

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MOTION OF RESPONDENTS TO STRIKE

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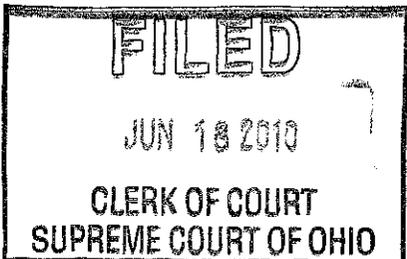
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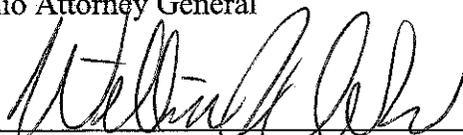
Pursuant to the Master Commissioner’s Order of June 8, 2010, Respondents move to strike the following submissions from the evidence filed in this case:

- A. All expert evidence that Relators did not provide to Respondents’ counsel by March 1, 2010. (Relators’ Evid. Vol. 10, Tabs 124 & 125; Vol. 11, Tab 129.)
- B. All documents from other cases involving other properties that are not the subject of this litigation. (Relators’ Evid. Vol. 5, Tabs 105-109; Vol. 6, Tabs 110-115; Vol. 7, Tabs 116-121; Vol. 8, Tab 122.)
- C. All evidence of recent (i.e., post-March 1, 2010) flooding on Relators’ lands. (Relators’ Evid. Vol. 1, Tabs 4 & 23; Vol. 2, Tabs 32, 34, 39, 40, & 44; Vol. 3, Tabs 58, 60, 62, 65, & 69; Vol. 4, Tabs 79, 83, 84, 88, & 93.)
- D. All evidence from appraisers. (Relators’ Evid. Vol. 1, Tab 3; Vol. 4, Tab 102; Vol. 7, Tab 121; Vol. 8, Tab. 122.)
- E. The affidavits and exhibits of Relators Karen S. Doner, Rhonda Powell, M. Leone Powell, and Larry Pugsley. (Relators’ Evid. Vol. 5, Tab 34; Joint Evid. Vol. 1, Tab 7; Vol. 5, Tabs 37 & 38; Vol. 6, Tab 40.)
- F. The affidavit and exhibit of Jay H. Gould. (Relators’ Evid. Vol. 4, Tab. 101.)
- G. The affidavit and exhibits of Attorney Martha C. Brewer. (Relators’ Evid. Vol. 10, Tab 128.)

A memorandum in support follows, with exhibits attached thereto.

Respectfully submitted:

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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO STRIKE

- A. **The Court should strike all expert evidence that Relators did not provide to Respondents' counsel by March 1, 2010, because the parties had agreed to provide their respective expert evidence to opposing counsel by that date. (Relators' Evid. Vol. 10, Tabs 124 & 125; Vol. 11, Tab 129.)**

Recognizing the need to facilitate both the orderly exchange of the extensive documentary evidence and the scheduling of multiple depositions, the parties through counsel agreed in January of this year to a schedule for exchanging expert evidence¹ and conducting both expert and non-expert depositions. Specifically, the parties agreed that, inter alia, all expert evidence would be exchanged by March 1, 2010. **Exhibit A** (1st email, from attorney Joseph M. Miller). Nothing in the agreed-upon schedule provided for either side to exchange any expert rebuttal or other evidence after the March 1st deadline. And neither side advised the other of any intention, or reservation of right, to submit such evidence post-deadline. In accordance with the agreement, on March 1, 2010 Respondents provided to Relators' counsel the affidavits and reports of their expert engineers. Relators provided no new evidence on March 1. They had previously provided an affidavit of Pressley Campbell based on his work in 2006 regarding real estate not involved in this litigation, and an affidavit of Richard Vannatta regarding valuation.

In April, when Relators' counsel indicated their intention to submit expert rebuttal evidence (despite that the agreed deadline for exchanging expert evidence had passed), Respondents moved to prohibit the filing of any evidence not provided to opposing counsel by the March 1st deadline. Relators argued they had a right to file expert rebuttal

¹ Respondents in discovery requested Relators to produce all evidence that they intend to file in their presentation of evidence to the Court. (Respondents' Evid. Tab. P, Request for Production No. 1.)

evidence. The Court ruled that admissibility issues would be considered after the evidence is filed. (Master Commissioner Order of April 21, 2010.) Relators provided Respondents' counsel with affidavits and evidence from Mr. Moir on May 24 and the afternoon of June 1st. **Exhibit B** (May 24 and June 1 correspondence from attorney Thomas F. Fusonie). As expected, on June 1st Relators filed expert rebuttal evidence from two engineers, Messrs. Campbell and James R. Moir, that had not been provided to Respondents' counsel on or before March 1st. (Relators' Evid. Tabs 124, 125 & 129.) By doing so, Relators violated their agreement with Respondents to exchange expert evidence on or before March 1st.

