators’ Mot. to Extend by 60 Days the Deadlines for Presentation of Evidence & Merit Briefing at 5-7. Respondents specifically argued that “[t]his Court should not permit Relators to engage in any further expert discovery, by submitting additional evidence, by adding expert witnesses, or by deposing ODNR’s expert witnesses.” *Id.* at 7. Further, Respondents claimed that the “Court should also not extend time to allow Relators to prepare evidence of alleged recent flooding on some of their properties . . . .” *Id.* Alternatively, Respondents asked that if any extension was granted, “it should only permit Relators a reasonably sufficient time to review and correct their deposition transcripts in

accordance with Civ. R. 30(E)” and in that instance, “ODNR should be permitted to depose any of the Relators who make any substantive change to their transcripts as to those changes.” *Id.* at 7.

On March 23, 2010, the Court granted Relators’ request for an extension, thereby extending the deadline for the submission of evidence to and including June 1, 2010. This Court did not, as Respondents requested, impose any limitation on the discovery to be conducted during those sixty additional days.

Now, in an effort to prevent Relators from using the sixty days to engage in further discovery as Relators had requested, Respondents have asked this Court to rule on the admissibility of such evidence. Respondents’ Motion should be denied.

### **III. LAW AND ARGUMENT**

#### **A. Relators Must Be Given the Opportunity to Attack and Challenge Respondents’ Expert Reports.**

Relators’ lead reason for requesting an extension of the schedule was for purposes of rebutting Respondents’ expert report. Relators’ Mot. at 3, 8-9. This Court did not invalidate that reason in its order granting the requested extension. Indeed, Relators have an unconditional right to rebut Respondents’ expert evidence. *See Phung v. Waste Management* (1994), 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (“A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent’s case-in-chief and should not be brought in the rebutting party’s case-in-chief.”) Moreover, prejudicial error has been found where a court excludes expert testimony on behalf of one party to rebut similar expert testimony which has already been admitted on behalf of the other party. *See, e.g., Breymann v. Pennsylvania* (6th Dist. 1932), 43 Ohio App. 473, 477-78.

Here, Respondents conveniently fail to mention that they have had Relators' expert affidavits since December 24, 2009, and that Respondents used those expert affidavits in formulating their expert evidence and to attack Relators' experts. They are now asking this Court to punish Relators for producing those affidavits in a timely manner in discovery. Relators must not be punished for following the discovery rules; but rather must be given the same opportunity to rebut Respondents' expert report. In other words, if Respondents' expert report is admissible, so too is Relators' rebuttal evidence.

In an effort to bolster their position and disparage Relators, Respondents claim that two days after the supposed expert deadline of March 1, 2010, Relators produced an "expert" affidavit. Respondents' Mot. for an Order Regarding the Admissibility of Certain Evidence and for Proceeding with Expert Discovery at 3. Respondents are mistaken. Contrary to the label Respondents have given them, Relators are not relying on Mr. Keith Earley as an "expert." A review of Mr. Earley's affidavit reveals he is being presented solely as a fact witness. *See* Ex. B to Memo of Respondents' in Opp'n to Relators' Mot. to Extend by 60 Days the Deadlines for Presentation of Evidence & Merit Briefing. Moreover, March 1, 2010 was not a deadline for factual evidence. Thus, Respondents' efforts to disparage Relators constitute a baseless attack.

Respondents' claimed existence of a "no-rebuttal agreement" between the parties is disingenuous. Only after Respondents produced an indefensible expert report, did Respondents seek to prevent Relators from attacking the report, suddenly and unilaterally deeming March 1, 2010, a deadline "without exception". Tellingly, only a few weeks earlier, and after the supposed expert deadline had passed, Respondents acknowledged and contemplated the need for additional time to respond to the expert testimony of Jay Gould. *See* Exhibit A to Relators Mot. to Extend by 60 Days the Deadlines for Presentation of Evidence & Merit Briefing, at Ex. 1, at

March 2, 2010 Cole Email to Fusonic (“We may need more time to respond to the statements in his affidavit that we just received yesterday [March 1], **which may include seeking an extension of one or more deadlines.**”) (emphasis added). Prior to that time, Respondents had never suggested that they might need to rebut any expert materials Relators would produce on March 1. Rather, only after Respondents determined that they needed to prevent the exposure of their indefensible expert reports to rebuttal, did they oppose Relators’ requested extension and Relators’ efforts to prepare rebuttal evidence.

