

IN THE SUPREME COURT OF OHIO

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

Relators,

v.

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

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

**RELATORS' MEMORANDUM CONTRA TO
RESPONDENTS' MOTION TO STRIKE EVIDENCE**

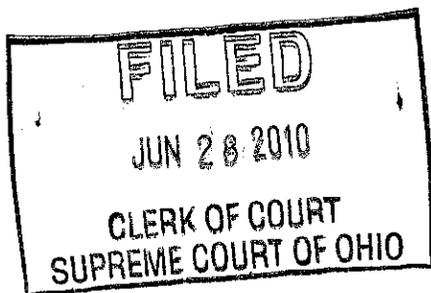
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I. INTRODUCTION

Respondents Sean D. Logan and the Ohio Department of Natural Resources (collectively “ODNR”) again attempt to hide reality from this Court and prevent it from fulfilling its obligation of getting to the truth of the matter – the truth being that ODNR has taken Relators’ lands without just compensation. ODNR asks this Court to strike seven categories of evidence submitted by Relators: 1) all expert evidence not provided to ODNR by March 1, 2010; 2) all evidence from other cases; 3) all evidence of flooding on Relators’ lands after March 1, 2010; 4) all evidence from appraisers; 5) the affidavits and exhibits of five Relators; 6) the affidavit of Jay H. Gould; and 7) the affidavit of Attorney Martha C. Brewer. *See generally* Mot. to Strike. All seven categories are competent, relevant, and admissible, and, thus, ODNR’s motion in its entirety should be denied.

First, ODNR’s efforts to strike Relators’ rebuttal expert evidence must be denied. Not only does ODNR not dispute the admissibility of Relators’ rebuttal expert evidence on any evidentiary ground, this portion of ODNR’s motion amounts to an improper motion for reconsideration. On two occasions, this Court rejected ODNR’s position. ODNR has given this Court no reason to decide otherwise now. ODNR just wants to prevent this Court from learning the extent and severity of the flaws in ODNR’s expert reports. Additionally, ODNR will suffer no prejudice with the admission of Relators’ expert evidence, but Relators will suffer prejudice if the evidence is excluded.

Similarly, evidence of litigation brought by neighboring landowners against ODNR involving flooding caused by the Spillway and ODNR’s new lake-level management practices is relevant and admissible. ODNR tries to hide from this Court relevant and damaging sworn testimony and admissions from *Post*, *Case Leasing*, and the pending appropriation actions. This

evidence is relevant to establish widespread recurring flooding all along the Beaver Creek and Wabash River from the Spillway to the Indiana state line. Relators rely on this evidence for purposes of conserving resources and establishing issue preclusion (and not for purposes of establishing claim preclusion). And, last, this evidence is not cumulative.

Likewise, evidence of recent flooding is relevant and not cumulative. The recurrence of flooding may be relevant in determining whether a landowner has established a takings claim. Moreover, contrary to ODNR's opinion, this Court cannot ignore flood events merely because they happen after a supposed deadline for deposing Relators.

Relators' "appraisal evidence" is also relevant and admissible. This evidence includes the admissions of ODNR's own appraiser, James A. Garrett, that the recurring flooding caused by ODNR impacts the utility of the flooded property, scars the land, and causes further and further decline in utility with each recurrence. Such evidence is relevant to whether the flooding has interfered with the owners' use and enjoyment of the property. And ODNR does not attack the competency of these individuals to testify to the impact of the flooding.

The affidavits of the Relators are based on personal knowledge and thus are admissible. As became clear through deposition testimony, all Relators have, at minimum, personal firsthand knowledge of pre-1997 of the conditions on their property. Thus, they possess the firsthand knowledge required to sign affidavits regarding the change in flooding on their property.

The affidavit of Jay Gould is also admissible. Mr. Gould's 40 years as Executive Director of the Adams County Indiana Farm Services Agency qualifies him to testify about his observations and experiences. ODNR's quibbles with Mr. Gould's qualifications go directly to the weight attributable to Mr. Gould's affidavit, not its admissibility. Nothing prevents Mr.

Gould from testifying as to his own personal firsthand observations and opinions based on those observations, which exist separate and apart from his official government role.

Last, the affidavit of Attorney Brewer and attached Addenda, which summarize Relators' deposition testimony and affidavits as well as Stantec's reports, are proper summaries of evidence. Interestingly, ODNR seeks to strike this affidavit not based on its content or accuracy but instead upon a licensed Ohio attorney's competency to summarize the information. Ms. Brewer's summaries do not differ from what attorneys do for this Court every day when they provide summaries of the factual and procedural posture of a case and affirm the truthfulness of the statement under Civil Rule 11. As such, her affidavit satisfies both Ohio Rule of Evidence 602 and Ohio Rule of Civil Procedure 11 and is consistent with Rule of Evidence 1006.

ODNR's motion is frankly a waste of this Court's time and resources. In bench trials, this Court "presume[s] that the trial court will consider only relevant, material and competent evidence." *State v. Bays*, 87 Ohio St.3d 15, 27, 1999-Ohio-216. This Court has noted that "[j]udges, unlike juries, are presumed to know the law. Judges are trained and expected to disregard any extraneous influences in deliberations." *State v. Davis* (1992), 63 Ohio St.3d 44, 48, 584 N.E.2d 1192, 1196. If trial courts are presumed to consider only appropriate evidence and "disregard any extraneous influences in deliberations" we can trust this Court to do the same.

