ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. WAYNE T. DONER, ET AL.,	:	
Relators,	:	
v.	:	Case No.: 2009-1292
SEAN D. LOGAN, DIRECTOR OHIO DEPARTMENT OF NATURAL RESOURCES, ET AL.,	:	Master Commissioner Campbell
Respondents.	:	

RELATORS' MERIT BRIEF IN SUPPORT OF WRIT OF MANDAMUS

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STATEMENT OF THE CASE

Relators, many who have farmed along the Beaver Creek and Wabash River for 30, 40, or even 50+ years, own 91 parcels and over 2,500 acres in Mercer County now subject to recurring floodwaters caused by Respondents' (collectively "ODNR") new 500-foot western spillway ("Spillway") to the Grand Lake St. Marys ("GLSM" or "lake") and new lake-level management practices.

ODNR concedes that by converting its prior 39.4-foot spillway into the new 500-foot Spillway, it substantially increases the discharge of water from the lake, and thus, increases flooding downstream in the number of parcels and acres impacted, frequency, and duration. ODNR concedes that it deliberately elects each year not to draw down the elevation of the lake in the winter in anticipation of snow melt and spring rains, which further increases flooding downstream in parcels and acres impacted, frequency, and duration. In fact, ODNR concedes that 79 of the 91 Relator parcels are subject to floodwaters that would not otherwise occur but for ODNR's new Spillway and lake-level management practices. ODNR also concedes that it knew before constructing the Spillway that it would cause increased flooding. Finally, ODNR concedes that it has already been compelled to take 16 parcels neighboring those of Relators – stretching from properties near the Spillway on the Beaver Creek to properties along the Wabash River at the Indiana State line. Yet, despite all of those admissions, ODNR still refuses to fulfill its public duty and initiate appropriation actions as to Relators' parcels. ODNR knows that it causes devastating flooding on the property of farmers and homeowners downstream of the Spillway, yet it will not respect Relators' constitutional and inviolable rights.

ODNR ignores those cherished rights despite the overwhelming firsthand competent and credible evidence of over 75 farmers and residents of Mercer County who witnessed with their own eyes the increased recurring flooding that would not otherwise have occurred except for the Spillway and ODNR's new lake-level management practices. That testimony of life-long residents and farmers of Mercer County confirms repeated flooding of property since 1997 that never flooded before. And for properties that experienced some flooding prior to 1997, the testimony confirms increased flooding in duration, acreage, frequency, and timing (i.e., flooding after the crops have been planted and after the point where re-planting would be an option). Further, the testimony establishes how the flooding has repeatedly interfered with Relators' use and enjoyment of their property, not just through the inundation of long-standing water, but flooding of farm buildings and homes, massive deposits of debris (everything from silt and sand to hog carcasses and appliances), erosion, and soil compaction. All of this interference substantially impacts the utility of the Relators' property. Yet, in response, ODNR only disparages the farmers as too dumb to understand what they see with their own eyes – more flooding, more frequent flooding, and flooding that lasts longer as a result of ODNR's actions.

More than just damaging to the Relators' livelihood – farming – the flooding has impacted the homes of some of the Relators, like Jason and Emily Hines, a young couple who in 2001, purchased a home in which to raise their children. When the Hines' purchased the home, the property had never flooded. Since then, however, the property has been subject to frequent, severe flooding. As a result, the Hines lost the ability to obtain flood insurance, and as a result, the Hines lost their mortgage. The Hines are stuck with a home they cannot properly insure and that they cannot sell. Yet, ODNR could not care less about the plight of homeowners like the Hines.

Only two factors have changed since 1997: (1) the construction of the 500-foot Spillway, and (2) ODNR's annual decision not to draw down the lake for flood control. As one Relator explains, "We didn't do nothing different. We [are] doing the same thing we've done for years. We didn't change nothing. Only thing changed was the spillway." Finally during this action, ODNR admits its two decisions have increased flooding downstream of the Spillway – it just disputes how much. The Relators know how much; they have observed the flooding with their own eyes. They have observed the Spillway as the lake-levels increase and water rushes out through the Spillway and watch helplessly as the flooding inundates their lands again and again. It does not take an engineering degree to put two and two together: when the water rushes over a 500-foot Spillway (as opposed to a 39.4-foot spillway), a lot of flooding is going to occur downstream. Relators' video and photo evidence confirms this fact.

Tellingly, ODNR has not come forward with any witness with actual, firsthand knowledge of the flooding of the Relators' parcel that refutes the Relators' credible and competent firsthand evidence. Instead, ODNR relies upon an "expert" opinion, an opinion that opinion deliberately ignores the testimony of life-long Mercer County residents and depicted in photos and video of the recurring flooding. In contrast, Reltaors' expert testimony supports reality, as it establishes that the discharge of water from the Spillway has caused frequent and increased severe flooding downstream along the Beaver Creek and Wabash River in Mercer County.

Relators anticipate that ODNR will attempt to dodge its duty by claiming that Relators' claims are time-barred. In doing so, ODNR ignores clear Ohio law regarding the limitations period for real property claims based on repeated flooding. As long as ODNR maintains control of the ability to rectify the situation – which it does, by controlling the Spillway, the ability to

conduct draw downs and the lake generally – the limitations period is tolled until the running of the prescriptive period of 21 years. Despite those indisputable facts, ODNR has not modified the Spillway, has not conducted draw downs and has not taken other steps available to it (like widening the Beaver Creek or creating another outlet for water from the lake). Since ODNR maintains control and has the ability to rectify the situation, the limitations period is tolled, and Relators' claims are timely.

Moreover, applying the 21-year prescriptive period to a takings claim makes sense. It is the only limitations period that does not convert the illegal seizure of private land without just compensation into a vested property right. Since ODNR has not secured such compensation and the prescriptive period has not run, Relators' claims are timely.

Finally, Relators timely filed their claims because they were not a position to ascertain the full extent of the taking until at the earliest, late 2007 or early 2008, ten years after the completion of the Spillway and ten years after ODNR began making repeated decisions to not conduct draw downs. As ODNR's own hydraulics and hydrology "expert" admits, ten years of data is required to ascertain the impact of the Spillway and lake-level management practices on flooding downstream of the lake.

Relators have suffered and continue to suffer ongoing interference with their use and enjoyment of their property. The time has come for ODNR to fulfill its public duty to initiate appropriation actions to compensate Relators for the ongoing taking to the fullest extent, as set forth by the Relators in their affidavits and testimony. Since ODNR will not voluntarily fulfill its duty, the time has come for this Court to compel it to do so, and to do so promptly.

STATEMENT OF FACTS

A. History of Grand Lake St. Marys.

GLSM is a man-made lake which was built between 1837-1845 as a water source for the Miami-Erie Canal. Relators' Presentation of Evidence ("PE") 104, Respondents' Responses to Relators' First Set of Requests for Admission ("Admissions") No. 7. GLSM discharges water from a western spillway into Beaver Creek, which in turn discharges into the Wabash River. Admissions No. 10. There is also a gate at the eastern end of GLSM, but this gate currently has limited discharge capabilities. Admissions No. 12. By the early twentieth century, the lake was primarily used for recreation. *State ex rel. Post v. Speck* (3d Dist. 2006), 2006-Ohio-6339 at ¶ 9. In 1949, the State of Ohio designated GLSM as a state park and placed it under ODNR's authority. Admissions No. 14.

GLSM is 8.2 miles long and has a surface area of approximately 13,500 acres. PE 105, *Post v. Speck*, Judgment Entry of the Common Pleas Court for Mercer County, Dec. 14, 2005 ("*Post* Judgment Entry") at 3. The dam at Grand Lake St. Marys is an earthen embankment. Admissions No. 16. The elevation level of the top of the dam is 877 feet. *Post*, 2006-Ohio-6339 at ¶ 11. Normal pool of the lake is at 870.6 feet. Admissions No. 18. Prior to 1997, the dam had a curved 39.4-foot-long concrete overflow spillway with four 30-inch diameter gated outlet conduits. Admissions No. 19. In 1978, an inspection of the dam revealed that the western spillway could not sustain a probable maximum flood without overtopping for 48 hours, a situation which would result in the eventual failure of the dam. Admissions No. 21. ODNR determined that the spillway needed to be replaced, but ODNR did not have the funding to replace the western spillway until 1990. Admissions No. 22.

B. ODNR Constructs A Replacement Spillway Over Ten Times The Size Of The Old Spillway And Ignores Warnings About Downstream Flooding.

In 1990, ODNR determined that the 39.4-foot spillway at GLSM needed to be replaced with a 500-foot Spillway to pass the probable maximum flood test. Admissions No. 23. From the outset of the Spillway replacement project, federal and local agencies as well as numerous landowners expressed concern that the replacement project would result in greater flooding downstream. Admissions No. 24; *see, e.g.,* PE 103, Rels.' Request for Admissions ("Rel. Requests") at Exs. A-I; Admissions Nos. 63-65, 67-72.) Mercer County officials, including the Mercer County Engineer, an expert in hydraulics, expressed concern that ODNR's replacement Spillway would result in greater flooding downstream and would "cause more damage than good." PE 100, Aff. of Keith Earley at ¶ 4, 6 & Ex. 1; JE 126, Dep. Earley at 19, 38-39, 45, 72. Based on a review of information supplied by ODNR and the Army Corps of Engineers, Mr. Earley believed that the new Spillway, without any remedial measures such as lake draw downs or a widening of the upper three miles of the Beaver Creek, would cause deeper and more extensive flooding. Aff. Earley at ¶ 4, 6 & Ex. 1; Dep. Earley at 45, 72. Mr. Earley *repeatedly* shared his concerns ODNR officials, to no avail. Id. at ¶ 5, 12 & Exs. 1-6; Dep. Earley at 31.

Some landowners also suggested that ODNR divert a portion of the runoff to the St. Marys River though the east gate to more closely model the flow conditions prior to the construction of the lake. Admissions No. 25. ODNR rejected the landowners' suggestion. *Post*, 2006-Ohio-6339 at ¶ 13, 15. From the time it obtained control of GLSM in 1945, ODNR has used the western Spillway as the outlet for virtually all water flow out of the lake. Admissions No. 27. In 1987-88, ODNR modified the eastern outlet with a structure that had no flood management capacity. PE 111, *Case Leasing & Rental, Inc. v. ODNR*, Case No. 2005-08034, Stipulations at ¶ 11-12.

ODNR was also concerned with flooding on the south shore of GLSM during periods of high lake levels, and concluded that the new, larger Spillway would relieve some of that flooding. Admissions No. 29; *Post*, 2006-Ohio-6339 at ¶ 16.