Relators' late rebuttal evidence should be stricken. By insisting they have a right to file such evidence beyond the deadline that they agreed to, Relators have done a complete about-face. Early in this litigation, when Respondents sought to extend the original writ schedule, Relators said they were prepared then to present their evidence and submit their briefs within the limited time allotted. (Relators' Memorandum in Opposition to Respondents' Combined Motion to Refer the Action to a Master Commissioner & Amend the Alternative Writ Schedule, p. 3.) The original schedule, of course, did not allow any party to present evidence beyond the deadline. Once Relators saw Respondents' expert reports they changed their minds.

Relators previously accused Respondents' counsel of improperly reading in a no-rebuttal limitation to the parties' agreement. (Relators' Memorandum in Opposition to Respondents' Motion for an Order Regarding the Admissibility of Certain Evidence and for Proceeding with Expert Discovery pp. 6-7.) But closer scrutiny shows it is Relators who are trying to read in a non-existent exception to the agreement. When the parties'

counsel agreed to the March 1st deadline for exchanging expert evidence, neither side even mentioned rebuttal evidence. Respondents turned over their expert evidence to Relators' counsel in accordance with the agreement. Relators, who had previously provided their expert affidavits to Respondents in discovery, produced no additional expert evidence until after March 1. Only after the March 1st deadline passed did Relators complain that they need time to gather rebuttal evidence.

Relators' about-face is even more obvious considering they have argued that the original alternative writ and this Court's rules contemplate the simultaneous presentation of evidence. (Relators' Memorandum in Opposition to Motion for Expedited Discovery or to Refer the Action to Mediation, pp. 6-7.) Respondents' position—that no post-deadline rebuttal evidence should be allowed—is more faithful to Relators' earlier argument than Relators' current stance. Holding Relators and Respondents to their agreement places, as Relators once argued, both sides on “equal footing as to the evidence the opposing party will present.” (Id. p. 6.)

When the parties' counsel agreed in January to set a deadline for exchanging expert evidence they did not distinguish between expert evidence-in-chief and expert rebuttal evidence. Despite having nearly two months to gather more expert evidence, Relators did not submit any additional expert evidence by the agreed-upon deadline. Nor did Relators approach Respondents about extending the deadline until *after* that deadline passed and they had Respondents' expert reports. If Relators wanted the opportunity to submit expert rebuttal evidence, their counsel could and should have raised that matter with Respondents' counsel before agreeing on a deadline for exchanging evidence, or even thereafter, *but before that deadline expired*.

Accordingly, this Court should strike Relators' expert rebuttal evidence from Messrs. Moir and Campbell because such evidence was not provided to Respondents' counsel on or before March 1, 2010, in violation of the parties' agreement.

B. Relators' submissions of documents from other cases involving other properties that are not the subject of this litigation are irrelevant because Relators' lands are unique and distinct from other parcels. (Relators' Evid. Vol. 5, Tabs 105-109; Vol. 6, Tabs 110-115; Vol. 7, Tabs 116-121; Vol. 8, Tab 122.)

Relators' "evidence" includes multiple submissions from cases involving taking claims against ODNR by other landowners (who are not Relators in this case) for properties that are not the subject of this litigation. The submissions include judicial entries, proceedings, stipulations, and exhibits from the *Post* mandamus case in Mercer County Common Pleas Court (Relators' Evid. Vol. 5, Tabs 105-109); entries, proceedings, stipulations, exhibits, depositions, and appellate decision from the *Case Leasing* case in the Ohio Court of Claims (Relators' Evid. Vol. 6, Tabs 110-115); and appropriation petitions from Mercer County (Relators' Evid. Vol. 7, Tabs 116-120). Relators also submit the deposition testimony and exhibits of James A. Garrett, who was the appraiser for ODNR in the *Baucher* appropriation case. (Relators' Evid. Vol. 7, Tab 121; Vol. 8, Tab 122.) The purpose of these submissions is to bolster Relators' argument that Respondents have taken their properties by showing that other courts previously found that ODNR had taken other properties due to its modification of the Grand Lake St. Marys dam spillway. (See Relators' Merit Brief pp. 23-25.)