II. LAW AND ARGUMENT

A. Relators' Expert Rebuttal Evidence Which Attacks And Challenges ODNR's Expert Reports Is Admissible.

1. ODNR does not dispute the admissibility of Relators' rebuttal expert evidence on any evidentiary ground.

ODNR does not rely on a single rule of evidence. ODNR does not criticize the competency, qualifications, expertise, or experience of Relators' experts. It does not challenge

the relevancy of Relators' rebuttal expert evidence to Relators' claims. ODNR seems to be arguing that it is somehow "unfair" for this Court to consider Relators' rebuttal expert evidence which refutes the reports and theories of ODNR's experts simply because such evidence was prepared after March 1, 2010. The admissibility of Relators' expert evidence does not hinge upon any supposed deadline. ODNR has made absolutely no attempt to attack Relators' rebuttal expert testimony on any evidentiary grounds.

2. ODNR's arguments to exclude Relators' rebuttal expert evidence amount to an improper Motion for Reconsideration.

This Court has twice rejected ODNR's "unfair" argument. On March 17, 2010, Relators moved this Court for an extension of the deadline for the presentation of evidence from April 1, 2010 to June 1, 2010. Relators identified, as the lead reason in seeking the extension, their need for additional time to conduct expert discovery. Relators' Mot. to Extend by 60 Days the Deadlines for Presentation of Evidence & Merit Briefing ("Mot. to Extend") at 8 (noting the need for additional time "to obtain rebuttal evidence to [ODNR's] contentions concerning [the work of Relators' expert].") ODNR opposed Relators' motion on grounds nearly identical to those advanced in ODNR's current motion. Memo in Opp'n. to Mot. to Extend at 5-6. On March 23, 2010, this Court granted Relators' request for an extension. Order, 03/23/2010.

On the second occasion, ODNR asked this Court to prohibit Relators from submitting any expert evidence not provided to opposing counsel on or before March 1, 2010. ODNR's Mot. for an Order Regarding the Admissibility of Certain Evidence & for Proceeding with Expert Discovery ("Mot. re. Admissibility") at 1, 3. ODNR re-hashed its arguments from its opposition to Relators' motion for extension. Id. at 7-9. On April 21, 2010, this Court rejected ODNR's arguments. Order, 4/21/2010.

Now, for the third time, ODNR argues that Relators' rebuttal expert evidence should not be considered by the Court. In doing so, ODNR simply asks this Court to reconsider its March 23rd and April 21st Orders. This is improper. The Supreme Court Practice Rules do not permit reconsideration of the March 23rd and April 21st Orders. Also, Rule 11.2(B) precludes ODNR from simply rearguing its case. Yet, that is all ODNR does with the pending Motion. For this reason, ODNR's motion is improper and should be denied.

Even if ODNR's motion was proper, Relators have an unconditional right to rebut ODNR's expert evidence. *See Phung v. Waste Mgmt.* (1994), 71 Ohio St.3d 408, 410, 644 N.E.2d 286 ("A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief."); *Breyman v. Pennsylvania* (6th Dist. 1932), 43 Ohio App. 473, 477-78 (similar). After all, this Court's paramount purpose is to determine the truth, and such rebuttal expert testimony is essential to that truth-finding process.

In its March 23rd and April 21st Orders, this Court correctly recognized the appropriateness of Relators' efforts to discover and present rebuttal expert evidence, regardless of this purported deadline. If it was appropriate for Relators to develop the rebuttal evidence, it is also appropriate for this Court to admit the rebuttal evidence **when, as here, there is no dispute the evidence is competent, highly relevant, and not inadmissible hearsay.**

3. ODNR's position is factually unavailing as the parties never agreed there would be no rebuttal evidence.

Contrary to ODNR's position, Relators are not trying to read a "non-existent exception" to the agreement to exchange evidence by March 1, 2010. Mot. to Strike at 4. There was simply no agreement between the parties regarding rebuttal evidence. Only after ODNR produced an indefensible and fatally flawed expert report did ODNR first seek to prevent Relators from

preparing rebuttal evidence by suddenly and unilaterally deeming March 1, 2010, a deadline “without exception.”

Late afternoon on March 1, ODNR produced its purported expert materials which included two affidavits and reports. One of those reports consisted of a CD-ROM with two pdf documents, one of which included two hidden, unidentified attachments.¹ Prior to that date, ODNR had produced zero affidavits. In response to these reports, Relators timely reached out to the Court and asked for additional time to analyze the materials and prepare their rebuttal. Prior to ODNR’s brief opposing the extension, ODNR never in the parties’ communications indicated either that Relators would have absolutely no opportunity to respond to ODNR’s expert evidence or that March 1, 2010 was the drop-dead deadline for all expert evidence. Indeed, after the exchange of expert evidence, both parties acknowledged the need for rebuttal evidence and an extension of the deadlines. Ex. A-1 to Mot. to Extend at 03/02/10 Email (“We may need more time to respond to the statements in his [Jay Gould] affidavit that we just received yesterday, which may include seeking an extension of one or more deadlines.”); Ex. A-1 to Mot. to Extend at 03/03/10 Email (agreeing that an extension of the deadlines was needed). ODNR acknowledges this fact even though, prior to that time, ODNR never suggested that it might need to rebut any expert materials Relators would produce on March 1.

Relators never hid the fact that they intended to produce rebuttal expert evidence. Indeed, in Relators’ Motion to Extend the Deadlines for the Presentation of Evidence and Relators’ Memorandum opposing ODNR’s Motion for an Order Regarding the Admissibility of

¹ ODNR provided no indication that the report included hidden data and data that required downloading particular software to view. After repeated exchanges with ODNR, finally, on March 12, 2010, Relators discovered that the 50-page .pdf file was in fact a 50-page .pdf file plus two voluminous hidden data files containing a considerable number of sub-files, all of which required Relators to download software programs from the Army Corps of Engineers in order to view and read the data.