ODNR approved the design for, and directed and oversaw the construction of the replacement Spillway. Admissions No. 31. ODNR began construction of the new Spillway in 1996 and completed construction by 1997. Admissions No. 32. The proposed new Spillway permanently established a four-inch increase in the normal pool elevation of GLSM in order to ensure the lake was high enough for the boaters. *Post*, 2006-Ohio-6339 at ¶ 19; PE 69, Dep. of Glenn Cobb at 35-36[1]; Dep. Earley at 42-43. Ultimately, the chosen Spillway design primarily served the recreational users of the lake (i.e., a design that maintains a constant lake level and prevents flooding on the south side). Aff. Earley ¶ 12; Dep. Earley at 49-50 (explaining "[T]here was significant economic benefit to having the recreational use of the lake . . . . to do that, they needed to maintain lake levels near the spillway to have it be satisfactory for recreation. And the higher you keep the lake, the less flood-control ability it has.")

ODNR knew, however, that this design would result in increased discharge from the Spillway and that the duration of flooding would increase. *See, e.g.,* Dep. Earley at 39 (noting that ODNR's own calculations showed "much greater" peak outflows); Rel. Requests No. 64 & Ex. B (acknowledging "that there will be additional flows in the channel due to the enlarged spillway); Admissions No. 65 & Ex. C (acknowledging "the duration of out of bank flows would significantly increase" from approximately 30 hours to 110 hours and that "agricultural land could be affected by loss of crop but also may not justify expense of channel enlargement"); *Case Leasing & Rental, Inc. v. ODNR* (10th Dist. 2009), No. 09AP-498, 2009-Ohio-6573, ¶ 51

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[1] Glen Cobb served as the Manager at GLSM between October 1991 and December 1999 and participated in ODNR's lake draw down policies. Dep. Glen Cobb at 27.

("Despite knowledge that the replacement spillway would result in more frequent and more severe flooding to downstream landowners, ODNR rejected alternative plans and proceeded with construction.").

C. ODNR Ceases Annual Draw Downs Of The Lake.

Prior to the building of the replacement Spillway, ODNR, having such responsibilities for regulating the lake, regulated the lake on an annual basis by periodically lowering lake levels. Admissions Nos. 34 & 48; Dep. Cobb at 37-38; Dep. Earley at 50-51; Dep. Caris at 40, 51. Indeed, prior to 1997, ODNR, at least annually, chose to draw down the lake level for GLSM one foot in the fall and winter months for flood control. Dep. Cobb at 37-38. These draw downs were intended to minimize the frequency and severity of flooding that the lake could otherwise cause to landowners west of the Spillway. *Case Leasing & Rental, Inc. v. ODNR (*Cl. Cl. 2008), 2008-Ohio 3411, at ¶ 23; Dep. Cobb at 38-39; Dep. Caris at 23, 28; JE 70, Dep. Gary Harsayne at 76.

Subsequent to the building of the Spillway, ODNR has not opened outlets on the lake to manage lake levels. Admissions No. 49; Dep. Cobb at 36, 40-41; JE 72, Dep. Craig Morton at 22-23. 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 St. Marys by releasing water into Beaver Creek. Admissions No. 34; Dep. Morton at 22-23. Since 1997, ODNR has not opened the 60-inch diameter outlets for management of lake levels. Admissions No. 36; Dep. Cobb at 41, 43-44; Dep. Caris at 40, 51; Dep. Morton at 22-23. These 60" diameter outlets, however, are capable of being opened; the decision whether to open those outlets, rests with ODNR and is a decision ODNR makes at least once each year. Admissions No. 50; Dep. Cobb at 41-44; Dep. Caris at 38-39, 51; Dep. Morton at 22-23, 46-47. In addition to the ability to conduct seasonal draw downs using these outlets, ODNR has the ability to draw down the lake in advance of

anticipated storm events. Dep. Cobb at 65-66, 104; Dep. Caris at 55; Dep. Morton at 22-23. ODNR's decisions not to conduct draw downs at GLSM is atypical of its management practices of other Ohio lakes, where draw downs *do* occur annually, often for flood control purposes. Dep. Caris at 56-57; Morton Dep. at 54-56 & Ex. 3. ODNR's decisions to not conduct draw downs, however, is consistent with the interests of boaters and recreational users of the lake, a constituency to whom ODNR is responsive. Dep. Harsayne at 55; Morton at 52.

D. Relators' Lands Flood Like They Have Never Flooded Before With The Flooding Increasing In Frequency, Extent, And Duration.

Since ODNR redesigned the Spillway and changed its lake level management practices, Relators have experienced, and continue to experience, increased flooding to their lands, in terms of extent, frequency, and duration. The increased flooding has impacted over 2,500 acres of Relators' lands. PE 128, Aff. Martha Brewer at ¶ 2 & Ex. A. Relators have experienced flooding on multiple occasions since 1997 that would not have otherwise occurred at all or to the same extent, including in 2003, 2005, 2008, 2009 and 2010. *See generally* JEs 1-67 & PEs 1-97, Relators' Affs. & Deps., respectively; Brewer Aff. and Exs. The flooding has interfered with Relators' use and enjoyment of their property by causing erosion, soil compaction, the deposit of silt, sand, stones, and other debris, drainage tile failure, crop losses, the destruction of trees, bushes, shrubs, vines and saplings, the destruction of homes and buildings, and livestock losses. Aff. Brewer at ¶ 2 & Ex. A; PE 122, *ODNR v. Richard L. Baucher, et al*, Mercer Co. Court Com. Pl., Ex. to Dep. of James A. Garrett, ARA, ASA, 11/9/09 ("Dep. Garrett Ex."), Ex. A at 62 (ODNR's appraiser acknowledging increased flooding from the Spillway, which has increased the risk of erosion and "has increased the risk of crop loss due to potential flooding during the crop-growing season and potential erosion during a flood at any time of the year."). Additionally, the increased frequency of flooding has changed the Relators'

expectations as to how often they are going to be flooded, which impacts their economic situations. J.E. 80, Dep. James Moir at 203-04 (explaining the effect of the increased flooding and noting that a farmer may expect to be flooded once every five years and still be profitable, but if the flooding increases in frequency to every other year, the farmer "can't make money at that. That's a change of his economic situation.").

As a result of the interference, the value of Relators' property has decreased significantly, a fact ODNR's accredited rural appraiser, James A. Garrett, concedes. Dep. Garrett Ex. A at 62 ("The increased risk of flooding decreases the desirability of the flood easement area . . .); *see also* id. Ex. A at 1, 2, 73; Dep. Garrett Ex. B at 2, 78, 134. In fact, Mr. Garrett recognizes that over time, the impact of the flooding continues to cause property values to decline. *Compare* id. Ex. A at 1, 2, 73 (concluding in 2005 that ODNR's flood easement devalued a *Post* Relators' property by 35%) *with* Dep. Garrett Ex. B at 2, 78, 134 (concluding in 2009, the flood easement devalued the same property by 40%).

The evidence before this Court includes the testimony of over 75 landowners and their fact witnesses – many of whom have lived and farmed in the area for 30, 40, and even 50 years – who have testified through the Spillway and new lake-level management practices, ODNR has caused flooding that would not otherwise occur. *See generally* PE 123, Jane Gaines Aff. & Exs.; Aff. Brewer at ¶ 2-4 & Exs. A-C.).

This firsthand evidence includes the testimony of farmers like Vietnam veteran, Wayne Doner and his wife, Janet, who have lived and farmed in Mercer County for decades. JE 8, Dep. of Wayne T. Doner at 7. In fact, Mr. Doner has been farming some of the same land for over 50 years. PE 2, Aff. of Wayne T. Doner at ¶ 3. The Doners' property borders the Wabash River and the Beaver Creek (the confluence of the two is located on their property). Id. at ¶ 4. Since

ODNR's replacement of the Spillway and its current management practices, the Doners have suffered repeated, frequent, devastating flooding. Id. at ¶ 5-6. Their lands flood multiple times each year and remain flooded for longer periods of time. Id. at 6-7. Indeed, portions of their property, which the Doners farmed for decades, now remain inundated with water for months (and in some years, remain wet all year long) and as a result are no longer farmable. Dep. W. Doner at p. 13-14. The Doners have even observed Canadian Geese in their flooded fields, most recently in May 2009. Dep. W. Doner at 54. Yet again in March 2010, the Doners' use and enjoyment of their properties was interfered with by flooding that would not have occurred but for the Spillway and ODNR's lake-level management practices. PE 4, Second Sup. Aff. of Wayne T. Doner ("Aff. W. Doner III") at ¶ 4, 11 & Ex. 1-4. The Doners took photographs and video during the May 2009 and March 2010 flooding, which documents the obvious: when GLSM overtops the Spillway, their property floods. Aff. W. Doner III at Ex. 1-4.

The flooding has interfered with the Doners' use and enjoyment of their property in the form of frequent long-lasting flooding, indefinite loss of tillable acres, loss of crops, field and bank erosion, delayed planting, the deposit of silt, sand, stones, and other debris, drainage tile failure, soil compaction, and the destruction of foiliage. Aff. Brewer ¶ 2, Ex. A. The trash and debris are so extensive that some remain on the property even today despite the Doners' clean-up efforts. JE 6, Dep. of Janet K. Doner at 22-23. During one flood event, the Doners found seven hog carcasses amongst the debris left on their property. Dep. W. Doner at 55. The floodwaters have also left behind large deposits of sand and gravel that is "is so deep and so loose that we can't drive a tractor through it or a truck through it, let alone try to farm it," making that area unfarmable. Dep. W. Doner at 50-52; *see also* Dep. J. Doner at 38.

The flooding is affecting more than farmers and farmland. Homeowners Jason and Emily Hines have been devastated by the flooding. Mr. and Mrs. Hines have owned a house on 1.245 acres in Mercer County since 2001, which, at the time of purchase, never flooded before. PE 28, Aff. of Jason E. Hines ¶ 2-3, 8-9; PE 26, Aff. of Emily A. Hines at ¶ 2-3, 8-9. Since then, the property has flooded at least every other year, and at times, more than once per year. Aff J. Hines at ¶ 6; Aff. E. Hines at ¶ 6. Indeed, belatedly, ODNR acknowledges that prior to the redesign of the Spillway, the Hines' property was not in the floodplain for a 100-year rainfall event, but now because of ODNR's actions, the property falls within that floodplain. (Resps.' Evid. Tab A, Ex. A, at March, 2010 Modeling, at Discussion & Report at Table 7.)