Relators' submissions are irrelevant because they involve properties not at issue in this litigation, owned by persons who are not Relators in this case. It is well-recognized at law that each piece of real estate is unique, and that no two parcels are the

same in location, quality, or value. *State ex rel. Park Inv. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 415; *DeSario v. Indus. Excess Landfill, Inc.* (1991), 68 Ohio App.3d 117, 128. Thus, Relators' evidence that ODNR's actions were found to cause a taking of other lands in Mercer County lends no support to Relators' claims that ODNR has taken their properties in this case—claims that Relators admit they have the burden of proving. (Relators' Merit Brief p. 27.)

Most likely, Relators are trying to use prior case submissions to bolster their earlier offensive claim preclusion position. (See Relators' Memorandum in Support of Their Complaint for a Writ of Mandamus p.9.) Some of Relators' counsel (attorneys Ingram, Miller, and Fusonie) recently tried this same tactic while representing different property owners in the *Nickoli* case (No. 2009-0026), but to no avail. *Nickoli v. Erie MetroParks*, 124 Ohio St.3d 449, 2010-Ohio-606, ¶¶ 22-25.

To the extent evidence from these prior cases show background facts in this case, such evidence is unnecessary and cumulative. There is no need for such evidence because Relators have filed many volumes of their own evidence to show the background facts of this litigation.

C. Evidence of recent (i.e., post-March 1, 2010) flooding on Relators' lands is cumulative, unfairly prejudicial, and immaterial to Relators' taking claim. (Relators' Evid. Vol. 1, Tabs 4 & 23; Vol. 2, Tabs 32, 34, 39, 40, & 44; Vol. 3, Tabs 58, 60, 62, 65, & 69; Vol. 4, Tabs 79, 83, 84, 88, & 93.)

Some Relators have filed evidence purporting to show additional flooding on their lands in March 2010. (Relators' Evid. Tabs 4 (Wayne T. Doner), 23 (Patricia Highley), 32 (Daniel W. Johnsman), 34 (David A. Johnsman aff. & ex. 2), 39 (Timothy Alan Knapke), 40 (Thomas Krick), 44 (Darrell Kuhn), 58 (Jerome Meyer), 60 (William Muhlenkamp), 62 (James Post, on behalf of Opal Post), 65 (Brenda S. Powell), 69

(Thomas D. Rasawehr), 79 (Rodney Sheets), 83 (Ronald J. Siefiring), 84 (Neil Siefiring), 88 (Carl A. Sutter), & 93 (Jerry Weisman.) These affidavits should be stricken because Relators are seeking relief for an alleged *continuing* taking of their lands, not for multiple temporary takings. Evidence of additional, recent flooding on some Relators' lands is simply cumulative to Relators' continuing taking claim.

Moreover, the supplemental affidavits and exhibits claiming additional flooding were provided to Respondents' counsel after the agreed-upon March 1st deadline to depose Relators and non-experts. Respondents could not depose those submitting such affidavits, based on the agreement because the Relator-deposition deadline had expired. Therefore, this Court should strike all affidavits, exhibits, and other evidence of recent (post-March 1, 2010) flooding on Relators' lands.

D. Relators' appraisal evidence is premature and irrelevant because the issue in this mandamus case is to determine whether a taking of Relators' properties has occurred, not to determine what impact an undetermined taking might have on a parcel's value. (Relators' Evid. Vol. 1, Tab 3; Vol. 4, Tab 102; Vol. 7, Tab 121; Vol. 8, Tab. 122.)

Putting the cart before the horse, Relators' evidence includes the testimony and exhibits of James A. Garrett, ODNR's appraiser in the *Baucher* appropriation case (Relators' Evid. Vol. 7, Tab 121; Vol. 8, Tab 122), and the affidavit of appraiser Richard M. Vannatta. (Relators' Evid. Vol. 4, Tab. 102.) Also, the second supplemental affidavit of Relator Wayne T. Doner includes abbreviated appraisals and appraiser's comments. (Relators' Evid. Vol. 1, Tab 3.) None of these individuals has engineering, hydraulic, or hydrological expertise or experience to opine whether Respondents' actions have caused an increase in flooding on Relators' lands. (See Relators' Evid. Vol. 8, Tab 122, Addendum p. 42 (Garrett's qualifications); Joint Evid. Vol. 18, Tab. 81, Depo. pp. 9-10.)