Certain Evidence, Relators stated their intention to produce rebuttal expert evidence, and, on April 22, 2010, identified Jim Moir as an expert and made him available for deposition.² Mot. to Extend at 3, 8-9; Mem. Opp'n to Mot. re. Admissibility at 2-3, 5-7; Correspondence, 04/22/2010, attached as Ex. B. Further, any delay in identifying Mr. Moir was the result of Respondents' efforts to prevent Relators from producing rebuttal evidence. *See generally* Mem. Opp'n to Mot. to Extend & Mot. re. Admissibility. *See also* Resps.' P.E. Tab A at Exs. A & B (ODNR's additional expert materials produced on April 29 and May 27).

Because the parties never agreed to foreclose each other from preparing rebuttal evidence, ODNR's motion must be denied.³

4. ODNR will suffer no prejudice with the admission of Relators' expert evidence, but Relators will suffer prejudice if the evidence is excluded.

There is nothing unfair or prejudicial about giving the party with the burden of proof the opportunity to challenge the opposing party's expert materials. Indeed, ODNR has it reversed: to strike Relators' rebuttal expert evidence and prevent them from even presenting this Court with evidence challenging ODNR's expert evidence would be unfair and prejudicial to Relators.

² Relators also made a point to inform ODNR that the rebuttal affidavit of Relators' expert, James Moir would be delayed due to the delay in receiving materials from ODNR's experts. *See* Correspondence, 05/17/2010, attached as Ex. A. Prior to the depositions of ODNR's experts, Relators had served subpoenas on those experts. ODNR's experts did not comply with those subpoenas until the middle of May. Moreover, only on April 29, 2010, did ODNR provide Relators with a second Stantec report and new mapping, which Mr. Moir needed to analyze.

³ ODNR makes numerous factual misstatements. In particular, ODNR's claim that Relators did not provide any new evidence to ODNR on March 1 (Mot. to Strike at 3) is simply not true. Relators provided ODNR with the affidavit of Jay Gould. In that same vein, ODNR claims that the affidavit of Relators' expert, Pressley Campbell, was "based on his work in 2006 regarding real estate not involved in this litigation." *Id.* Again, this statement is inaccurate. The affidavit Dr. Campbell prepared is based on Dr. Campbell's work in this case. His affidavits concern the Spillway, ODNR's lake level management practices, and the impact of the Spillway and those management practices on property adjacent to and/or near the Beaver Creek and the Wabash River from the Spillway and extending to the state line.

ODNR will suffer no prejudice with the admission of Relators' rebuttal evidence. ODNR had Relators' initial expert materials in its possession on December 24, 2010, and thus ODNR and its experts had **over two months** to analyze and challenge the work of Relators' expert and used Relators' expert affidavits in formulating its expert evidence. By early Fall, Relators had already obtained considerable evidence regarding their claims, including affidavits from Relators experts, and had produced those affidavits in a timely manner in response to discovery requests.

ODNR, however, waited until late afternoon, March 1, 2010 to produce any expert materials, and according to ODNR, Relators should be given no opportunity to challenge the work of ODNR's experts. Yet, ODNR fails to mention that ODNR's expert, Stantec, provided not one, but two voluminous additional reports to Relators beyond the supposed March 1, 2010 deadline (i.e., one on April 29 and a second on May 27, *see* Resps.' P.E. Tab A at Exs. A & B). Additionally, on May 28, 2010, ODNR produced an affidavit of another "expert" Jay Dorsey. Resps.' P.E. Tab O. So, while Relators are not permitted rebuttal expert affidavits, ODNR can submit new expert testimony and "supplemental" reports. Apparently, the purported drop-dead March 1 deadline applies only to Relators, and not ODNR.⁴ Moreover, that Stantec prepared a response report (albeit only confirming the incompetency of Stantec) to Mr. Moir's report demonstrates that ODNR has suffered no prejudice, let alone unfair prejudice.

B. Evidence From Litigation Brought By Neighboring Landowners Against ODNR Which Arises Out Of Flooding From The Spillway Is Relevant And Admissible.

ODNR seeks to strike sworn testimony, evidence, pled facts and judicial decisions from *State of Ohio ex rel. Leo Post v. ODNR*; *Case Leasing & Rental Inc. v. ODNR*; and five

⁴ Principles of fairness dictate that if this Court adopts ODNR's position as to the March 1 deadline and strikes Relators' rebuttal expert evidence, it must also strike Stantec's April 29, 2010 report, May 27, 2010 Affidavit of Tadd Henson and May 28, 2010 Affidavit of Jay Dorsey.

appropriation actions filed by ODNR against the *Post* landowners and pending in Mercer County. ODNR contends this evidence is irrelevant because it “involve[s] properties not at issue in this litigation and owned by persons who are not Relators in this case.” Mot. to Strike at 6. ODNR also argues that this evidence is cumulative. Both positions must be rejected.

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ohio Evid. R. 401. Relators’ evidence satisfies this definition.

1. ODNR tries to hide from this Court highly relevant and damaging sworn testimony and admissions of their own agents and experts.

By attempting to exclude evidence from *Post*, *Case Leasing*, and the pending appropriation actions, ODNR desperately tries to run from devastating sworn testimony and admissions. ODNR does not want this Court to consider the general admissions it made regarding the Spillway, ODNR’s lake level management practices, and Grand Lake St. Marys in general. ODNR does not want this Court to read its admissions that its actions and inactions are causing flooding all along the Beaver Creek and Wabash River from the Spillway to the Indiana state line. And ODNR does not want this Court to read its admissions that its actions and inactions are causing the utility of the land to further and further decrease.

Specifically, ODNR tries to hide the sworn testimony of its expert, Doyle Hartman, and its agents, Mark Odgen and Michelle Hoffer, that the Spillway and ODNR’s lake-level management practices cause increased discharge and downstream flooding, an issue directly before this Court. Relators’ Merit Br. at 20-21. Likewise, ODNR tries to run from the sworn admissions of its appraiser (James Garrett) that the flooding from the Spillway and ODNR’s lake level management practices causes interference with landowners’ use and enjoyment of their properties; impacts the utility of the properties; causes the properties to decline in value; and as

time passes and the flooding continues, causes further and further decline in utility and value. Id. at 10, 39. Mr. Garrett's admissions make it more probable than not that Relators' parcels have also suffered and will continue to suffer diminished utility as a result of ODNR's flooding.