In 2003, floodwaters completely surrounded the Hines' home, and Ms. Hines and her children were forced to abandon the home. Aff J. Hines at ¶ 9, 11; Aff. E. Hines at ¶ 9, 11; PE 29, Sup. Aff. of Jason E. Hines. at ¶ 3 & Ex. 1; PE 27, Sup. Aff. of Emily A. Hines at ¶ 3 & Ex. 1. Mr. Hines remained at the house in an effort to rescue the home from the floodwaters. Aff J. Hines at ¶ 11; Aff. E. Hines at ¶ 11; Supp. Aff. J. Hines at ¶ 3 & Ex. 1; Supp. Aff. E. Hines at ¶ 3 & Ex. 1. The Hines also suffered severe flooding again in 2005 and 2008, and in 2005, Mrs. Hines and her children again forced to abandon their home. Aff J. Hines at ¶ 10-12; Aff. E. Hines at ¶ 10-12. In addition to the water damage, the Hines are now no longer able to obtain flood insurance on the property, and because they cannot obtain flood insurance, they lost their mortgage. Aff J. Hines at ¶ 13; Aff. E. Hines at ¶ 13. The Hines are stuck; without the ability to obtain flood insurance or a mortgage, the Hines cannot and will not be able to sell their property. Aff J. Hines at ¶ 13; Hines Aff. at ¶ 13. Similar to the Hines, ODNR's floodwaters have surrounded Carman and Jill Ellis's home on at least four occasions, though, prior to 1997, it had never flooded. PE 13, Aff. Carman R. Ellis at ¶ 5-6; PE 14, Aff. Jill Ellis at ¶ 5-6.

Relators Robert and Patricia Highley, long-time residents and farmers in Mercer County, have experienced increased flooding from the Spillway. Robert Highley is 79 years old and has lived and farmed his entire life in Mercer County. JE 18, Dep. of Robert E. Highley at 5-6, 44. Mr. Highley, along with his wife Patricia, own three farms and lease additional farmland that lies adjacent to Beaver Creek or the Wabash River. Id. at 9, 15, 22, 28, 30, 37. Since 1997, he has experienced more frequent and more extensive flooding. Id. at 7, 12. Mr. Highley estimates that his properties ("and everybody else's on all sides of [his] too") flood every year, and often floods as many as three times per year. Id. at 14-15. "[W]e've had so damn many floods, I'm sick of it." Id. at 14. Mr. Highley blames the increased flooding on the Spillway and ODNR's refusal to conduct draw downs: "[T]hey keep the . . . lake too high up there and they don't get it down in the winter time so that . . . it's got some room for water in the spring . . . ." Id. at 33.

Similarly, Relators Tom and Brenda Powell have also suffered increased severe flooding. The Powells have lived in Mercer County their entire lives. JE 35, Dep. of Brenda S. Powell at 11; JE 39, Dep. of Thomas L. Powell at 36. Mr. and Mrs. Powell own a farm that is located approximately one-quarter to one-half mile south of the Wabash River. Dep. B. Powell at 13; Dep. T. Powell at 18; PE 67, Aff. of Thomas L. Powell at ¶ 3-4. Flooding is now "happen[ing] all the time." Dep. B. Powell at 26.

> . . . seems like since the spillway went in . . . it's such a bigger spillway than what the old spillway was, and then it seems like it release[s] a whole lot more water . . . instead of the little part that's normally supposed to go over, it goes over the whole [horseshoe]. All the way around it will spill over. . . . you can see fish being thrown over the dam, and it never used to be that way.

Id. at 26-27. Now with the new Spillway, "if that lake is full and we get an inch or two of rain we are gonna have water down on us." Dep. T. Powell at 35. Indeed, the Spillway caused

flooding of the Powells' property as recently as March 2010. PE 65, Aff. Brenda S. Powell at ¶ 6-9 & Exs. 1-2.

Ms. Powell explained that the duration of the flooding has increased and can last for weeks now as opposed to a couple of days. Dep. B. Powell at 22; Aff. B. Powell at ¶ 6. With the increased duration, the Powells face new problems:

> . . . the problems we had are when it's so bad that I can't hang the clothes on the line because the stench is so bad from the rotting vegetation of the plants that are up trying to grow and the water comes over and buries them and then they just kind of boil, 'cause it's so hot and the water is there and it cooks the plants and it smells terrible, and you put your clothes on the line and you bring 'em in not thinking and they smell like swamp.

Ms. Powell, like many Relators, now realizes the redesigned Spillway and ODNR's new lake-level management practices have resulted in this increased flooding. She explained that when she was a child, the south side of the lake flooded and the west side did not, but now, the south side does not flood, leading to the obvious conclusion, "something has changed." Id. at 27. Ms. Powell, like many Relators, fear ODNR has chosen the lake residents with their "expensive several hundred thousand dollar homes" and recreationalists over the farmers and Mercer County residents west of the Spillway. Id. at 27.

Like the others, Relator Darrell Kuhn has experienced the devastating flood waters. Mr. Kuhn has farmed in Mercer County for over forty years. JE 24, Dep. of Darrell D. Kuhn at 5, 35. Mr. Kuhn has farmed an 88-acre parcel along Beaver Creek since about 1965. Dep. Kuhn 5-6, 7, 12. In 2003, approximately ¾ of his parcel flooded up to a depth of six to seven feet, and remained on the property for two months. Id. at 7-8, 17-18. Prior to 1997, only the "low-ground swales," about 4 to 5 acres of the property, flooded "occasionally." Id. at 12-13. Prior to 1997, the depth of the water would reach one to two feet and remain on the property up to one week. Id. at 14. Prior to 1997, Mr. Kuhn never reported crop loss to any federal or state agency, Id. at

14, and never carried crop insurance because only four to five acres flooded, Id. at 15. Now the property floods every year (and most years, it floods two to four times), and most recently flooded in 2009 and 2010. Id. at 15-16; PE 44, Second Sup. Aff. of Darrell D. Kuhn ("Aff. Kuhn III") at ¶ 8-12. In 2009, 40 to 45 acres flooded to a depth of three to four feet, and remained on the property for three weeks or more. Id. at 15-16. In 2010, the flooding occurred after the Grand Lake St. Marys area received approximately only 1 ½ inches of rain; that was all it took for the western Spillway to cause the Beaver Creek to overtop its banks. Aff. Kuhn III at ¶ 12.

The flooding has resulted in the deposit of large logs, refrigerators, tires, doors, windows, fire wood, and trash. Id. at 18-20. Even worse, "[t]he trash and stuff will be a foot deep or better, and . . . it's just mud, you can't work it, you can't do anything with it. It gets that way every time it floods." Id. at 20, Errata sheet. The flooding has also caused crop losses, ranging from total losses to reduced yields. Id. at 21. And "[e]very time it floods [the crop yields are] lower." Id. at 23. On his mother's property, the yield has dropped from 220 to 240 bushels per acre to less than 100 bushels per acre in some years. Id. at 35-36.

Relators Chad and Andrea Knapke have also experienced increased flooding. The Knapkes have lived in Mercer County their entire lives and own 81 acres along the Wabash River which Mr. Knapke farms. JE 20, Dep. of Andrea M. Knapke at 6, 9, 38; JE 21, Dep. of Chad M. Knapke at 10, 34. Prior to the new Spillway, the property experienced minor ponding on a "very minute" number of acres, but never experienced flooding to the extent the property does now. Dep. A. Knapke at 12-14; Dep. C. Knapke at 12-13. "[I]f you'd compare it to now, now it's like a big lake when it floods as opposed to, like, water puddle out in the middle of the field." Dep. A. Knapke at 13. Indeed, in 2003 and 2005, the Knapke's entire farm was under water, in 2008, approximately one-quarter of the farm flooded, and in 2007 and 2009 the farm

also experienced significant flooding. Id. at 15-18; Dep. C. Knapke at 14-18. And now, the water will stand for one to two weeks on the property. Dep. C. Knapke at 15-18. As a result of the flooding, in 2008, there was three feet of debris and trash on the property which the Knapkes had to clean up before they could plant their crops. Id. at 14. The debris ranges from pop machines, to tires, to driftwood; "you name it as far as debris out there." Id. at 19.

On more than one flooding, Mr. and Ms. Knapke could only access their home by boat. Dep. A. Knapke at 17-18; Dep. C. Knapke at 15, 17. And now, during the floods, the blowing wind actually creates "white caps" measuring one to two feet on the surface of the flood waters. Id. at 37. The flooding has been severe enough that the Knapkes saw someone riding a jet ski on the adjacent property that belongs to Relator Tim Knapke. Id. at 30, 38. Ultimately, the Knapkes moved from this property as a result of the flooding. Dep. A. Knapke at 36.

Mark Siefring owns and farms several parcels in Mercer County that have been flooded by ODNR. JE 53, Dep. of Mark A. Siefring at 11-13, 17, 19, 32-33. Mark has lived in the area his entire life. Id. at 84. He testified that prior to 1997, any flooding was "minimal" and not a "problem." Id. at 6-8. After the Spillway was constructed, things changed: "prior to that, whenever the [B]eaver did flood . . . the land that was flooded was very small, but after 1997 it become a lot bigger issue because we had so much more land flooded . . . ." Dep. M. Siefring at 9. Mr. Siefring has even observed two tributaries of Beaver Creek, the Baker Menchhofer and the Kittle Ditch, "bounce back" and actually flow backwards and flood properties along the tributaries. Id. at 184. Mr. Siefring blames the increased flooding on the new Spillway:

> [S]ince the new spillway has been put in, we have continuously encountered severe flooding. At more times the water has been deeper. We have had more problems with flood trash. . . .[W]e[ ] have had anything from garbage cans to dead fish to 5 gallon buckets, trees, logs end up in our field, and because of the high water we're left to clean this all up, and it's happened on numerous occasions which it never did prior to 1997.

Id. at 142. He explained that while ODNR increased the size of the Spillway, it

> never increased the size of where the water flows through. . . . [I]f you pour a 10 gallon bucket of . . .water [in a] 5 gallon bucket it's gonna overflow and that's basically what they did. And we have trusted the engineers when they develop[ed] this knew what they were doing, but obviously down the road they had no clue what was going on.

Id. at 143.

Undoubtedly, Respondents will attempt to paint Relators as money-hungry opportunists. Nothing could be further from the truth. Relators believed ODNR would act like a responsible governmental-actor should, do the right thing, and fix the problem. And they still want that today:

> I'd like to fix it so they quit flooding us all the time. Nothing has changed accept the new spillway since 1997, but we get flooded horribly more times. It's just horrible amount of flooding. Just fix the mess. **We didn't do nothing different. We [are] doing the same thing we've done for years. We didn't change nothing. Only thing that changed was the spillway**.

Dep. D. Kuhn 37 (emphasis added). Unfortunately, Relators have no reason to believe that ODNR will ever change the spillway or ODNR's management practices. ODNR wants a continuous flood easement across their properties without having to pay a single dollar.

E. Experts Agree That Increased Flooding Has And Continues To Occur And That Such Flooding Is The Result Of ODNR's Actions.