In response to Respondents’ expert report, Relators timely reached out to the Court and asked for additional time to analyze the report and prepare their rebuttal. This Court granted Relators’ request. This Court did not, as Respondents’ requested, impose any limitation on the discovery to be conducted during those sixty additional days, nor did this Court reject the need for rebuttal expert discovery as a valid basis for the extension. Nothing has changed since that time which should alter this Court’s order. Accordingly, Relators should be permitted to satisfy the lead purpose of the extension and, thus, continue with the gathering and submission of rebuttal expert evidence. After all, this Court’s paramount purpose is to determine the truth, and such rebuttal expert testimony is essential to that truth-finding process.

**B. Evidence of Recent Flooding Is Relevant And Material to Relators’ Takings Claims And Thus Should Not Be Excluded.**

Respondents seek to prevent Relators from introducing evidence of recent flooding on their lands on the basis that evidence of additional flooding “is irrelevant to Relators’ permanent taking claim” and instead would be relevant only if Relators were seeking relief for “multiple temporary takings.” Respondents’ Mot. for an Order Regarding the Admissibility of Certain Evidence & for Proceeding with Expert Discovery at 10 (emphasis added). Respondents are wrong.

Relators brought the present action based on the claim that their lands are subject to continuing, persistent, frequent, and inevitable increased severe flooding as a direct result of ODNR's replacement of the spillway and ODNR's lake-level water management practices and that ODNR's actions have resulted in an unlawful taking of Relators' property by ODNR. *See generally* Compl. At this juncture, Relators have made no allegation whatsoever as to whether this taking is "permanent" or "temporary" as such a distinction is not important. As this Court recently recognized, "whether a taking is characterized as temporary or permanent is of little significance in determining whether a taking has occurred . . . ." *State ex rel. Gilbert v. City of Cincinnati*, Slip Opinion No. 2010-Ohio-1473, ¶ 36 (quoting Annotation, Elements & Measure of Compensation in Eminent Domain Proceeding for Temporary Taking of Property (2009), 49 A.L.R.6th 205, Section 2.). Instead, the issue of whether a taking is permanent or temporary "has a bearing on the measure of damages." *Id.* (quoting Annotation, Elements & Measure of Compensation in Eminent Domain Proceeding for Temporary Taking of Property (2009), 49 A.L.R.6th 205, Section 2).

Here, Relators must show that a taking occurred and "[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 by section 19 of the Bill of Rights." *Id.* at, ¶ 29 (affirming grant of writ of mandamus to compel the city to commence an appropriation proceeding to compensate relators for the city's physical taking of relators' property where city had repeatedly caused the sanitary-sewer to overflow onto relators' property) (quoting *Norwood v. Sheen* (1933), 126 Ohio St. 482, paragraph one of the syllabus). Evidence of flooding after the redesign of the spillway and ODNR's shift in lake-level management decision-making practices, whether that flooding occurred in 1998, 2003, or 2010,

is relevant for purposes of establishing that Relators indeed have suffered a direct encroachment on their land which subjects the land to a public use that excludes or restricts the Relators' dominion and control over it. Indeed, Respondents themselves conceded as much when just earlier this year, but before the recent flooding, Respondents inquired during depositions as to whether Relators' properties had flooded in 2010. *See, e.g.*, Ex. B Post Dep. at 29:20-22.