Not only does ODNR try to run from sworn testimony and admissions, but from stipulations and pled facts in *Post, Case Leasing*, and the pending appropriation actions. The stipulations and pled facts constitute judicial admissions. See *Shifflet v. Thomson Newspapers (Ohio), Inc.* (1982), 69 Ohio St.2d 179, 187, 431 N.E.2d 1014 (noting that where a party alleges a matter of fact in a pleading, that pleading is an admission); *Faxon Hills Constr. Co. v. United Bhd. of Carpenters & Joiners of Am.* (1958), 168 Ohio St. 8, 10, 151 N.E.2d 12 (similar). These admissions are binding and make it more probable than not that ODNR has caused increased discharge from the Spillway and increased flooding of Relators' lands.

2. Evidence from these actions is relevant to establish widespread recurring flooding all along the Beaver Creek and Wabash River from the Spillway to the Indiana state line.

The evidence submitted by Relators from *Post, Case Leasing*, and the appropriation actions demonstrates widespread flooding all along Beaver Creek and the Wabash River caused by the Spillway and ODNR's lake-level management practices. Thus, the evidence is not specific to any particular parcel, but rather, is evidence applicable to all parcels at issue in the present litigation. ODNR also ignores that the properties at issue in those cases neighbor and/or directly adjoin properties at issue in the present litigation. In many instances, the proximity of the properties is such that in order for the properties at issue in those cases to have flooded, Relators' properties at issue in this case must also flood. Accordingly, this evidence makes it more probable than it would be without the evidence that Relators' lands are subject to the same flooding. Indeed, ODNR recognized the relevancy of these prior cases and submissions when in

modeling the floodwaters it prepared a map showing the location of the properties at issue in the prior litigation and their relation to the properties at issue in this case. Joint Exhibits (“J.E.”) 79, Tadd Dep. Henson, at 97-98; J.E. 78, Philip Dep. DeGroot at Ex. E.

3. Relators rely on the evidence for purposes of conserving resources and establishing issue preclusion (and not for purposes of claim preclusion).

ODNR accuses Relators of trying to use these evidentiary submissions for purposes of establishing offensive claim preclusion. Mot. to Strike at 7.⁵ Such accusations are false. ODNR and this Court have Relators’ Merit Brief and know precisely the evidence Relators rely upon and the arguments Relators make in conjunction with that evidence. Not once in the entire brief did Relators argue claim preclusion. *See generally* Relators’ Merit Brief.

To the contrary, Relators rely on these submissions, in part, to conserve resources. Relying on sworn testimony, admissions, stipulations, and findings from the prior litigation has made it unnecessary to depose certain individuals, including, for example, ODNR representatives Michelle Hoffer and Mark Ogden, thus saving time and money for both sides.

Additionally, Relators rely on these submissions for their potential preclusive effect as to issues actually and necessarily litigated in *Post* and *Case Leasing*.⁶ The decisions rendered by the courts in *Post* and *Case Leasing* are final judgments establishing the existence of recurring flooding by ODNR of property which neighbors and/or directly abuts farmland and homes at issue in this litigation. Incredibly, ODNR asks this Court to ignore these judgments, even though

⁵ ODNR also launches a specious attack against certain named counsel for Relators, regarding strategy employed in wholly unrelated litigation. This personal attack has no bearing whatsoever on the matters pending before this Court and should be wholly ignored.

⁶ *See Hicks v. De La Cruz* (1977), 52 Ohio St.2d 71, 74 (holding that “A party precluded under [issue preclusion] from relitigating an issue with an opposing party likewise is precluded from doing so with another person unless he lacked full and fair opportunity to litigate that issue in the first action, or unless other circumstances justify according him an opportunity to relitigate that issue.”). Such “other circumstances” do not exist here.

those judgments tend to demonstrate the existence of recurring flooding on Relators' properties and that the flooding is caused by the inactions and actions of ODNR.

4. The evidence is not cumulative.

Last, evidence from these prior cases is not cumulative. ODNR's position inverts common sense. Relators did not need to conduct depositions of certain ODNR representatives due to the existence of the admissions and sworn testimony. These admissions and testimony are unique and absolutely necessary to this Court's determination of the facts in this case.

C. Evidence of Recent Flooding Is Relevant And Material to Relators' Takings Claims And Thus Should Not Be Excluded.

1. ODNR's arguments amount to an improper Motion for Reconsideration.

This Court has twice rejected ODNR's argument. First, when Relators moved this Court for an extension of the deadline for the presentation of evidence from April 1, 2010 to June 1, 2010, Relators identified, as a basis for the extension, the need for additional time to produce evidence related to new flooding recently experienced by many Relators. Mot. to Extend at 9. ODNR opposed Relators' motion claiming that evidence of recent flooding was immaterial to Relators' claims of "permanent continuing taking of their land." Memo in Opp'n. to Mot. to Extend at 6. On the second occasion, ODNR formally moved to exclude such evidence on grounds that the March 1, 2010 deadline for deposing Relators had passed and the evidence was immaterial to Relators' permanent taking claim. Mot. re. Admissibility at 10. Both times, this Court rejected ODNR's position. Order, 03/23/2010; Order, 4/21/2010.

Now for a third time, ODNR seeks to hide the same evidence,⁷ this time on the basis that evidence of additional flooding "is simply cumulative to Relators' continuing taking claim."⁸ In

⁷ In this section, ODNR seeks to exclude the affidavit of Thomas Krick, Relators' P.E. Tab 40. Mr. Krick did not testify in this affidavit, or in any affidavit, that his property has been

doing so, ODNR is asking this Court to reconsider its March 23rd and April 21st Orders. This is prohibited under S.Ct. Prac. R. 11.2(B) and amounts to improper reargument.