Relators' expert, Pressley L. Campbell, Ph.D., PE, evaluated the impact of the replacement Spillway and concluded that the Spillway "repeatedly caused frequent and severe flooding in the Beaver Creek, the Wabash-Mercer County and the properties in the vicinity of those two waterways" and that such flooding would not have occurred under the former spillway. P.E. 99, Aff. of Pressley L. Campbell, 9/29/09 ("Aff. Campbell I") at ¶ 8. Based on historical precipitation and water elevation data, and surveying records from the July 2003 storm event, Dr. Campbell calculated that had the 500-foot spillway been constructed in 1927, fifteen

storm events between 1927 and 2006 would have resulted in flow that exceeds the capacity of Beaver Creek and the Wabash River, for an average of approximately once every five years. Id. at ¶¶ 5, 14 & Ex. B. Conversely, with the 39.4-foot spillway in place and the lake-level management practices ODNR employed prior to 1997, only one storm event would have caused the discharge to overflow the banks of the Beaver Creek and Wabash River. Id. at ¶ 14 & Ex. B.

Dr. Campbell also studied historic lake elevation data between 1927 and 2006. Id. at ¶ 15 & Ex. C. Between 1997 and 2006, a time period during which ODNR chose not to manage lake levels, 73.3 percent of the daily lake level measurements taken reflect lake elevations above 870.6 feet MSL (Mean Sea Level), the elevation at which water overflows the spillway and enters Beaver Creek. Id. at ¶ 15.a & Ex. C. On the contrary, between 1927 and 1997, the lake elevation was above 870.6 feet on only 21.4 percent of the measurements. Id. at ¶ 15.a & Ex. C. Similarly, since 1997, 26.3 percent of the daily lake level measurements reflect lake elevations above 871.5 feet MSL, the elevation at which water overflows the entire 500-foot length of the spillway. Id. at ¶ 15.b & Ex. C. Whereas before 1997, the lake elevation was above 871.5 feet on only 2.4 percent of the measurements. Id. at ¶ 15.b & Ex. C. This difference in lake elevations is critical because "[i]f the lake is at or above that elevation when a storm event occurs, the storm is more likely to cause flooding outside the banks of Beaver Creek and the Wabash [River] regardless of the severity of the events; and the higher the lake elevation at the onset of the storm event, the more extensive the flood impact." Id. at ¶ 16.

Dr. Campbell determined that the replacement spillway "discharges a substantially larger quantity of water into the Beaver Creek and Wabash [Rivers] . . ." and that the discharging water "has the potential to be moving at high velocities and can overflow the banks at a significant depth." Id. at ¶¶ 18-19. *See also* PE 124, Aff. Campbell, May 20, 2010 (Aff. Campbell II), ¶ 3

& Ex. B-1 at 7 ("For any given lake level, the 500-foot spillway results in a larger discharge (flow) than the 39.4 foot spillway. This results in a corresponding increase in depth and velocity in Beaver Creek and increased potential for damage injury and loss of life."). Dr. Campbell also observed that the records of the one available flow gage in Linn Grove, Indiana which records the daily mean discharges of the Wabash River for October 1964 to the present offers further evidence of increased discharge from the Spillway. Aff. Campbell II, at ¶ 3, Ex. B-2 at 5, & Figures 1-2; JE 76, Dep. Pressley Campbell at 112-13, 141; PE 125, Aff. James Moir at ¶ 6(h)(4)(ii) & Ex. E. The three highest discharges recorded by the Linn Grove station were recorded after 1997, and four of the six highest measurements have occurred since 1997. Id. Dr. Campbell concluded that spillway and ODNR's management practices cause frequent and severe flooding of downstream property owners. Aff. Campbell I at ¶ 17-20, 25, 27.

The Executive Director of the United States Department of Agriculture for the Adams County[2] Indiana Farm Service Agency ("Adams County FSA") has also studied the new spillway and its flooding effects. PE 101, Aff. of Jay H. Gould at ¶ 1, 7. From on his studies, Mr. Gould concluded that the:

> ... five hundred feet of horizontal spillway invites the uncontrolled dispatch of the extra water. This water is unable to be maintained in the Beaver Creek .... At this point, not only is erosion occurring in the streambed, the speeding water seeks additional space in which to move, and the logical place to go is into adjoining farmland and woodland where crop and access losses are severe. **The Grand Lake – St. Mary's Lake has been one of the historic examples of one action causing another; of one group of people acting without regard for the people directly impacted by their actions.**

Id. at ¶ 8, 9 & Ex. 1 (emphasis added).

ODNR's expert, Doyle Hartman agrees that the new spillway causes more discharge and increased flooding. Hartman's modeling depicted a three-foot increase in flooding at the

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[2] Adams County is immediately to the west of Mercer County.

spillway and increased flooding within the first six miles downstream of the spillway. *Post*, 2006-Ohio-6339, at ¶ 39; PE 108, *Post v. ODNR,* Ct. Com. Pl., Trial Transcript, February 24 and 25, 2005 ("Trial Tr. 2/24/05") at 295, 310. He acknowledged that the discharge rate for the new spillway was higher and that "if the lake's normal pool is at its maximum point, then any rainfall will result in flooding along the first several miles of Beaver Creek." Id. at ¶ 41; *see also* Trial Tr. 2/24/05 at 296-97, 309-10. Mr. Hartman also acknowledged an increase in depth of flooding and duration of flooding as a result of the new spillway. Id.; *see also* Trial Tr. 2/24/05 at 298-99. Finally, he concedes that the new Spillway will always discharge a greater volume of water than ODNR's previous 39.4 foot spillway. Id. at ¶ 41; *see also* Trial Tr. 2/24/05 at 296-97; 309-10.

Admissions of ODNR representatives confirm the position of Relators' experts. Mark Ogden, for instance, was involved during the designing of the Spillway and designed a notch in the Spillway to purportedly handle a ten-year precipitation event. Id. at ¶ 43; Trial Tr. 2/24/05 at 331. That notch, however, could only have been designed for an event that occurs when the soil is dry and lake elevation is low, i.e., less run off in the lake, and thus, less discharge of water from Spillway. *See* Trial Tr. 2/24/05 at 193; PE 109, *Post v. ODNR,* Ct. Com. Pl., Plaintiff's Trial Exhibits at Ex. 11; Tab. 111, Case Leasing Stipulations at No. 25 (noting the Beaver Creek will overtop its banks at 500 cfs of discharge from the Spillway); Resps. Evid. Tab A, Ex. A, at Apr. 29, 2010 Modeling, at Technical Report at Table 2-5 on pg. 2.8 (establishing that under even "average conditions", the Spillway will discharge 650 cfs, and thus, easily cause the overtopping of Beaver Creek's for a 10-year event). Indeed, Mr. Ogden admitted that in analyzing the impact of increased discharge, he "did not consider seasonal differences." *Post*, 2006-Ohio-6339 at ¶ 44.

Michelle Hoffer, the assistant to the director of special projects at ODNR, also corroborates Relators' experts. Id. at ¶ 47. Ms. Hoffer admits that ODNR knew before completion of the Spillway that it would increase the duration of flooding downstream. Id. *See also* Trial Tr. 2/24/05 at 193, 196, 198; Tab 109, Pl. Tr. Exs. at Ex. 11.

Instead of rebutting <u>any</u> of the Relators' firsthand evidence of flooding, ODNR offers to this Court various iterations of flawed "modeling" of "hypothetical rain events" and of the July, 2003 flood event – all of which conveniently and significantly downplay the magnitude of the surface water ODNR casts downstream of the Spillway. *See generally* Aff. Moir; PE 129, Aff. James R. Moir ("Supp. Aff. Moir".)[3] Specifically, the modeling prepared by Stantec Consulting Services, Inc. ("Stantec") "present[s] an inaccurate description of the state of flooding along Beaver Creek and the relevant portions of the Wabash River downstream of the confluence with Beaver Creek to the state line." Aff. Moir at ¶ 3. Mr. Moir criticizes Stantec's modeling because Stantec failed to calibrate its modeling with the most relevant measured data, failed to account for antecedent soil moisture conditions,[4] failed to account for initial lake water elevations, failed to consider tributaries and the backwater effect of such tributaries, failed to include a sufficient number of cross sections. Id. at ¶ 4-5. As a result of these flaws, the modeling greatly underestimates discharge from GLSM and "presents results that consistently underestimate the extent of flooding that may occur . . . ." Id. at ¶ 5-6; Dep. Moir at 216 (Stantec underestimated size of floodplain).

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[3] Rather than accept reality, ODNR has engaged in serial hypothetical "modeling" and "mapping" -- all that has turned out fundamentally flawed.

[4] Moir notes that for the July 2003 flood, the Stantec modeling fails to account for antecedent soil moisture conditions and thus underestimates the amount of runoff into the Lake, and thus, extent of flooding caused by the Spillway. JE 80, Dep. James Moir at 72-75, 107.

Caught with a fundamentally flawed hydrology and hydraulic modeling, Stantec revised its hydraulic modeling, claiming that it incorporated a few recommendations made by Moir. *See generally* Resp. Evid., Tab A, Ex. B ("Henson Mem."). However, what Stantec really did amounts to obfuscation and an abandonment of basic engineering principles. While Stantec claims they have prepared "a model that, as accurately as possible, quantifies the impacts of the 1997 spillway modification" (Henson Mem. at 1), Mr. Moir points out that a "truly accurate model" would: 1) be calibrated; 2) match recorded lake-levels (i.e., Stantec's lake-levels were too low); 3) match flood profiles (hydrographs) at the one available flow gage in Linn Grove, Indiana (which Stantec did not do); 4) include sensitivities run on wet antecedent soil moisture conditions and elevated antecedent lake levels (i.e., Stantec ran its modeling under conditions of average soil moisture (Henson Mem. dated May 26, 2010 at 4) and for the 100-year event,[5] with the lake level at a winter draw down level, *see* Plate 40 to Henson Mem.); 5) run the sensitivities to wet conditions on various return period events, such as the 2-year, 5-year, 10-year, 25-year, 50-year and 100-year return period events; 6) use a computer program which allows an accurate depiction of the complex overbank areas of Beaver Creek and the relevant portion of the Wabash River; and 7) use a 2-D hydraulic model. Supp. Aff. Moir at ¶ 6(i). Mr. Moir concluded: "The Stantec hydrologic model does not match measured lake water levels and therefore **can not be relied on**." Id. at ¶ 6(i) (emphasis added). He also noted that Stantec's modeling underestimates the discharge over the new Spillway by 77%, and with that underestimation, Stantec's HEC-RAS model "**is meaningless**." Id. at ¶ 4(d)(v) (emphasis added).