The purpose of these submissions apparently is to show that the alleged increased and severe flooding on farmland causes a compensable diminution in value.

However, this is not a case about valuation, and any opinion about the impact of Respondents' actions upon valuation at this stage is speculative and hypothetical. (Joint Evid. Vol. 18, Tab. 81, Depo. pp. 16-22.) Valuation of Relators' properties is only appropriate if this Court finds that parcels have been taken. Valuation evidence at this mandamus-stage of the litigation is premature and irrelevant. Therefore, this Court should strike all evidence from Messrs. Garrett and Vannatta.

E. The affidavits and exhibits of Karen S. Doner, James A. Post, Rhonda E. Powell, M. Leone Powell, and Larry Pugsley should be stricken for lack of personal knowledge. (Relators' Evid. Vol. 5, Tab 34; Joint Evid. Vol. 1, Tab 7; Vol. 5, Tabs 37 & 38; Vol. 6, Tab 40.)

Supreme Court Practice Rule X(7) requires affidavits to be "made on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit." "Personal knowledge" means "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay." BLACK'S LAW DICTIONARY (6 Ed. 1990), 873. Deposition testimony reveals that Relators Karen S. Doner, M. Leone Powell, Rhonda Powell, and Larry Pugsley, as well as James A. Post, lack personal knowledge of increased flooding on their lands attested to in their affidavits. Their "knowledge" of increased flooding is based entirely on hearsay information.

Relator Karen S. Doner testified she has no first-hand knowledge of the alleged increased flooding on her lands, and that her allegations are based solely upon information from others. (Joint Evid. Vol. 1, Tab. 7, Depo. pp. 21-29.) In fact, she

admitted that she was not sure whether her allegations were based on any personal knowledge. (Id. p. 23.)

Although James A. Post first testified that he saw flooding on Relator Opal Post's property after 1997, he later admitted he only knew that the property flooded in 2003, and that was because his brother told him. (Joint Evid. Vol. 5, Tab. 34, Depo. pp. 16-17.) Moreover, Mr. Post's affidavit is inadmissible hearsay because he could not testify to facts on behalf of his mother (Relator Opal Post) simply through a power of attorney.

Relator M. Leone Powell's belief that her land has been subjected to increased flooding is based entirely on the statement of her farmer, Mike Highley. (Joint Evid. Vol. 5, Tab 37, Depo. pp. 21-27.)

Relator Rhonda E. Powell has never seen any flooding on her lands, either before or after the spillway was modified. (Joint Evid. Vol. 5, Tab. 38, Depo. pp. 13-16.) Her information about increased flooding on her lands comes entirely from statements from her family members. (Id.)

Relator Larry V. Pugsley has never seen any flooding on his land. (Joint Evid. Vol. 6, Tab. 40, Depo. pp. 30-34, 36-38.) His knowledge comes entirely from information supplied by others. (Id. pp. 28, 30, 32-33, 37.)

None of these Relators has personal knowledge of increased flooding on their properties. As shown by their deposition testimony, their "knowledge" of such flooding is based entirely on hearsay. Accordingly, their affidavits² should be stricken.

² These affidavits are also attached to the mandamus complaint as Exhibits D6 (Rhonda E. Powell), D9 (Karen S. Doner), D50 (James A. Post), D53 (M. Leone Powell) and D56 (Larry V. Pugsley).

F. The affidavit and exhibit of Jay H. Gould should be stricken because Mr. Gould is not qualified to give an expert opinion on the impact of ODNR's actions, and because he lacked the required federal authority to execute the affidavit. (Relators' Evid. Vol. 4, Tab. 101.)