Relators note that ODNR's cumulative argument constitutes a startling concession by ODNR: that Relators' evidence of ODNR's recurring flooding of Relators' property through 2009 sufficiently establishes a taking of Relators' property. While that concession provides further evidence of ODNR's complete failure to perform its public duty and initiate appropriation actions, it does not preclude evidence of flooding in March, 2010.

2. The recurrence of flooding may be relevant in determining whether a landowner has established a takings claim.

Relators must show a taking (i.e., a "direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it"). *State ex rel. Gilbert v. City of Cincinnati*, 2010-Ohio-1473, ¶ 29 (affirming grant of writ of mandamus to compel city to commence appropriation proceeding to compensate relators for the taking of property where city had repeatedly caused sanitary-sewer to overflow onto relators' property) (quoting *Norwood v. Sheen* (1933), 126 Ohio St. 482, 186 N.E. 102, ¶ 1 of syllabus). In other words, "any physical interference by another with the owner's use and enjoyment of his property is a taking" *Id.* In determining whether a taking has occurred, courts may consider the recurring nature of the interference. *See id.* *See also Masley v. Lorain* (1976), 48 Ohio St.2d 334, 336, 358 N.E.2d 596; *Mansfield v. Balliett* (1902), 65 Ohio St. 451, 471, 63 N.E. 86.

flooded so far in 2010. Accordingly, ODNR has identified no basis for this Court to even entertain striking this evidence. Likewise, without any basis, ODNR seeks to exclude David Johnsman's Supplemental Affidavit despite the fact it does not just address flooding in March, 2010, but also 2003 flooding.

⁸ Previously ODNR argued such evidence was "irrelevant to Relators' permanent taking claim" and instead would be relevant only if Relators were seeking relief for "multiple temporary takings") Mot. re. Admissibility at 10 (emphasis added).

Any evidence of flooding after the new Spillway and ODNR's shift in lake-level management practices, whether that flooding occurred in 2003, 2005, 2008, 2009, or 2010, is relevant for purposes of establishing a taking.⁹ The fact that there is "no good end in sight" to the flooding, *see* ODNR's Mot. re. Admissibility at 10, is relevant to establishing the magnitude of ODNR's interference with Relators' use and enjoyment of their properties.

Moreover, before the recent flooding, ODNR inquired during depositions as to whether Relators' properties had flooded in 2010. *See, e.g.*, J.E. 73, Dep. M. Post at 29. ODNR then thought it was important to know whether the flooding had recurred in 2010. Now, it wants to prevent this Court from knowing the answer to that question. Further, ODNR's position as to evidence of recent flooding is simply nonsensical. Apparently, evidence of 2009 flooding is not cumulative, but evidence of 2010 flooding is cumulative. Stated differently, evidence of five floods is not cumulative, but evidence of a sixth flood is cumulative. ODNR wants this Court to select an arbitrary date and/or number of floods for purposes of establishing whether evidence of flooding is admissible. All evidence of recent flooding should be admitted, regardless of date and regardless of the number of instances of flooding. Finally, the flooding ODNR caused in March, 2010 evidences just how little rainfall it takes for ODNR to cause flooding.

3. This Court cannot ignore flood events merely because they happen after a supposed deadline for deposing Relators.

In addition, ODNR absurdly asks this Court to ignore anything that happens after the arbitrary date of March 1, 2010. While ODNR wants to ignore the March, 2010 flooding it caused, Relators cannot ignore the reality of the recurring flooding on their properties, including the flooding in March, 2010. Relators do not believe this Court should either. Further, ODNR's

⁹ This Court has considered similar evidence of recurring inundation relevant in continuous trespass actions as well. *See Valley Ry. Co. v. Frantz* (1885), 43 Ohio St. 623, 627, 4 N.E. 88.

position regarding the inability to depose Relators is also wholly disingenuous. In March, 2010, Relators agreed to permit ODNR to depose Relators who submitted additional evidence. Ex. A-1 to Mot. to Extend at 03/05/10 Email. Despite ample time before June 1, 2010 to do so, ODNR elected not to depose the Relators about the March, 2010 flooding. Moreover, the supposed March 1, 2010 deadline was never the deadline for factual evidence; the schedule did not contemplate that all factual evidence would be available at that time.

D. Relators So Called “Appraisal Evidence” Is Relevant.

ODNR also seeks to strike Relators’ evidence of ODNR’s appraiser, James A. Garrett; the affidavit of Richard M. Vannatta; and certain portions of and exhibits to an affidavit of Relator Wayne T. Doner on the basis that this evidence is “premature[,]” “irrelevant[,]” and incompetent because none of these individuals are engineering, hydraulic, or hydrological experts. Mot. to Strike at 8-9. ODNR’s position is unavailing.

Relators must show physical interference by ODNR with their use and enjoyment of their property. *State ex rel. Gilbert*, 2010-Ohio-1473, ¶ 29. These appraisers, including ODNR’s own appraiser, indicate that the flooding caused by the Spillway and ODNR’s lake level management practices has interfered with neighboring landowners’ use and enjoyment of their properties through flooding that has impacted the utility of the properties, caused scarring of the land, and caused the properties to decline in value. Mr. Garrett also testified that as time passes and the flooding recurs and recurs, the utility and, thus, the value of the land continues to decline. Likewise, the appraisals of Wayne Doner’s parcels demonstrate that ODNR’s recurring flooding has caused severe interference with the use and enjoyment of those parcels that will further and further increase as the flooding recurs. Such evidence is directly relevant to the issue of whether

the flooding has interfered with the landowners' use and enjoyment of the property, i.e., the utility of the land, and, thus, is directly relevant to whether a taking has occurred.