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[5] "The term 100-year flood is misleading. It is not the flood that will occur once every 100 years. Rather, it is the flood elevation that has a 1-percent chance of being equaled or exceeded each year. Thus, the 100-year flood could occur more than once in a relatively short period of time." Aff. Campbell II at ¶ 3 & Ex. B-1 at 5.

Even ODNR's flawed modeling establishes that ODNR physically interferes with most of the Relators' parcels and causes flooding that would not otherwise occur, but for ODNR's redesigned Spillway and ODNR's new lake level management. In particular, ODNR's own modeling (which, as explained above, underestimates the extent of the flooding) concedes that 79 parcels owned by Relators are "impacted" by increased duration of flooding and includes some parcels which never flooded prior to 1997. JE Tab 79, Dep. Henson, at 30-43, 81-83, & Ex. H at Discussion Report, at Tables 1, 2, 4, 5, 7 and Appendix A) & Ex. L; Resps. Evid., Tab A, at Ex. B, May 26, 2010 Modeling, at Discussion Report, at Tables 1, 2, 4, 5 and 7 and Appendix A; *see also* Aff. Brewer at ¶ 4, Ex. C. ODNR's own modeling also shows that 35 parcels owned by Relators are "impacted" by additional acres being flooded. Dep. Henson, at 30-43, 81-83, & Ex. H at Discussion Report, at Tables 1, 4, 7 and Appendix A) & Ex. L; Resps. Evid., Tab A, at Ex. B, May 26, 2010 Modeling, at Discussion Report, at Tables 1, 4 and 7 and Appendix A ; *see also* Aff. Brewer at ¶ 4-5 & Exs. C & D. ODNR's modeling shows that the discharge from the Spillway flows at a greater rate (390 cubic feet per second) during a <u>five-year event</u> in comparison to the discharge from the old 39.4 foot spillway (345 cubic feet per second) for <u>a one hundred year event</u>, which floods Relators' property more frequently. Resps. Evid., Tab A, Ex. A, April 29, 2010 Modeling, at Technical Report, at Table 2-5 on pg. 2.8. As the modeling demonstrates, ODNR is creating one hundred year flood events on a regular basis.

F. <u>Two Courts Have Already Held That ODNR Is Causing Increased Flooding, But ODNR Refuses To Take Responsibility For Its Actions.</u>

In 2001, five landowners of seven parcels adjacent to the Beaver Creek and nine parcels west of the confluence of the Beaver Creek and Wabash River 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. Admissions No. 40; JE 116-120, *Petitions to Appropriate*; Dep. Henson, at 97-98;

JE 78, Dep. DeGroot, at Ex. E. The landowners alleged ODNR had effected a taking of their property and sought a writ of mandamus compelling ODNR to initiate appropriation proceedings. Admissions No. 41. The landowners based their taking claims on the severe flooding to their property as a result of the redesign of the west Spillway of GLSM and ODNR's improper management of lake water levels. Admissions No. 42.

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* Judgment Entry at 10. Based on that finding, the trial court granted the writ of mandamus compelling ODNR to institute appropriation proceedings. Admissions No. 43. The Sixth District Court of Appeals, sitting by designation, affirmed the decision of the trial court holding that ODNR's flooding constituted a taking. *Post*, 2006-Ohio-6339 at ¶ 56, 76.

In 2005, another landowner and business owner filed suit against ODNR in the Court of Claims for ODNR's flooding of its property. *See generally Case Leasing*, 2008-Ohio-3411. While the Court of Claims acknowledged the utility of ODNR's safety objective in redesigning the Spillway, when "balanced against the gravity of the foreseeable and avoidable harm caused," the Court of Claims concluded "that the manner in which ODNR implemented its objective was unreasonable and negligent." *Case Leasing*, 2008-Ohio-3411 at ¶ 26. Specifically, the Court of Claims 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.

Further, the Court of Claims 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 of Claims granted judgment

against ODNR, 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 severe flooding to downstream landowners. Therefore, its design choice and subsequent lake level management were unreasonable." Id. at ¶ 28. The Ohio Tenth District Court of Appeals affirmed the findings of the Court of Claims. 2009-Ohio-6573.

Despite losing two court battles *and* having the ability to fix the problem, ODNR has continued to do nothing to rectify the situation. It has refused to fulfill its public duty and initiate appropriation actions as to the Relators' property even though it has already been found in a final judgment in *Post* to have taken 16 parcels through the increased flooding that ODNR causes from its Spillway and lake-level management practices. Seven of those parcels are along the Beaver Creek at varying distances from the Spillway and nine of them are adjacent to the Wabash River at varying distances from its confluence with the Beaver Creek up to the Indiana state line. JE 116-120, *Petitions to Appropriate*; Dep. Henson, at 97-98; Dep. DeGroot, at Ex. E. Despite that clear finding, ODNR refused to initiate appropriation actions as to <u>any</u> other properties adjacent to the Beaver Creek and Wabash River despite the obvious fact that to take those sixteen parcels in *Post*, ODNR necessarily subjected and continues to subject other parcels along the Beaver Creek and Wabash River to the same increased flooding. ODNR's own map showing the location of *Post* properties with properties at issue in this case confirms this obvious fact. JE 79, Dep. Henson, at 97-98; JE 78, Dep. DeGroot, at Ex. E.

G. <u>ODNR Has Known From The Beginning That It Is Causing Increased Flooding But ODNR Refuses To Rectify The Situation Or Compensate Landowners For Its Interference With Landowners' Use And Enjoyment.</u>

ODNR knows that the channel through which the high volume of water from the new Spillway discharges is insufficient to accommodate that flow of water during reasonably anticipated rain events. *Post* Judgment Entry at 19. And it has known these facts for a long

time. Dep. Harsayne, at 59, 66. Indeed, an internal memorandum reveals that ODNR knew that "bridge[s] or building[s] could be affected by loss of use . . ." and "agricultural land could be affected by loss of crop," but ODNR noted that such losses "may not [and apparently did not] justify expense of channel enlargement." Rel. Requests at Ex. C; Admissions No. 65. ODNR further knows that it could decrease the frequency of these events or their magnitude by conducting annual draw downs of GLSM or by taking other flood prevention measures, but it chooses not. Dep. Harsayne at 76; Dep. Caris at 55.

ODNR chose a Spillway design and lake-level that serve the recreational users of the lake and ODNR's own financial interests, which include its lodging business, and the boating and fishing licensing fees it can generate by maintaining a high lake-level, conducive to boating and fishing. Aff. Earley ¶ 12; Dep. Earley 49-50 (explaining "[T]here was significant economic benefit to having the recreational use of the lake . . . . to do that, they needed to maintain lake levels near the spillway to have it be satisfactory for recreation. And the higher you keep the lake, the less flood-control ability it has."); Dep. Harsayne at 55; PE 127, Aff. of Thomas H. Fusonie, at ¶ 2 & Ex. 1. ODNR is financially incentivized to promote lodging, boating, and fishing at the expenses of the downstream property.

ODNR has several available alternatives to fix the problem. Yet, ODNR continues to implement its lake-level management practice in connection with completion of the Spillway – electing not to conduct annual draw downs of the lake in the fall and winter months to minimize potentially flooding during the spring thaw. Dep. Harsayne at 76; Dep. Caris at 55; Admissions 66, 77. Further, the lake has a functioning drain system which permits manual or mechanical release of water. Admissions No. 66. ODNR has not developed Coldwater Creek as an outlet channel for GLSM. Id. at No. 77. ODNR has not constructed an emergency spillway beyond or

in addition to the redesigned Spillway in 1997 for GLSM that could be used during large flood events. Id. at No. 78. ODNR has not modified the eastern outlet to GLSM and its accompanying canal to provide an additional active point for the discharge of overflow from GLSM other than the redesigned Spillway. Id. at No. 79. ODNR has not increased the size or width of the channel connected to the redesigned Spillway. Id. at No. 80. And ODNR has not initiated any appropriation actions as to any of the property of the Relators at issue in this action. Id. at No. 62. ODNR has, however, taken a flood easement across the Relators' parcels.

ARGUMENT.

Generally, in order to obtain a requested writ of mandamus, the relator must establish: (1) clear legal right to have the requested act performed; (2) a clear legal duty on the named respondents to do the requested act; and (3) no adequate remedy through ordinary course of law.[6] *State ex rel. Cody v. Toner* (1983), 8 Ohio St.3d 22, 456 N.E.2d 813. In the takings context, in order to ensure the minimum protections of the Fifth and Fourteenth Amendments of the U.S. Constitution, the burden of proof to establish these elements is the preponderance of the evidence. *See Kingsport Horizontal Prop. Regime v. U.S.* (Fed. Cl. 2000), 46 Fed. Cl. 691, 693.

Proposition of Law No. 1. ODNR's Flooding Of Relators' Property Amounts To A Taking For Which The Relators Have A Clear Right To Just Compensation.

"Any 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." *State ex rel. Gilbert v. City of Cincinnati*, 2010-Ohio-1473, ¶ 29 (quoting *Norwood v. Sheen* (1933), 126 Ohio St. 482,

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[6] Mandamus is the appropriate vehicle to compel a public authority to commence appropriation proceedings. *State ex rel. Gilmour Realty, Inc. v. Mayfield Heights*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d. 320, ¶ 13-14.

186 N.E. 102, at syl., ¶ 1). In fact, this rule of law applies even where there has been only a partial deprivation: "...the principle of the constitution is as applicable where the owner is partially deprived of the uses of his land as where he is wholly deprived of it." *Mansfield v. Balliett* (1902), 65 Ohio St. 451, 471, 63 N.E. 86.

Where the government causes an increase in the amount or frequency of flooding by casting surface waters upon property, "it must pay compensation for the property taken under Section 19 of the Ohio Bill of Rights." *Masley v. City of Lorain* (1976), 48 Ohio St.2d 334, 341 358 N.E.2d 596 (when a city causes "material damage to a down-stream landowner, as a result of flooding from rains or other causes which are reasonably foreseeable, [that flooding] is a direct encroachment upon that land which subjects it to a public use that excludes or restricts the landowner's dominion and control over his land, and such owner has a right to compensation for the property taken under Section 19, Article I of the Ohio Constitution"); *Gilbert*, 2010-Ohio-1473, ¶ 29-34 (affirming court of appeals decision that sewage overflow from city pump station into a creek that ran through private land partially deprived the private land owners of the use and enjoyment of their property, and thus, the city took the property without just compensation).[7]

Applying these basic principles establishe that ODNR has physically interfered with each of the Relators' parcels at issue and partially deprived the Relators of the uses of the land.

A. The Evidence Of Both Parties Establishes That ODNR's Spillway And Lake-Level Management Practices Causes Flooding Downstream Of The Spillway To The Indiana State Line That Would Not Otherwise Occur.