Respondents also complain that if Relators are permitted to submit additional evidence now, Relators will file evidence of further flooding each time such flooding occurs, and that the future submission of such evidence would occur "with no good end in sight." Respondents' Mot. for an Order Regarding the Admissibility of Certain Evidence & for Proceeding with Expert Discovery at 10. Respondents' complaint reveals precisely why such evidence should be admitted; the fact that there is "no good end in sight" to the flooding is relevant for purposes of establishing that a taking has occurred. Moreover, although Respondents argue that the submission of evidence of recent flooding would require further review by Respondents' experts, Relators are in the same position. The supposed expert deadline of March 1, 2010 was not the deadline for factual evidence; the schedule did not contemplate that all factual evidence would be available at that time. And the parties never agreed that any evidence gathered after March 1 would not be included in the Presentation of Evidence.

Respondents' position as to evidence of recent flooding is simply nonsensical. Under their theory, evidence of flooding which occurred in 2009 is relevant, but evidence of flooding occurring in 2010 is not. Respondents would have this Court select an arbitrary date for purposes of establishing the relevancy of evidence of flooding. All evidence of recent flooding should be admitted.

### **C. Relators Should Be Permitted To Depose Respondents' Experts.**

Finally, Respondents wish to prevent Relators from deposing Respondents' experts, seeking to enforce a supposed March 19, 2010 deadline for deposing all experts. Again, Respondents ignore Relators' lead reason for requesting the extension: developing and gathering rebuttal expert evidence. Relators should be permitted to satisfy the lead purpose of the extension.

Second, principles of fairness dictate that Relators should be given the same opportunity to depose Respondents' experts. Respondents had the opportunity to depose Relators' expert, but chose not to do so. Indeed, Respondents had the affidavits of Relators' expert nearly three months prior to the supposed March 19, 2010 deadline, yet Respondents never took any steps to depose Relators' expert. Relators, however, have not had the same opportunity; they had little if any time to depose Respondents' experts as a result of Respondents' failure to be forthcoming fully with respect to such report. Relators should now be given that opportunity.

Alternatively, Respondents ask that in the event this Court permits Relators to depose Respondents' experts, that Respondents be permitted to depose Relators' experts as well.

Despite Respondents' antagonistic behavior,<sup>1</sup> Relators are agreeable to this alternative. Because

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<sup>1</sup> As reasonable and fair as the notion of permitting both parties to depose experts may sound, it is not entirely so. Respondents have done nothing but played games throughout the discovery process (*e.g.*, placing unreasonable conditions on their consent to an extension of the schedule and failing to be fully forthcoming with respect to Respondents' expert report). The policy underlying the discovery rules is, in part, "to prevent an attorney from taking undue advantage of an adversary's industry or efforts." Civ. R. 26(A)(2). Respondents' actions amount to an improper attempt to circumvent this policy by taking undue advantage of Relators' efforts to overcome Respondents' obstructions. Though admittedly Respondents are now entitled to the benefit of the June 1, 2010 deadline for the submission of evidence as a result of the Supreme Court Practice Rules which require the simultaneous presentation of evidence, Respondents frankly should not have the benefit of using the additional time to depose Relators' experts. Respondents essentially waived that opportunity and should not now gain undue advantage through Relators' industry and efforts.

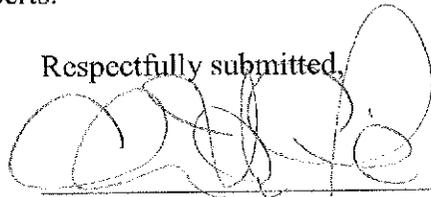
these experts reside in various locations, however, Relators ask that the Court establish May 7, 2010, as the deadline for conducting such depositions.

#### IV. CONCLUSION

Thus, for the reasons above, Relators respectfully request that the Court deny Respondents' Motion and enter an order permitting Relators to 1) gather and submit rebuttal expert testimony attacking Respondents' expert reports; 2) gather and submit evidence of recent flooding; and 3) depose Respondents' experts.