ODNR does not challenge the ability of these individuals to assess the impact of the flooding on the utility of the property. The fact that none of these individuals have expertise in engineering, hydraulics, or hydrology is immaterial. They have the expertise, unlike an "engineer," to assess the impact ODNR's recurring flooding has on the land's utility. To ODNR, these appraisers, like the farmers and landowners downstream, are too dumb to understand the increasing impact ODNR's recurring flooding is having on the land. Because Relators' so called "appraisal evidence" is relevant and competent, ODNR's motion should be denied.

E. All Relators Have Offered Firsthand Knowledge.

ODNR challenges the affidavits of five Relators Karen S. Doner, James A. Post, Rhonda Powell Agnello, M. Leone Powell and Larry Pugsley, incorrectly asserting that none have firsthand knowledge of the flooding on their respective properties.¹⁰ All have, at minimum, firsthand knowledge of the lack of flooding on their property pre-1997, and, accordingly, possess the requisite knowledge to execute affidavits regarding the same.

ODNR's most blatantly improper allegation of lack of personal knowledge relates to James A. Post. Mr. Post, acting as power-of-attorney for his elderly mother, Opal Post, executed an affidavit detailing his mother's observations regarding the lack of flooding on her property pre-1997 and the flooding experienced since and through 2004, the year that she moved to an assisted living facility. This is proper pursuant to Ohio Revised Code § 1337.2(A)(4), which permits a power-of-attorney to, "[d]o any act of management or of conservation with respect to

¹⁰ In addition to their own observations, Ms. Doner, Mr. Post, Ms. Rhonda Powell, Ms. Leone Powell and Mr. Pugsley have testimony from other Relators and/or fact-witnesses with firsthand knowledge of the flooding to their respective land.

an interest in real property, or a right incident to real property, owned or claimed to be owned by the principal, including ... protect, by litigation or otherwise.” Ms. Post lived on the property from 1949-2004 and was able to observe the conditions on her property during that time period, satisfying the requirement that she possess personal knowledge. P.E. 61, Aff. J. Post (6/24/09), at ¶ 3-4. Therefore, Mr. Post properly affirmed, as power-of-attorney, the facts known by his mother in order to protect her property rights through this litigation.

Further, Mr. Post himself has personal knowledge of the flooding. Mr. Post testified, “I drive by the land and see that it’s flooded, and when we farmed it years ago until the ‘80’s, I even helped farm until the ‘80’s, and it never flooded as much.” J.E. 33, Dep. J. Post, at 11. When asked how he knows that the property has flooded since 1997, Mr. Post responded, “I’ve seen it.” Id. at 16. Mr. Post also executed a second affidavit describing the flooding he personally observed in March 2010. P.E. 62, Aff. J. Post (3/31/10), at ¶ 6 & Exs. 1-3. Thus, Mr. Post has firsthand knowledge sufficient to attest to increased flooding of his mother’s land.

Ms. Doner, Ms. Rhonda Powell, Ms. Leone Powell and Mr. Pugsley all have personal knowledge of the lack of flooding pre-1997. Ms. Rhonda Powell grew-up in Mercer County, and she does not recall seeing any flooding prior to 1997. J.E. 38, Dep. R. Powell at 12-13. Ms. Leone Powell testified that prior to 1997, she had only seen her property flood one time in the 1950s. J.E. 37, Dep. L. Powell at 15. Ms. Doner testified that she grew-up in Mercer County and does not recall seeing any flooding on her property prior to 1997. J.E. 6, Dep. K. Doner at 5-6, 18. Mr. Pugsley also testified that he is not aware of any flooding on his property prior to 1997. J.E. 40, Dep. Pugsley at 29. Because these landowners have knowledge of, at minimum, the lack of flooding on their respective properties pre-1997, they possess the requisite firsthand knowledge required to sign affidavits regarding the change in flooding on their property.

F. Jay Gould Is Qualified To Offer Expert Testimony.

ODNR contests the affidavit of Jay Gould, Executive Director of the U.S. Department of Agriculture, Adams County Indiana Farm Services Agency, because it claims Mr. Gould does not have any specialized knowledge, skill, experience, training or education “in engineering, hydrology, or hydraulics.” Again, ODNR misstates the Rules of Evidence. Under Rule 702(B), Mr. Gould need only be qualified to testify regarding “the subject matter of the testimony.” He need not have a degree in engineering, hydrology, or hydraulics, as ODNR seems to assert. Mr. Gould’s 40 years as Executive Director have provided him experience regarding the impact running water has on soil erosion, soil fertility, and the productivity of farmland. This qualifies him to testify about his observations and opinions related to those observations. ODNR’s quibbles with Mr. Gould’s qualifications go directly to the weight attributable to Mr. Gould’s affidavit, not its admissibility, and this Court is certainly competent to make that assessment.

ODNR also attempts to confuse the issue by noting that Mr. Gould, as a government employee, is not authorized to speak in his official capacity without his agency’s consent. While this may be true, Mr. Gould’s affidavit was not made on behalf of the U.S. Department of Agriculture. Mr. Gould executed his affidavit based on personal firsthand observations. While 7 C.F.R. § 1.210 may preclude Mr. Gould from issuing an official agency statement, the section does not prohibit Mr. Gould from testifying to his own observations and expert opinions. ODNR’s argument is without merit, and Mr. Gould’s affidavit should be considered.

G. The Affidavit And Exhibits Of Attorney Brewer Are Proper.

Without citing a single Rule of Evidence or case to support its argument, ODNR requests that this Court strike the affidavit and four attached addenda signed by one of Relators’ attorneys, Martha Brewer. Ms. Brewer summarizes Relators’ deposition testimony and affidavits

as well as Stantec's various reports. Notably, ODNR does not contest the accuracy of the addenda or the authenticity of the underlying documents; instead, it challenges the competency of a licensed Ohio attorney to summarize the information.