Relators' evidence includes an affidavit (plus exhibit) from Jay H. Gould, who is the executive director of the Adams County Indiana Farm Service Agency, which is part of the U.S. Department of Agriculture ("USDA"). (Relators' Evid. Vol. 4, Tab. 101, Affidavit ¶ 1.) In his affidavit and attached letter, Mr. Gould attests to the damaging impact of ODNR's actions upon land along Beaver Creek. (Id. ¶¶ 7-9 & ex. 1.) The basis for his opinion is his familiarity with water flows and its impact upon soils in western Ohio and eastern Indiana, which he apparently has gained in his position as executive director and frequent observer of Beaver Creek and the Wabash River. (Id. ¶¶ 4-6.)

Nowhere does Mr. Gould indicate that he has any specialized knowledge, skill, experience, training, or education in engineering, hydrology, or hydraulics. Certainly, he did not become an "expert" in hydrology or hydraulics simply by living in Adams County, Indiana for 40 years and watching Beaver Creek and the Wabash River. Mr. Gould is therefore not qualified to give an expert opinion on the hydrological or hydraulic impact of ODNR's actions on nearby lands. Evid.R. 702.

Further, by law, Mr. Gould had no authority to execute the affidavit in his capacity as executive director of the Adams County Farm Service Agency because he had no prior approval from the appropriate USDA authorities. 7 C.F.R. 1.216; see, also, **Exhibit C** (Apr. 27, 2010 letter from Steven G. Reed, Assistant USDA Regional Attorney.)

G. Attorney Martha C. Brewer's evidence summaries and compilations are not themselves evidence. (Relators' Evid. Vol. 10, Tab 128.)

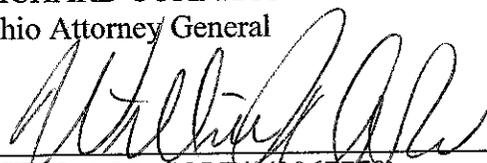
Relators' presentation of its "evidence" includes an affidavit and exhibits prepared and attested to Martha C. Brewer, one of Relators' attorneys in this case. (Relators' Evid. Vol. 10, Tab 128.) While Ms. Brewer's exhibits purportedly compile and summarize Relators' evidence (apparently for the Court's convenience), they are not evidence and should not be construed as such. Yet, Relators use Ms. Brewer's affidavit and exhibits in their merit brief as evidence to support their factual and legal arguments. (Relators' Merit Brief pp. 9, 10, 11, 23, 33 & 47.) While Ms. Brewer's compilations are perhaps appropriate for Relators' legal brief, they have no place in Relators' presentation of evidence. Moreover, nothing in Relators' evidence suggests that Ms. Brewer is somehow competent to testify in this case as a fact (or, much less, expert) witness. Therefore, her affidavit and exhibits should be stricken.

Conclusion

For these reasons, this Court should strike from the record the submissions identified in this motion.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic and regular mail on June 18, 2010, to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, Kristi Kress Wilhelmy, and Martha C. Brewer, Vorys, Sater, Seymour & Pease, P.O. Box 1008, Columbus, OH 43216.


WILLIAM J. COLE

William J. Cole

From: Miller, Joseph R. [JRMiller@vorys.com]
Sent: Tuesday, January 12, 2010 1:46 PM
To: William J. Cole; Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin
Subject: RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Bill,
 Following up on the Court conference of this afternoon and the Court's admonition that the parties agree upon a schedule for the completion of discovery, we accept your proposal to exchange expert evidence by March 1 and conclude expert depositions by March 19. We also accept your compromise proposal during the Court conference that non-expert depositions be completed by each side by February 15.
 Joe

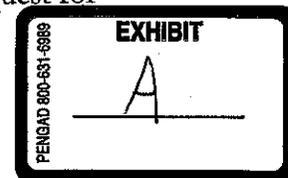
From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Tuesday, January 12, 2010 8:58 AM
To: 'Campbell, Andrew'; Ingram, Bruce L.; Miller, Joseph R.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin
Cc: Kudela, Justin
Subject: RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Master Commissioner Campbell:

Per your instruction, here are the outstanding unresolved discovery issues between the litigants:

- 1) Venue of depositions of Relators: Respondents' counsel maintain the right to depose Relators in their chosen venue of Columbus, with allowances for those who can document a physical inability to travel here. Relators' counsel insist that all such depositions take place in Mercer County.
- 2) Scheduling of expert evidence and depositions: Based on Joseph Miller's Jan. 8 correspondence, it appears that the parties agree, with the Court's approval, to extend to April 1 the deadline for filing their evidence with the Court. Relators' counsel proposes that Respondents provide their expert evidence to them by February 15, to allow them to complete discovery by March 1. Respondents' counsel counter-proposes that both parties exchange their expert evidence (affidavits, reports, supplements) by March 1, and conclude all expert and non-expert depositions by March 19.
- 3) Communications, if any, between Respondents and J. Anthony Logan (Mr. Logan represented certain other Mercer County landowners in a prior litigation, and was subsequently chief legal counsel for ODNR until early December): Relators' counsel claims that any substantive legal communications that Mr. Logan had with Respondents about this litigation are not privileged, and they demand all documentation of such communications. Respondents maintain that Mr. Logan's substantive legal communications, if any, with ODNR about this litigation are privileged. Further, Respondents note that there is no documentation of such communications to produce.
- 4) Relators' refusal to answer Respondents' Interrogatory # 5, part 3, which asks whether any Relators have applied to the federal Natural Resources Conservation Service for drought or other natural causes: Relators object to this interrogatory as irrelevant and refuse to answer. Respondents maintain that Relators must answer (and produce all related documentation pursuant to Respondents' attendant Request for

6/18/2010



Production # 5) because any factual evidence of whether, when, how, and why Relators filed requests for assistance is relevant to support or rebut their allegations that they have been and will continue to be flooded.

5) Relators' refusal to answer Respondents' Interrogatory # 6, which asks whether any Relators ever received any financial assistance, compensation or other relief from any entity, including the federal Department of Agriculture's Farm Service Agency since 1997 for property damage or loss due to flooding, drought, or other natural causes: Relators object to this interrogatory as irrelevant and refuse to answer. Respondents maintain that Relators must answer (and produce all related documentation pursuant to Respondents' attendant Request for Production # 5) because any factual evidence of whether, when, how, and why Relators filed requests for assistance is relevant to support or rebut their allegations that they have been and will continue to be flooded.

The above list does not include all of Respondents' supporting arguments, which counsel will be prepared to discuss at the 1:00 phone conference.

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From: Campbell, Andrew [mailto:Andrew.Campbell@sc.ohio.gov]
Sent: Monday, January 11, 2010 1:20 PM
To: blingram@vorys.com; jrmiller@vorys.com; thfusonie@vorys.com; kkwilhelmy@vorys.com; William J. Cole; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin
Cc: Kudela, Justin
Subject: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Counsel:

In an e-mail sent to the clerk's office on Friday afternoon, January 8, counsel for relators informed the court that the parties "have reached an impasse related to certain discovery issues" and sought the court's assistance in resolving those matters. Correspondence between counsel was attached.

It is not clear from the foregoing correspondence what issues remain outstanding between the parties. To expedite consideration of these matters, counsel for each side should reply to this e-mail and submit a description of outstanding discovery issues by 9:00 a.m. tomorrow morning (Tuesday, January 12). The description of issues should be submitted by replying to this e-mail using the reply-to-all function, as should any questions. Any discovery requests and responses relevant to the outstanding issues should be included with the party's submission.

A telephone conference will be held at 1:00 p.m. the same day (Tuesday, January 12) to discuss the outstanding issues. Further information regarding the conference (confirming time and date, how it will be initiated, procedures to be used, etc.) will be circulated via e-mail prior to the conference.

6/18/2010

Except as stated above, and as previously directed, the parties should continue to first contact the clerk's office regarding any future matters or issues concerning this case.

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From the law offices of Vorys, Sater, Seymour and Pease LLP.

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6/18/2010

William J. Cole

From: Fusonie, Thomas H. [thfusonie@vorys.com]
Sent: Monday, May 24, 2010 11:00 AM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Kudela, Justin
Subject: RE: Doner v. Logan, 2009-1292

This morning you'll be receiving a CD of the Affidavit of Jim Moir. I tried to email it Friday, but it bounced back.

Tom Fusonie

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Monday, May 24, 2010 8:49 AM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Kudela, Justin
Subject: Doner v. Logan, 2009-1292

Counsel:

Attached is a copy of Respondents' motion to reduce the number of copies for Respondents' evidence submissions, filed this morning. A hard copy is being mailed to your office today.