Dated: April 19, 2010

Respectfully submitted,



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Thomas H. Fusonie (0074201)

Kristi Kress Wilhelmy (0078090)

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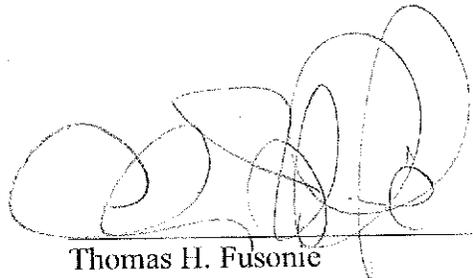
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via U.S. Mail postage prepaid, this 19th day of April, 2010:

William J. Cole  
Mindy Worly  
Jennifer S.M. Croskey  
Assistant Attorneys General  
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Dale T. Vitale  
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Rachel H. Stelzer  
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Thomas H. Fusome

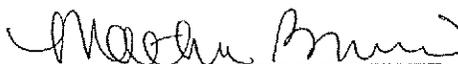


7. I attach as Exhibit 2 true and accurate copies of two video clips taken on March 14, 2010 of the flooding of Mercer County Parcel Number 28-015300.0000 caused by the Beaver Creek overtopping its banks near my property.

**FURTHER AFFIANT SAYETH NAUGHT.**

  
\_\_\_\_\_  
Carl A. Sutter

Sworn to before me and subscribed in my presence this 31<sup>st</sup> day of March, 2010.

  
\_\_\_\_\_  
Notary Public

MARTHA C. BREWER, Attorney At Law  
NOTARY PUBLIC - STATE OF OHIO  
My commission has no expiration date  
Sec. 147.03 R.C.