It is hardly unusual for an attorney to summarize facts for the Court's convenience – indeed, in every merit brief presented to this Court, an attorney summarizes the factual and procedural posture of the case in a Statement of Facts and affirms the truthfulness of the statement under Ohio Rule of Civil Procedure 11. Ms. Brewer affirmed that she personally reviewed the underlying depositions, affidavits, and expert reports and that she personally prepared the addenda based on her review of those underlying facts. She did not create facts or testimony; she simply created a summary based on the personal knowledge found in the underlying documents. This satisfies both Ohio Rule of Evidence 602, regarding competency, and Ohio Rule of Civil Procedure 11. ODNR does not a single case that suggests the affidavit or addenda are somehow evidence that the highest Court in the State cannot consider and assess.

Further, the use of summary exhibits is entirely appropriate and consistent with Ohio Rule of Evidence 1006.¹¹ The documents Ms. Brewer summarized were all available to ODNR and were presented to this Court. In the summaries, Ms. Brewer specifically identified, by its location in the presentation of evidence, the source of the information being summarized. There is no Ohio requirement that such a summary must be made by an expert witness.

¹¹ Rule 1006 states,

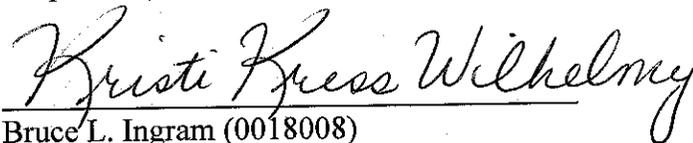
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

If this Court is inclined to strike Ms. Brewer's affidavit because it was submitted as part of Relators' presentation of evidence, rather than as attached to the merit brief, then Relators respectfully request leave to amend their merit brief to attach Ms. Brewer's affidavit and Addenda. Indeed, ODNR concedes that would be an appropriate alternative to present the Addenda to the Court. Mot. to Strike at 12. Likewise, ODNR concedes that the Addenda are designed for the convenience of the Court. *Id.* Thus, ODNR's issue with Ms. Brewer's affidavit is nothing more than a petty attempt to exalt form over function. For these reasons, the Court should not strike Ms. Brewer's affidavit, or alternatively, should grant leave to permit Relators to attach the affidavit to its merit brief.

III. CONCLUSION

For the reasons set forth above, Relators respectfully request that this Court deny ODNR's Motion to Strike Evidence in its entirety.

Respectfully submitted,



Bruce L. Ingram (0018008)

(Counsel of Record)

Joseph R. Miller (0068463)

Thomas H. Fusonie (0074201)

Kristi Kress Wilhelmy (0078090)

Martha C. Brewer (0083788)

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Attorneys for Relators

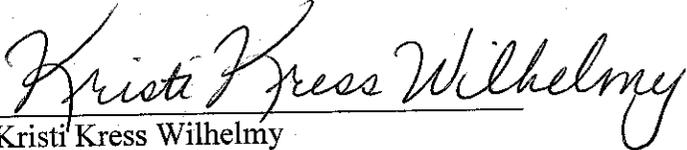
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via U.S. Mail postage prepaid, this 28th day of June, 2010:

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

Dale T. Vitale
Daniel J. Martin
Rachel H. Stelzer
Assistant Attorneys General
Environmental Enforcement Section
2045 Morse Road # D-2
Columbus, Ohio 43229

Attorneys for Respondents


Kristi Kress Wilhelmy

Wilhelmy, Kristi K.

From: Fusonie, Thomas H.
Sent: Monday, May 17, 2010 6:03 PM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

Who will be coordinating the preparation of the joint submission from ODNR's end? I'd like to have our paralegal on the case, Courtney Weiss start working out the logistics of gathering and preparing the joint submission.

We do intend to submit additional affidavits. We can't answer when yet, as we're still waiting on Dr. De Groot's compliance with the subpoena served on him.

Tom Fusonie

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Monday, May 17, 2010 11:58 AM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly
Subject: RE: Doner, et al. v. Logan, et al.

Tom:

We propose jointly submitting all (not just Relator) depositions with exhibits thereto, provided that Respondents (and presumably, Relators) reserve the right to object to any testimony and/or exhibit(s) therein. We also support a joint motion to reduce the number of submissions of any joint material.

Do you intend to submit any more affidavits? If so, when might we expect to receive a copy(s)?

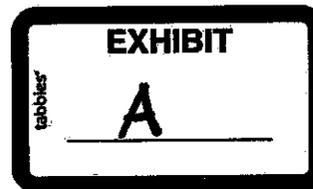
Bill

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Friday, May 14, 2010 3:11 PM
To: William J. Cole; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin
Cc: Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

Thank you for the email. As to the Relator Depositions, it is all or nothing. Either ODNR agrees to submit all of them jointly or none of them. We need to know Monday, May 17, 2010, which depositions the State is interested in submitting jointly. Given the number of depositions that need copying and that the deadline for submitting evidence is the day after Memorial Day, if we don't hear from ODNR by the end of the day Monday, May 17, 2010, we're just going to have to go ahead and copy and submit depositions separately.

We've already planned for having to submit an original and 12 copies so we cannot agree to a joint motion to reduce the number of copies of evidence. We might be able to agree to a joint motion to submit a reduced number of any joint submission of depositions.



On an agreed statement of facts, we'll get back to you.

On the issues related to the experts, how is it that the State of Ohio believes it can withhold copies of documents from Dr. De Groot's files on the basis that we already have copies of the complaint and Relator affidavits. Dr. De Groot was served a valid subpoena for his files, which would include the complaint and Relator affidavits in his files. He did not object to production of those documents. We're not aware of authority that a party can withhold a portion of an expert's files because the other party already has a copy of some of the documents in the file. In fact, ODNR has taken the exact opposite approach in ODNR v. Baucher.