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[7] *State ex rel. Livingston Court v. Columbus* (1998), 130 Ohio App.3d 730, 735, 721 N.E.2d 135, appeal not allowed, 85 Ohio St.3d 1464 (1999) (following "[a] long line of Ohio Supreme Court cases..." and holding that flooding caused by heavy rains and a failure of the City of Columbus to maintain and operate its sewer system in a manner to avoid damage interferes with the landowner's use and enjoyment of the property and thus, constitutes a taking).

Over 75 farmers, homeowners and residents of Mercer County have testified and submitted documentary evidence establishing that the Spillway and ODNR's lake-level management practices have caused increased flooding. This firsthand evidence includes the testimony of farmers who have lived and farmed in the area for upwards of 50 years. Further, some of these landowners, like Jason and Emily Hines, Jill and Carmen Ellis, Marvin Kuhn, and Thomas and Candace Krick have testified that their properties never experienced any flooding prior to 1997, but have flooded since. All Relators have presented evidence demonstrating that between 1998 and 2010, their property has been flooded for several months (and, in the case of the Doners, for years), and that this flooding never would have occurred pre-1997. This firsthand evidence is competent and establishes a take. *E.g.*, *Gilbert*, at ¶ 30 (holding that overflow of sewage into a creek running through relators' property on at least 79 days amounted to a direct encroachment of the relators' property that was a taking).

Relators have also presented the expert testimony of Dr. Campbell and Mr. Moir that the Spillway and ODNR's lake-level practices are causing increased flooding in amounts, duration and frequency from the Spillway to the Indiana State line. Further, Relators present the testimony of Jay Gould, a federal officer and author of a 2003 federal report that concluded that the Spillway caused increased flooding and erosion downstream. Finally, Keith Earley, an expert in hydraulics, including flow and discharge issues testified that the Spillway would "cause more damage than good." Aff. Earley, at ¶ 4, 6 & Ex. 1; Dep. Earley, 19, 38-39, 45, 72.

Moreover, all of Relators' evidence is consistent with the findings in *Post* that ODNR through its Spillway and lake-level management practices causes increased downstream flooding to properties adjacent to the Beaver Creek and the Wabash River to the Indiana state line. The trial court in *Post* only reached that finding after ODNR exhaustively litigated whether it caused

increased flooding downstream to the Indiana State line. ODNR lost as to seven parcels at varying points along the Beaver Creek. It lost also as to the nine parcels adjacent to the Wabash River and extending to the Indiana State line. The Sixth Appellate District affirmed the trial court, finding that even setting aside the 2003 and 2005 flooding, the landowners in *Post* all "testified that they have experienced an increase in the extent of flooding and its duration since the new [sic, should be old] spillway was replaced in 1997." 2006-Ohio-6339, ¶ 75. That testimony, the Court of Appeals held, constituted "sufficient evidence to establish that the extent of the flooding and its duration has increased since the new spillway was installed." Id.

All of the Relators' evidence confirms common sense – if one increases the spillway-size from 39.4 feet to 500 feet without correspondingly increasing its channel (Beaver Creek), more acres will be flooded downstream, and the frequency and duration of flooding will increase. Likewise, it confirms that common sense would require ODNR to conduct winter draw downs to lower lake-elevation in anticipation of snow melt and spring rains: by lowering the lake level, it can store more water before overtopping the Spillway and flooding landowners downstream.

Even Stantec, through its flawed modeling, recognizes the common sense conclusion that the Spillway causes increased flooding in amounts, duration and frequency to properties adjacent to the Beaver Creek, and increased flooding in duration and frequency to properties along the Wabash River to the Indiana State line. Stantec even shows that the discharge from the Spillway flows at a greater rate during a <u>5-year event</u> than the discharge from the old 39.4 foot Spillway for a <u>100-year event</u>, thus, causing flooding of Relators' property more frequently. Resps. Evid., Tab A, Ex. A, April 29, 2010 Modeling, at Technical Report, at Table 2-5 on pg. 2.8. Of course, the vast difference is even more pronounced when the data is not manipulated to

favor ODNR, and instead, the impact of the Spillway is considered under wet antecedent conditions. *See, e.g.,* PE 125, at ¶¶ 4(q)(7)(v).

Finally, Stantec also has demonstrated that draw downs would decrease the flooding caused by the Spillway. Specifically, the May 26, 2010 Memo attached to Mr. Henson's Second Affidavit shows that less acres flood for a 100-year event at winter pool than flood during a 100-year event with average antecedent conditions as purportedly modeled in its March 1, 2010 report. For example, Lois McNeilan purportedly has 62.6 acres flooded in the March 1, 2010 report for the 100-year event and only 59.1 acres of the same property flooded in the May 26, 2010 Memo for a 100-year event at winter pool.

Accordingly, the indisputable evidence establishes that ODNR through its Spillway and its ongoing lake-level management practices causes increased flooding to properties adjacent to the Beaver Creek and Wabash River extending to the Indiana State line. The remaining question, then, is whether the Relators can prove, by a preponderance of the evidence, that each of their properties is subject to increased flooding either in frequency, duration or acres impacted as caused by ODNR. The answer is yes.

B. Each Relator Has Submitted Competent And Compelling Firsthand Knowledge Of Increased Flooding For Each Of The Parcels At Issue.

Each of the Relators proffers firsthand evidence of an increase in flooding in frequency, duration, and acres impacted as to the parcels at issue. As detailed in affidavits and depositions of Relators and their fact witnesses, Relators all own property downstream of the Spillway that has since 1997 repeatedly suffered flooding caused by the Spillway and ODNR's lake-level management practices. The Relators have suffered and will continue to suffer various forms of substantial physical interference with their property all caused by ODNR's actions. *See* Aff.

Brewer, at Ex. A and B, listing each Relator's interference experienced and record testimony evidencing such interferences.

The affidavits and deposition testimony of Pressley Campbell and James Moir confirm that the discharge from the Spillway and ODNR's lake-level management practices causes high discharges even for frequent events like a two year or five year rain event as to cause substantial flooding downstream along the Beaver Creek and Wabash River to the Indiana State Line. Tellingly, ODNR does not dispute Mr. Moir's calculations that a 5-year rain event with the Spillway in place causes substantially more discharge than a 100-year event with the old 39.4 Spillway in place. Further, as Dr. Campbell establishes, had the new Spillway been in place for certain rainfall events, flooding downstream along the Beaver Creek and Wabash River would have occurred 14 times when such flooding would not have occurred with the 39.4 foot spillway. Aff. Campbell I at ¶¶ 12, 14 & Ex. B.

Essentially, ODNR has created a situation where substantial flooding now occurs on a regular basis downstream of the Spillway. In fact, in March 2010, substantial acres were flooded after only a nominal amount of rainfall. As farmers of land along the Beaver and Wabash for over 30 and 50 years, respectively, both Jerry Weisman and Wayne Doner testified that such flooding would never have occurred had ODNR drawn down the lake in Autumn 2009 or Winter 2010. The video of this flooding taken by Wayne Doner, Brenda Powell and Carl Sutter is devastating to ODNR's contention that the Spillway and its lake-level management practices only cause some flooding during historic rain events. Moreover, their testimony confirms the expert testimony of Dr. Campbell and Mr. Moir – that the Spillway and lake-level management practices are causing increased flooding in amounts, frequency and duration. Accordingly,

Relators have met their burden to establish by a preponderance of the evidence their right to the requested writ.

C. *As To 79 Relator Parcels, ODNR Admits That It Has And Will Continue To Cause Physical Interference With Relators' Use And Enjoyment Of The Property.*

ODNR concedes that it has physically interfered with many of the Relators' properties by subjecting them to increased volumes of flooding and/or increased frequency of flooding. *See* supra, at pg. 23. ODNR's own modeling also shows that 35 parcels owned by Relators are "impacted" by additional acres being flooded. Id.; *see also* Aff. Brewer at ¶ 4-5 & Exs. C & D. ODNR admits that it impacts 79 Relator parcels with greater volumes of water than would otherwise have occurred, and thus, longer lasting flooding. Id.; *see also* Aff. Brewer, at id.

In fact, tellingly, Stantec neglected to model the widespread flooding of March 2010, May 2009, February 2008, early winter 2005 or Summer 1998 – even with ample evidence of the flooding readily available and with readily accessible data on rainfall. Why not? The answer is obvious from a review of Relators' documentary evidence. For example, Relators' videos and photographs regarding the March 2010 flooding show that it started only when the water overtopped the Spillway. *See* W. Doner Aff. III, at Exs. 1-4; B. Powell Aff, at Ex. 2. It is no coincidence that Relators' property flooded with only about an inch of rain, but with the lake overtopping the entire Spillway.

Stantec's glaring omissions are best explained by one simple fact from Stantec' s report and one point from Dr. Campbell's report. First, Stantec notes that now a 5-year rainfall event under the new Spillway causes greater discharge out of the lake, and thus, frequent flooding equivalent to a 100-year historic event with the old 39.4 spillway. Second, Dr. Campbell established that under the new Spillway, flooding occurred for 14 historic precipitation events

that would not have otherwise occurred. Stantec never challenges the ultimate conclusion of Dr. Campbell. Thus, the evidence on both sides clearly establishes that the frequency of flooding has increased with the new Spillway.

D. *As To The Remaining 12 Relator Parcels, The Compelling And Competent Firsthand Evidence Establishes That ODNR Has Taken Their Property.*

The only disputed issue concerns 12 properties that ODNR claims are not flooded by its actions.[8] However, for each of those properties, the Relators have offered compelling and competent firsthand evidence, including photos of flooding caused by ODNR. *See* PE 128, Aff. Brewer, at Addendum A and B, charting the types of interference for each Relator parcel and the record testimony of Relators and their fact witnesses evidencing the interference. The following illustrates the compelling evidence Relators offer:

- Marvin Kuhn, whose property never flooded before, has 35 years of experience farming the property, has observed the yearly flooding caused by ODNR (up to six-inches of water), and has particular recollection for 2003, 2005, 2009, and 2010, along with photos taken by his sister-in-law detailing the progression of flooding onto his property in March 2010.[9]

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[8] The properties are Marvin Kuhn's parcel; Jeff Siefring's two parcels; Parcel 41-0017300.0000 (Baucher Farms); Parcel 42-020000.0000 (Mark and Ron Siefring); Parcel 41-019800.0000 (Amy and Jerome Meyer); Parcel 42-016900.0000 and 42-024200.0000 (Jerry and Betty Powell, Trustees); Parcels 26-030700.0000 and 26-011900.0000 (Bonita and Robert Searight); Parcel 26-024700.0000 (David Johnsman, Trustee); and Parcel 26-048600.0000 (David Johnsman).

[9] Aff. of M. Kuhn; PE 44, Second Sup. Aff. of D. Kuhn; Dep. of M. Kuhn at p. 12-18.