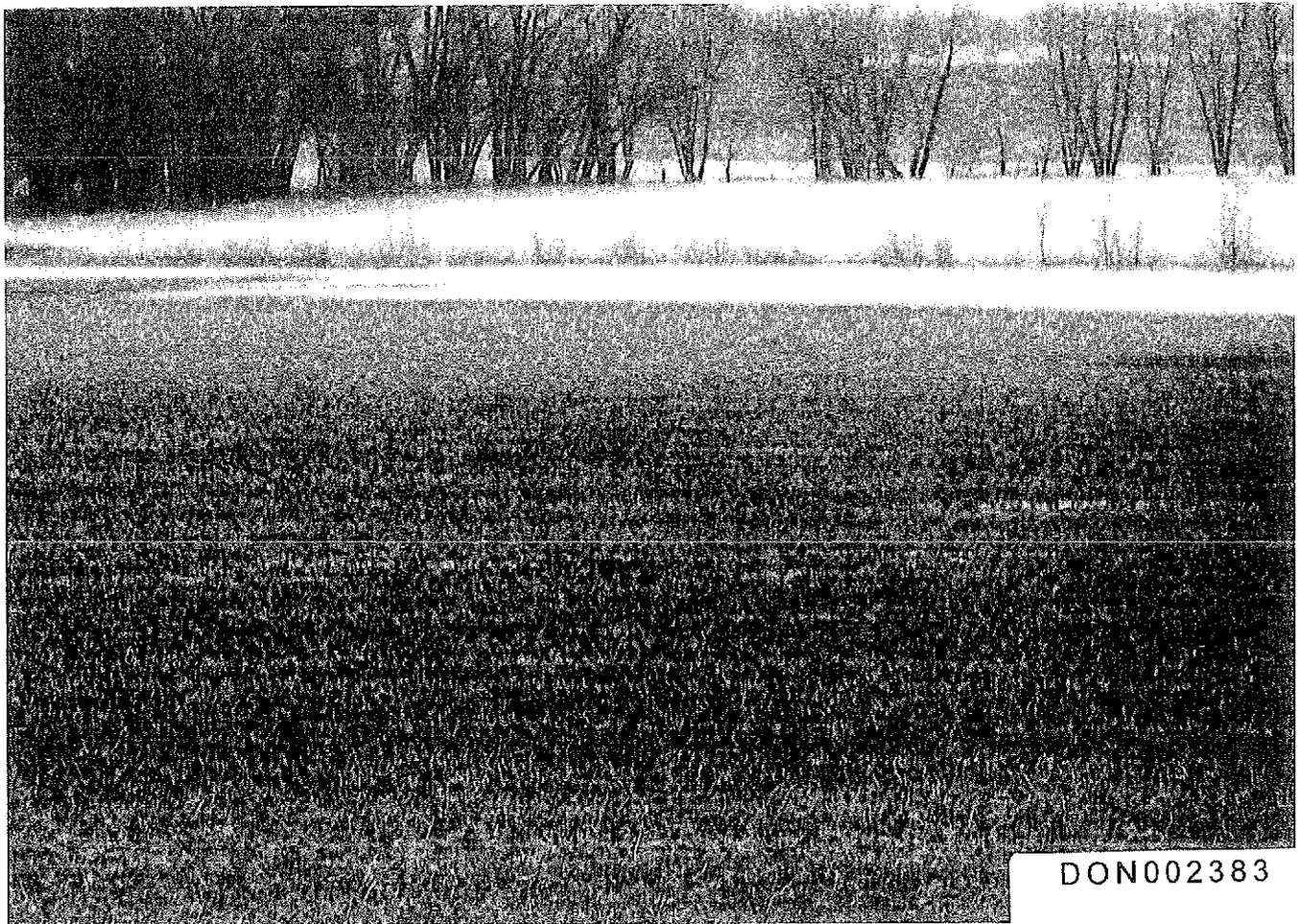
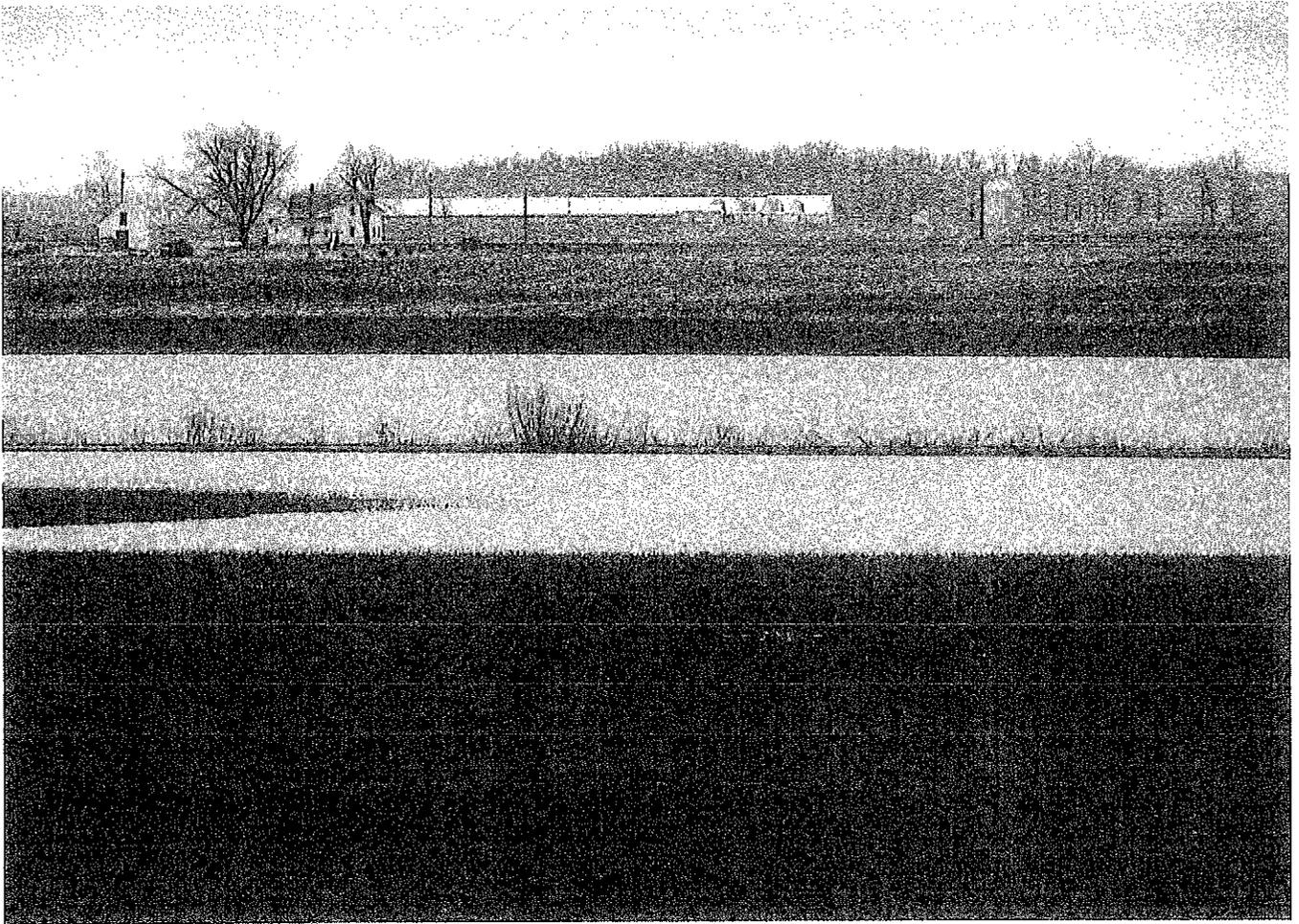
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**EXHIBIT 1 TO  
SUPPLEMENTAL AFFIDAVIT  
OF CARL A. SUTTER**