Likewise, Dr. De Groot did not object to producing documents in his file he did not rely on. Again, we're not aware of a party refusing to turn over portions of an expert's files because the expert did not rely on that portion in preparing his affidavit or report. The absence of reliance on portions of an expert's files is certainly information likely to lead to the discovery of admissible evidence. Again, ODNR took the opposite approach in ODNR v. Baucher, ODNR v. Linn, ODNR v. Minch, ODNR v. Post and ODNR v. Zumberge.

Please advise Dr. De Groot that if we do not receive a complete production of the requested documents by the end of the day Tuesday, May 18, 2010, we'll have to seek the Court's assistance.

On Stantec, ODNR takes the position that despite having Stantec prepare a report and affidavit pursuant to the supplemental agreement, it can redact the portion of the supplemental agreement that describes the scope of Stantec's work. If you have authority to support ODNR's position, we'd appreciate it. Again, it is contrary to ODNR's stance in ODNR v. Baucher and in ODNR v. Linn, ODNR v. Minch, ODNR v. Post, and ODNR v. Zumberge. All cases in which ODNR produced its contracts with its expert in unredacted form. Finally, ODNR's position is contrary to its decision to not object when Relators asked Mr. Henson in deposition to describe the scope of Stantec's work for ODNR in this action. Unless we receive authority from ODNR to support its stance by the end of the day on May 18, 2010, we will be forced to seek the Court's assistance. Please advise Stantec accordingly.

Tom

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]

Sent: Friday, May 14, 2010 10:34 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

Subject: Doner, et al. v. Logan, et al.

Counsel:

Our side is meeting on Monday to discuss which, if any, depositions that we are interested in submitting jointly, and will get back to you. Whatever we decide, what are your thoughts regarding a joint motion to the court to reduce the number of required copies of evidence? The rule is original + 12 copies, and with what both sides have, that will be no small effort or cost. We should also think about an agreed statement of facts. While we obviously disagree significantly on key factual issues, there may be *some* facts we can agree upon which can make things easier on us and the court.

In addition to what Jennifer Croskey provided on Monday, we've received documents/material responsive to your subpoena to Philip De Groot, and will provide to you what is not protected work-product by early next week. While both Dr. De Groot and Mr. Henson are testifying experts, we do not agree that you are entitled to requested documents/material which they testified they did not rely upon in forming their expert opinions and reports. We also object to producing documents/material already in your possession, such as copies of the complaint and Relator affidavits. Finally, we do not agree to your request to remove the redaction from the supplemental

agreement with Stantec, because the redacted portion is protected work-product material. Mr. Henson only testified generally about the scope of Stantec's work at GLSM during his deposition.

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: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]

Sent: Monday, May 10, 2010 4:23 PM

To: Jennifer Croskey; William J. Cole; Mindy Worly; Rachel H. Stelzer; Daniel J. Martin; Dale T. Vitale

Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.

Subject: RE: Doner, et al. v. Logan, et al.

I was not aware of any prior understanding to submit depositions jointly. I had mentioned previously to Rachel about splitting the cost of submitting the relator depositions, which then led to my below email. We are fine with submitting all depositions jointly. Who should our paralegal contact to coordinate the joint submission.

Tom Fusonie

From: Jennifer Croskey [mailto:Jennifer.Croskey@ohioattorneygeneral.gov]

Sent: Monday, May 10, 2010 7:33 AM

To: Fusonie, Thomas H.; William J. Cole; Mindy Worly; Rachel H. Stelzer; Daniel J. Martin; Dale T. Vitale

Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.

Subject: RE: Doner, et al. v. Logan, et al.

It was our understanding that all depositions would be submitted jointly. Are you now suggesting that only these depositions be submitted jointly?

Jennifer S. M. Croskey

Assistant Attorney General, Executive Agencies

Ohio Attorney General Richard Cordray

Phone 614.466.2980

Fax 866.803.9971

Email Jennifer.Croskey@OhioAttorneyGeneral.gov

30 East Broad Street, 26th Floor

Columbus, Ohio 43215

OhioAttorneyGeneral.gov

SpeakOutOhio.gov

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]

Sent: Monday, May 03, 2010 1:55 PM

To: William J. Cole; Mindy Worly; Rachel H. Stelzer; Jennifer Croskey; Daniel J. Martin; Dale T. Vitale

Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.

Subject: Doner, et al. v. Logan, et al.

Counsel,

Are you planning on submitting the depositions from Relators, Mike Post and Mike Highley? If so, we think it would make sense as a joint submission. That way each side could split the copying cost and avoid unnecessary duplication. Could you please let me know this week?

Tom Fusonie

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

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

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

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

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Wilhelmy, Kristi K.

From: Fusonie, Thomas H.
Sent: Thursday, April 22, 2010 12:40 PM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Daniel J. Martin; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer
Subject: RE: Doner v. Logan

Counsel:

Mr. Campbell can be available April 28 in Columbus. Jim Moir of CRA will also be available that day for a deposition. We are identifying him as a rebuttal expert witness. We expect Mr. Vannatta will be available that day, but need to confirm that. We will depose DeGroot and Tadd Henson on April 29 in Columbus.

Mr. Gould is not a retained expert and is an agent/officer of the federal government.

Tom Fusonie

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Wednesday, April 21, 2010 7:45 PM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Daniel J. Martin; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer
Subject: Doner v. Logan

Counsel:

Based on this morning's ruling, please advise if you are still agreeable to having both sides produce their experts for depositions in Columbus next week at a mutually agreeable date and time, without the need for subpoenas. Respondents wish to depose Messrs. Campbell, Gould, and Vannatta.

Please also advise if you will be sending us further evidence and/or affidavits, including that which relates to claims of recent flooding on Relator lands.

Thank you.

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