- Robert and Bonnie Searight offer their testimony based on over 36 years of farming and living on their two parcels. In addition, they offer their visual observations of flooding caused by ODNR in 2003, 2005 and 2008.[10]
- Mark and Ron Siefring offer their over 40 combined years of farming Parcel 42-020000.0000 and living in the area and their visual observations of flooding caused by ODNR in 2003, 2005, 2008 and 2009.[11]
- Jeff Siefring offers his testimony and his father Mark Siefring's 27 years of farming Jeff's two disputed parcels and their visual observations of flooding caused by ODNR in 1998, 2003, 2005, 2008 and 2009. That testimony includes both Jeff and Mark's testimony regarding how the Beaver Creek tributaries that run adjacent to Jeff's land back-up when the Beaver Creek runs high and cause flooding on Jeff's land.[12]

ODNR meets this evidence with absolutely no firsthand knowledge, but instead, Stantec's fundamentally flawed modeling. Thought it acknowledges that its duty was to " model the impacts of the spillway modifications..." (Resps. Evid., Tab A, at Ex. B, pg. 70), it did not model the *full* impact of the Spillway because it did not model under wet antecedent conditions. Likewise, Stantec only conducted modeling of rainfall events with no water in the Spillway basin and no water overtopping any of the Spillway when the rainfall event occurred. If it truly wanted to measure the impact of the Spillway (and to comply with basic engineering principles) it would conducted such additional modeling. Supp. Aff. Moir, ¶ 4(d)(v) and 6(i).

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[10] PE 73, Aff. of B. Searight; PE 74, Aff. of R. Searight; PE 75, Sup. Aff. of R. Searight; JE 46, Dep. of B. Searight at p. 12; JE 47, Dep. of Robert E. Searight at p. 53-55.

[11] PE 80, Aff. of Mark Siefring (8/24/09); PE 82, Aff. of Ron Siefring (8/24/09); JE 56, Dep. of Ron Siefring at p. 27; JE 53, Dep. M. Siefring at p. 178-179.

[12] PE 81, Aff. of Mark Siefring (12/15/09); Dep. M. Siefring at p. 173-174, 182, 184; JE 52, Dep. of Jeff Siefring at p. 18, 29, 33-34.

Stantec cannot in good faith and good conscience represent that its modeling shows the full impact of the Spillway when it must concede that the Spillway's discharge is greater under wet conditions and is greater when the Spillway is already overtopping when a rain event occurs. Modeling under "average" conditions or when the Spillway is empty is cold comfort to the landowners subject to ODNR's flooding. It is obvious Stantec manipulated its study to shrink the impacted area and number of Relators' parcels affected by ODNR. None of this manipulation should come as a surprise considering Mr. Henson performs 95% of his work at Stantec for governmental entities. Dep. Henson at 15-16. Through Stantec, ODNR tries to manipulate this Court into believing that the flooding is not as bad as the firsthand observations and pictures show. This Court should reject such tactics. Simply put, ODNR has no competent evidence to rebut the compelling firsthand testimony of the Relators and their fact witnesses. In stark contrast, Relators present compelling evidence establishing the flooding caused by ODNR.

In sum, all Relators have established a right to writ requiring ODNR to appropriate to the extent of flooding as set forth by Relators and their additional fact witnesses. *Chesapeake and Hocking Ry. Co. v. Snyder* (1931), 38 Ohio App. 279, syl. ¶ 2 and 285 (holding that the jury in an appropriation action must take "into consideration the most damaging situation that might result from the lawful improvements to be constructed"); *Muskingum Watershed Conservancy v. Haynes* (5th Dist. 1937), 55 Ohio App. 284, 286 (similar).

Proposition of Law No. 2: A Governmental Entity That Casts Surface Waters That Would Not Otherwise Occur Onto Private Property Has A Clear Duty To Initiate Appropriation Proceedings To Pay The Owners Just Compensation For That Taking.

The flooding caused by ODNR stems from its Spillway and its lake-level management of GLSM. As the former Mercer County Engineer has testified, "[i]n its design of the spillway, ODNR chose to serve recreational users of Grand Lake by maintaining a constant lake level and

to avoid any flooding on the southern end of Grand Lake to the detriment of the owners of structures and farmers on the western side of Grand Lake." Aff. Earley, at ¶ 12. ODNR has elected in furtherance of the interests of the recreational users of the lake, the lake's south side residents, and its own financial interests to flood the Relators' properties downstream. That is its choice, but it cannot avoid its corresponding public duty to compensate the Relators for the flooding. Ohio law is clear that in casting surface water onto the land of another as a result of creating a public improvement, the governmental actor must compensate the owners of that land for physical interference of their use and enjoyment of the property. *Gilbert*, 2010-Ohio-1473, ¶ 29-34; *Masley*, 48 Ohio St.2d at 336, 339-340 (holding that the flooding of private property during heavy rains caused by a municipality's actions or inactions "plainly" established "a direct encroachment which deprives the plaintiffs of the use and enjoyment of their lands"). Here, ODNR knows that the channel through which the high volume discharge from the new Spillway will flow is insufficient to accommodate the flow during reasonably anticipated rain events and casts surface waters onto private property. It has a duty then to pay compensation for the property taken under Section 19 of the Ohio Bill of Rights.

Desperate to avoid taking responsibility for its actions and accepting that it has taken the Relators' property, Relators anticipate that ODNR wants to make much of the fact that some of the Relators' parcels experienced minimal-in-comparison seasonal flooding prior to 1997. That fact does not alter the conclusion that ODNR has caused flooding that would otherwise not occur to these properties – either in acres impacted, frequency, or duration, and that increased flooding amounts to a taking. See *Masley*, *supra*. Yes, some of these parcels experienced some flooding prior to 1997, but the frequency has increased, the amount of acres has increased, and the duration has increased. ODNR does not care that its conduct causes water to sit for weeks on

property, nor does it care about the unsanitary debris that it leaves behind. It is one thing to have nature interfere with your use and enjoyment of property. It is another to have the State continue to physically interfere over and over again by causing flooding that would not otherwise occur. Indeed, ODNR's own appraiser has admitted that properties subject to flooding by the Spillway have lost and are losing even greater value because of an increasing reduction in the utility of properties. Dep. Garrett Ex. A at 62.

Further, for some of the parcels at issue (such as the Kricks, Marvin Kuhn, the Ellises and Hines) there is no evidence that the parcels flooded at all before 1997, but since then have been flooded several times.

ODNR comes forward with no tangible evidence to refute the Relators' overwhelming firsthand knowledge of flooding. Instead, it wants this Court to view the Relators as incapable of knowing what is causing the flooding to their land and that Relators are just out to get compensation from the State. Some of the Relators have been farming the land for over 30, 40, 50 years. Yet ODNR wants this Court to ignore what these farmers see with their own eyes – more flooding, more frequent flooding, and flooding that lasts longer since the Spillway was built and ODNR stopped conducting annual draw downs.

Second, the idea that these Relators are out for compensation is implausible. When asked in deposition what they hoped to accomplish with this lawsuit, most Relators responded they wanted ODNR to fix the situation. Of course, none of them expect ODNR to fix the problem. Moreover, why would anyone want the government to take a flowage easement across their property?

ODNR's callousness is not surprising considering that it has already been established that ODNR has taken seven parcels along the Beaver Creek and nine along the Wabash River all the

way to the Indiana line. Despite that writ, ODNR failed to take one step towards acting like the responsible governmental actor: it refuses to accept that it has taken properties all along the Beaver Creek and Wabash River to the Indiana line. "There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood v. Horney* (2006), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E. 2d 1115, ¶ 38. "Though the Ohio Constitution may bestow on the sovereign a magnificent power to take property against the will of the individual who owns it, it also confers an 'inviolable' right of property on people. When the state elects to take private property without the owner's consent, simple justice requires that the state proceed with due concern for the venerable rights it is preempting." Id. at ¶ 68.

ODNR has ignored and continues to ignore its clear public duty and instead has foisted the burden and expense onto the farmers along the Beaver Creek and Wabash River to vindicate their right to compensation through mandamus actions. That does not comport with honoring the venerable and inviolable property rights of the Relators.

Proposition of Law No. 3: Since Property Cannot Constitutionally Be Taken Until Compensation Is Secured To The Private Property Owner, The Only Applicable Statute Of Limitations Is The 21-Year Prescriptive Period.

Despite taking the Relators' property and subjecting it to ongoing periodic flooding, as evidenced by Respondents' Motion to Dismiss, ODNR hopes to avoid its clear public duty to appropriate by claiming the Relators' mandamus action is time-barred. Relators' claims are timely.

The Ohio Constitution, Section 19, Art. I requires compensation "shall first be made in money, or first secured by deposit of money" before private property "shall be taken." Thus, 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. 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. Consequently, 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. Inv. v. City of Columbus* (1985), 17 Ohio St.3d 151, 152-53, 478 N.E.2d 773. In *A.A.A. Inv.*, this Court rejected a landowner's claim that it was still entitled to just compensation despite more than 21 years lapsing since the government first possessed its property. 17 Ohio St.3d at 153. This Court held that Columbus has acquired title to the property through 21 years of 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).

If R.C. § 2305.09 applies to physical takings claims, then the government can obtain a vested property interest by adversely possessing property for as little as 4 years under R.C. §

2305.09(E) versus 21 years as this Court held in *A.A.A. Inv.* – even though the General Assembly has not expressly amended R.C. § 2305.04 to shrink the limitations period for an action of ejectment or quiet title against governmental actors to 4 years. Applying R.C. § 2305.09's limitations period to physical takings claims versus R.C. § 2305.04's leaves private property owners in limbo. If this Court were to continue to sanction (*see Nickoli v. Erie MetroParks* (2010), 2010-Ohio-606) the General Assembly's adding of takings claims to claims under R.C. § 2305.09, the Court leaves landowners in the untenable position of having no claim to just compensation for the seizure of their property and no right to eject or for quiet title against the condemnor. In effect, the government not only takes the property without paying just compensation, but has obtained a vested right to the property in less than 21 years. This cannot be what the Supreme Court wants to sanction.[13]

Here, since the new Spillway was not completed until 1997 and ODNR did not begin its annual decision to refuse to drawn down GLSM until after the completion of the new Spillway, all of Relators claim are timely under the 21-year prescriptive period.

Proposition of Law No. 4: ODNR's Takings By Periodic Flooding Are Continuous And Subject To General Tolling Principles For Real Property Claims Brought Under R.C. § 2305.09.

A. R.C. § 2305.09's Limitations Period Should Be Tolled For Takings Caused By Periodic Flooding Consistent With This Court's Tolling Principles For Trespass And Nuisance Claims.