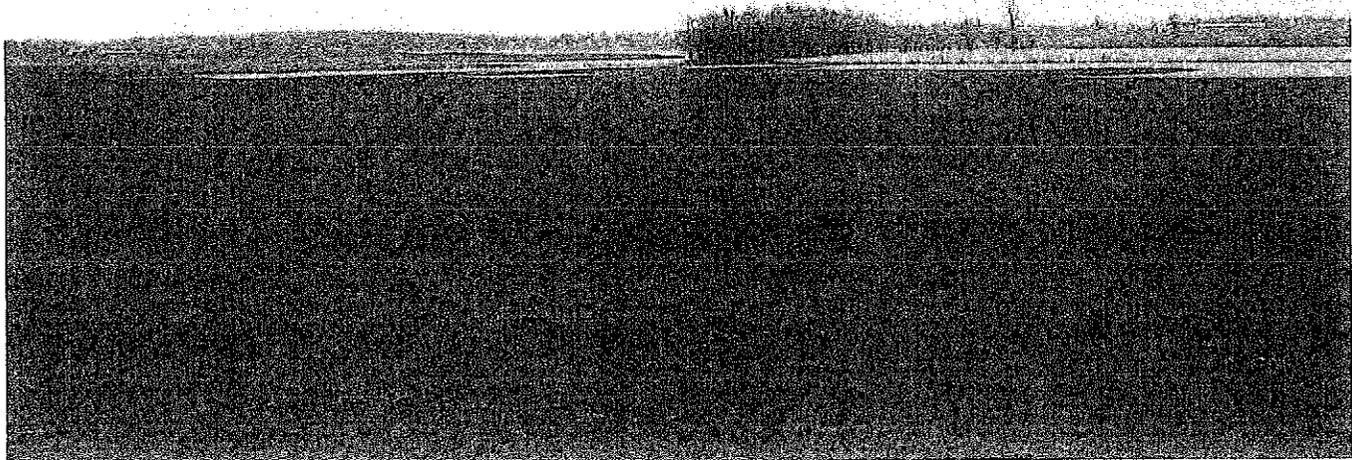
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**EXHIBIT 2 TO  
SUPPLEMENTAL AFFIDAVIT  
OF CARL A. SUTTER**

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IN THE SUPREME COURT OF OHIO