William J. Cole

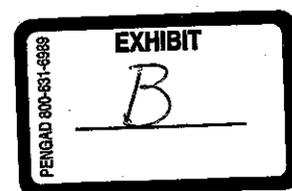
Senior Assistant Attorney General
 Ohio Attorney General Richard Cordray's Office
 Executive Agencies Section
 30 East Broad Street, 26th Floor
 Columbus, Ohio 43215
 614.466.2980 (phone), 866.354.4086 (fax)
 william.cole@ohioattorneygeneral.gov

From the law offices of Vorys, Sater, Seymour and Pease LLP.

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6/18/2010



VORYS

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Legal Counsel

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Founded 1909

Thomas H. Fusonie
Direct Dial (614) 464-3261
Direct Fax (614) 719-4886
Email thfusonie@vorys.com

June 1, 2010

VIA COURIER DELIVERY

William J. Cole, Esq.
Mindy Worly, Esq.
Jennifer S.M. Croskey, Esq.
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

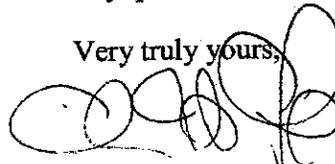
Re: *Doner et al. v. Logan, et al.*
Case No. 2009-1292 (Supreme Court of Ohio)

Dear Counsel:

Enclosed please find a disc containing a copy of the Affidavit of James R. Moir with exhibits.

Please contact me if you have any questions.

Very truly yours,



Thomas H. Fusonie

THF/gjs
Enclosure

cc: Dale T. Vitale, Esq. (all via email w/o enc.)
Daniel J. Martin, Esq.
Rachel H. Stelzer, Esq.
Bruce L. Ingram, Esq.
Joseph R. Miller, Esq.
Kristi Kress Wilhelmy, Esq.
Martha C. Brewer, Esq.



United States
Department of
Agriculture

Office of the
General
Counsel

209 Bricker Federal Building
200 North High Street
Columbus, Ohio 43215
614-469-2455
Fax 614-469-2458

VIA EMAIL

April 27, 2010

Ohio Attorney General Richard Cordray
30 East Broad Street, 26th Floor
Columbus, OH 43215

Attn: Jennifer S.M. Croskey
Assistant Attorney General, Executive Agencies

RE: State of Ohio ex rel. Wayne T. Doner, et al. v. Sean D. Logan, Director, Ohio Department of Natural Resources and Ohio Department of Natural Resources The Supreme Court of Ohio, Case Number 2009-1292

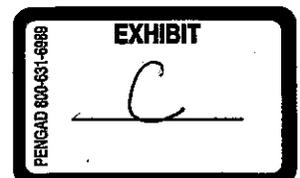
Dear Ms. Croskey:

I forwarded your letter of April 23, 2010 to Julia Wickard, State Executive Director (SED) of the Farm Service Agency (FSA) in Indiana. In that letter you requested to take the deposition of Jay H. Gould, County Executive Director of the FSA in Adams County, Indiana. The basis for that request was to question Mr. Gould concerning an affidavit he executed on January 27, 2010, a copy of which you forwarded to this office.

Testimony by USDA employees, including employees of the FSA, is governed by federal regulations found at 7 C.F.R. § 1.210 *et seq.* Specifically, no employee may provide testimony without the SED's approval. The SED has reviewed your request and has determined that Mr. Gould will not be given approval to testify since the United States is not a party to this lawsuit and the interests of the Government will not be served thereby. Further, if a formal subpoena is issued seeking Mr. Gould's testimony, Ms. Wickard's determination would be the same.

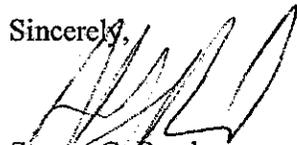
Finally, the SED has determined that Mr. Gould had no authority to execute the affidavit of January 27, 2010 in his official capacity. That affidavit and its contents do not represent the position of the United States or the FSA with regard to the issues involved in the above lawsuit.

I am providing a copy of this letter to Thomas Fusonie, attorney for plaintiffs, so that he is aware of the agency's position on the affidavit signed by Mr. Gould.



Ms. Jennifer S.M. Croskey
Page 2.

Sincerely,



Steven G. Reed
Assistant Regional Attorney

cc: Thomas H. Fusonie-Vorys, Sater, Seymour & Pease, LLP
State Executive Director Julia Wickard-FSA-IN
Assistant U.S. Attorney Andrew M. Malek-Columbus, OH
Assistant U.S. Attorney Deborah M. Leonard-Ft. Wayne, IN

SGR/hll