In 2004, the General Assembly added taking claims to those real property claims covered by the limitations period in R.C. § 2305.09. As such, by treating takings claims as akin to a tort

[13] Other state courts have found their similar constitutional provisions to Ohio's Section 19 Article 1 to be limited as to physical takings only by the prescriptive period. *A.W. Sundell v. Town of New London* (1979), 119 N.H. 839, 409 A.2d 1315, 1321; *V.J. Drabek v. City of Norman* (Ok. 1996), 946 P.2d 658, 659-62 (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; *City of Kenai v. Burnett* (Alaska 1993), 860 P.2d. 1233, 1240, n. 13.

against real property, the General Assembly unmistakably mandated that takings claims for statute of limitations purposes must be 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) (O'Connor, J.).[14]

Where trespasses and nuisances are recurring, the limitations period (now codified in R.C. § 2305.09) is tolled until the tortious conduct ceases. Id. at 275, 280, 284. The issue of the limitations period for recurring trespasses and nuisances in the flooding context has been addressed on several occasions by this Court. 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 Ry.* 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 causing the water inundation. 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.

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. That is exactly what the General Assembly intended by adding takings claims to the list of real property claims that fall under R.C. § 2305.09. Further, the rationale for tolling the limitations period for a recurring trespass

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[14] Federal courts also recognize continuous takings. *McNamara v. City of Rittman* (C.A.6, 2007), 473 F.3d 633, 639-40; *Hensley v. City of Columbus* (C.A.6, 2009), 557 F.3d 693, 697-98; *McNamara v. Rittman* (N.D. Ohio Feb. 23, 2010), Case No. 5:09 CV 005232010 WL 680956, at * 1, 3.

and nuisance claim that the defendant maintains the ability to "rectify the situation" applies equally to physical takings caused by the directing of a force from a property controlled by the government onto private land. *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 on its property to end the physical invasion. Either of these possibilities are why the limitations period under R.C. § 2305.09 should be tolled for a physical takings claim where the taking is caused by a recurring force, which remains within the control of the government to end or minimize. Each day the public entity directs a force, like surface water, onto private property 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'") (internal quotation omitted) .

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 in the same manner as trespass and nuisances claims ensures that the right to just compensation is not relegated to a second class right.

Both *Valley Ry.* and *Swartz* are particularly instructive on determining whether ODNR's recurring flood is continuous for statute of limitation purposes. In *Valley Ry.*, 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 on *Valley Ry.*, 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 Ry.*, 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.

In *Wojcik v. Pratt* (Sept. 30, 2009), 9th Dist. No. 24583, 2009-Ohio-5147, the Ninth District applied *Sexton* to a recurring trespass caused by flooding from a neighbor's pond, which the neighbor had expanded 17 years before the landowners filed suit. The trial court entered summary judgment against the landowners finding that R.C. § 2305.09 time-barred their claim. The trial court reasoned that the trespass was a permanent trespass fully accomplished with the expansion of the pond in 1988. The Ninth District held that the trial court erroneously found the trespass to be permanent versus a continuous. In doing so, it relied on *Sexton*'s rule of law that "[t]he defendant's ongoing conduct or retention of control is the key to distinguishing a continuing trespass from a permanent trespass." Id. at ¶ 18 (quoting *Sexton*, ¶ 45). Because the neighbors retained control over the pond, the Ninth District held that the "water flowing from the

pond constituted a continuous rather than permanent trespass." Id. at ¶ 20. Since the trespass was continuous, the Ninth District held that R.C. § 2305.09's four-year limitation period did not bar the landowners' claim. Relying on *Valley Ry.*, it explained that "[a]n action for continuous trespass 'may be brought at any time until, by adverse use or possession, the trespasser has enforced an adverse claim that has ripened and has become a presumptive right or a valid estate.'" Id. at ¶ 25 (quoting *Valley Ry.*, 43 Ohio St. at 626). Since the statute of limitations for recovering real estate is 21 years, and the landowners filed their continuous trespass claim only 17 years after the expansion of the pond, R.C. § 2305.09 did not time bar their claim. Id. at ¶ 25.

There is no dispute here that ODNR continues to control the Spillway and allows it to cause recurring increased flooding downstream. There is no dispute that ODNR decides at least annually not to draw down the lake to lessen flooding downstream of the Spillway. Nor is there any dispute that it could do such draw downs and that such draw downs would indeed lessen the flooding downstream of the Spillway. Consequently, ODNR's ongoing and recurring course of conduct, including its ability to rectify the situation, tolls the limitations period. Reaching any other conclusion would create a constitutionally infirm distinction between trespass claims and takings claims both subject to the **very** same limitations period. R.C. § 2305.09.

B. ODNR's Periodic Flooding Of Relators' Property Are Unlawful Acts That Cause Further And Further Material Damage To Relators' Property.

It is anticipated that ODNR will try to claim that the flooding of the Relators' property stems from a single act. That is not the case. Relators' claims do not stem from a single flood event with merely a continuation of effects from that one flood. This is not the case of a single release of water by ODNR permanently submerging Relators' properties. Instead, this is case of ODNR causing frequent and recurring flooding; each an unlawful act that causes new material damage to their property. As the Relators detail in their affidavits and deposition testimony, the

increased flooding subjects the properties to new inundation of water, new bank erosion, new soil erosion, new soil compaction, new loss of tillable acres, and new loss of topsoil – all further decreasing the utility of the property.[15] Indeed, ODNR's own appraiser, a certified agricultural land appraiser, has concluded that properties subject to the increased flooding caused by ODNR continue to decline in value as compared to market, because the properties suffer from further and further declining utility.

In addition, ODNR decides at least yearly that it is not going to attempt to minimize the flooding caused GLSM by drawing-down the lake-level. Each decision not to draw down the lake constitutes a new act that contributes to ODNR's physical interference with the Relators' use and enjoyment of their property. Even if ODNR decided not to draw down the lake in a particular year, it still has the capability to manually draw down the lake level in anticipation of reasonably foreseeable rain events, but it has also chosen not to do this, and in particular, chose not to do this in 2003, 2005, 2008, 2009, and 2010. Also, ODNR has chosen not to take any other steps to modify the Spillway to eliminate or minimize the flooding.

Thus, the acts of ODNR are not a single administrative act, such as granting a building permit, as in *Painesville Mini Storage, Inc. v. Painesville*, 2010-Ohio-920, ¶ 2. Nor are ODNR's actions like the solitary act of entering onto private property once to build and open a recreational trail on landowners' property with no further material damage to the property after that date, as in *Nickoli*, 2010-Ohio-606. *Nickoli* is first inapposite as it concerns the act solely on the claimants' land, i.e., the construction of a recreational trail, and not conduct on the land of the Respondent that directed a recurring force that affected the claimants' property. In stark contrast, here, each flooding event is a new, discrete act caused by new decisions by ODNR. *See*

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[15] Evidence of the impact to Relators' parcels is summarized in Aff. Brewer, ¶ 3, Ex. B.

Valley Ry. at 627. As detailed supra, ODNR's decisions as to its property and its conduct on its property causes further and further material damage to the Relators' property. As such, ODNR retains control over the source of the invasion of Relators' properties. *Sexton*, at ¶ 50 & n.2.

Were the ongoing and frequent flooding by ODNR a "single event," then this Court would be doing one of two things: (1) overruling 125 years of precedent, i.e., *Valley Ry.*, *Swartz* and *Sexton*, related to the tolling of limitations periods for invasions of property by repeated flooding or (2) perverting the intent of the General Assembly by treating takings different than trespass or nuisances claims despite falling under the same limitations provision.

Proposition of Law No. 5: Since Relators Could Not Ascertain The Full Extent Of The Take Until Late 2007/Early 2008, Their Takings Claims Are Timely.

Concluding that the ongoing and frequent flooding is not a single act is consistent with the United States Supreme Court decision in *U.S. v. Dickinson* (1947), 331 U.S. 745, 749, which held that "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.'" 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. Here, ODNR, through its expert, admits that the quandary Relators face as to the flooding caused by discharge from the Spillway and ODNR's lake-level management practices requires at least ten years of historical data to ascertain when the fact and scope of taking could no longer be in controversy. Resps. Evid. Tab A, at Ex A, at March 2010 Modeling, at Discussion of Results and other Analysis 3.1 ("**Standard engineering practice calls for at least 10 and preferably**

15 years or more of record in order to produce meaningful hydraulic [i.e., flow of water through an open channel] statistics") (emphasis added). Accordingly, with the Spillway completed in 1997 and the new lake-level management practices started in the Fall of 1997/ Winter of 1998, Relators could not have ascertained the full extent of the taking until at the earliest, late 2007/early 2008. Any lawsuit filed before 2007-2008 could have been premature or created piecemeal litigation. Since the full extent of the taking could not have been known until 2007-2008, Relators timely filed this lawsuit in July 2009.

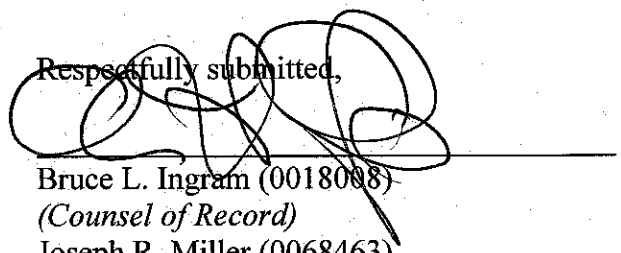
The intent of the United States Constitution is "to preserve practical and substantial rights, not to maintain theories." *Davis v. Mills* (1904), 194 U. S. 451,457. Private property owners should not be required to divine the full extent of a take caused by external factors like periodic flooding until they have sufficient statistical/historical data. *Dickinson*, 331 U.S. at 749. Forcing them to do otherwise subverts the mandates of this Court – that inviolable and cherished property rights should not be trod upon lightly. For this additional reason, Relators timely filed their claims.

CONCLUSION

For the above reasons, Relators respectfully request that this Court grant them their requested writ to compel ODNR to promptly initiate appropriation actions as to each of the 91 parcels at issue.

Dated: June 11, 2010

Respectfully submitted,



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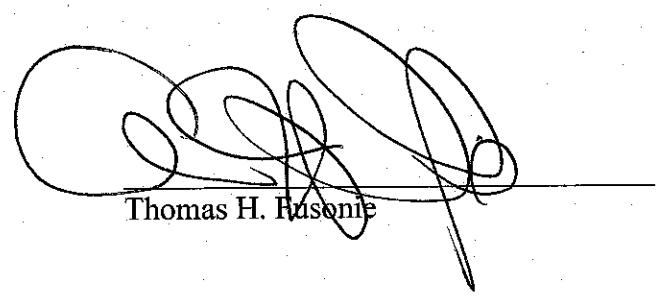

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