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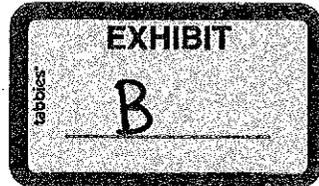
STATE OF OHIO  
EX REL., WAYNE T. DONER,  
ET AL.,

CASE NO. 09-1292

VS.  
SEAN D. LOGAN, DIRECTOR  
OHIO DEPARTMENT OF  
NATURAL RESOURCES  
2045 MORSE ROAD  
COLUMBUS, OHIO 43229-6693  
AND  
OHIO DEPARTMENT OF  
NATURAL RESOURCES  
2045 MORSE ROAD  
COLUMBUS, OHIO 43229-6693

Deposition of MICHAEL POST, Relator,  
was taken by the Respondents as on  
cross-examination, pursuant to the Ohio Civil  
Rules of Procedure at Central Service Building,  
220 West Livingston Street, Celina, Ohio 45822, on  
Friday, February 19, 2010, at 1:00 a.m., before  
Terence M. Holmes, Professional Court Reporter,  
and Notary Public within and for the State of  
Ohio.

HOLMES REPORTING & VIDEO  
982 Havensport Drive  
Cincinnati, Ohio 45240  
(513) 342-2088  
(513) 342-1820 Fax  
www.OhioDeposition.com



1 A. Yes, to my knowledge.

2 Q. Do you know of any residential or  
3 industrial land that's within two miles of the  
4 property?

5 A. Like somebody's factory do you mean  
6 or?

7 Q. Yeah, or a housing subdivision or?

8 A. Not to my knowledge.

9 Q. All right. Let's talk about after  
10 the spillway was built, all right. I'd like if  
11 you can take a look at Paragraph 7, and it's at  
12 the bottom of the first page and the top of the  
13 second page. You say as a result of this spillway  
14 replacement and the current management of that  
15 spillway, that your parcels, that these parcels  
16 that your mother owns have flooded every year and  
17 some years they have flooded several times, is  
18 that correct?

19 A. Yes.

20 Q. All right. We haven't gone too far  
21 in 2010. By the way, have the properties flooded  
22 this year?

23 A. No.

24 Q. Do you know whether either property  
25 flooded last year?

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MS. BREWER: Yes?

MR. POST: Yes.

MS. BREWER: Okay. Great.

MR. COLE: Thank you, Mr. Post,  
nice to meet you.

Mike Post  
Mike Post

(At 2:00 p.m., the deposition concluded)

Martha C. Brewer

MARTHA C. BREWER, Attorney At Law  
NOTARY PUBLIC - STATE OF OHIO  
My commission has no expiration date  
Sec. 147.03 R.C.

4/18/10



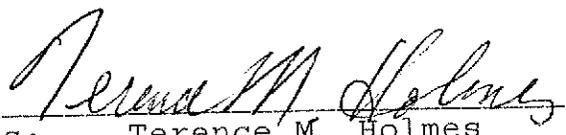
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STATE OF OHIO )  
 ) SS:  
COUNTY OF MERCER )

I, Terence M. Holmes, the undersigned, a duly qualified and commissioned notary public within and for the State of Ohio, do hereby certify that before the giving of his aforesaid deposition, the said MICHAEL POST was by me first duly sworn to depose the truth, the whole truth, and nothing but the truth, that the foregoing is the deposition given at said time and place by said MICHAEL POST; that said deposition was taken in all respects pursuant to agreement and stipulations of counsel hereinbefore set forth; that said deposition was taken by me in stenotype and transcribed into typewriting by me; that I am neither a relative of nor attorney for any of the parties to this cause, nor relative of nor employee or any of their counsel, and have no interest whatever in the result of this action.

IN WITNESS WHEREOF, I have hereunto set my hand at Cincinnati, Ohio, this 7th day of March 4, 2010.



My Commission Expires: Terence M. Holmes  
July 28, 2012 Notary Public - State of Ohio