

**ORIGINAL**

**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

**MERIT BRIEF OF AMICUS CURIAE THE OHIO FARM BUREAU FEDERATION  
IN SUPPORT OF RELATORS' AMENDED MERIT BRIEF  
AND PETITION FOR WRIT OF MANDAMUS**

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## **STATEMENT OF AMICUS CURIAE INTEREST**

The Ohio Farm Bureau Federation (“OFBF”) is the largest voluntary, non-profit general farm organization in Ohio. Its purposes are to promote, protect, and represent the business, economic, social, and educational interests of farmers across Ohio and agriculture in general. With over 235,000 member families, and with member county Farm Bureau organizations in all 88 counties in Ohio, its members produce virtually every kind of agricultural commodity found in this area of the country. Founded over 90 years ago in 1919, the Farm Bureau represents farmers, growers, producers, processors, family farms and others in a \$9.3 billion annual industry. The OFBF advocates for private property rights, equitable taxation, fiscally sound government, governmental accountability for its conduct, and against any and all developments that might inhibit agricultural production in our state.

OFBF members own substantial land located in the area in question and throughout the state, on which they engage in agricultural production for their livelihood. The decision in this case will greatly affect OFBF members’ property rights, as well as OFBF members’ livelihood throughout the state. Too often governmental entities in this State believe they can cast surface waters onto farmland without repercussion. OFBF urges that this Court protect the inviolable private property rights of farmers and other private property owners from such unlawful takings and grant Relators’ request for a writ of mandamus.

## **STATEMENT OF THE FACTS**

OFBF adopts the Statement of Facts in Relators’ amended merit brief.

## LAW AND ARGUMENT

### ***Proposition of Law I: The Ohio Department of Natural Resources Has A Clear Duty To Appropriate Private Property That It Subjects To Increased Flooding.***

Governmental actors, like the Ohio Department of Natural Resources (“ODNR”), have an obligation to private property owners to initiate appropriation actions for physical interference with their use and enjoyment of their property. The evidence demonstrates that when it comes to its new 500-foot spillway (“Spillway”) on the western side of the Grand Lake St. Marys (“GLSM” or “the lake”) and ODNR’s lake-level management practices, ODNR has not fulfilled its public duty to the farmers living downstream of the Spillway.

ODNR has not fulfilled its public duty and initiated appropriation actions as to the Relators’ property even though it has already been found in a final judgment in *State ex rel. Post v. Speck*, 185 Ohio App.3d 828, 2006-Ohio-105, 925 N.E.2d 1042 (“*Post*”) to have taken 16 parcels by causing increased flooding of those parcels through ODNR’s redesigned Spillway and lake-level management practices. Seven of those parcels are located at various points along the Beaver Creek at various distances from the Spillway, and nine are adjacent to the Wabash River at various distances from its confluence with the Beaver Creek and extending to the Indiana state line. See Joint Exhibits (“JE”) 79, Tadd Dep. Henson, at 97-98; JE 78, Philip Dep. DeGroot at Ex. E. ODNR’s own expert in *Post* even conceded that the new Spillway will always discharge a greater volume of water than ODNR’s previous 39.4-foot spillway. Rels.’ Presentation of Evidence (“PE”) 108, *Post v. ODNR*, Ct. Com. Pl., Trial Transcript, February 24 and 25, 2005 at 295, 310.

Despite the clear findings in *Post*, ODNR has not initiated appropriation actions as to any of the other properties adjacent to the Beaver Creek and Wabash River, even though to take

those 16 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. Dep. Henson, at 97-98; Dep. DeGroot, at Ex. E.

Unfortunately, when it comes to the Spillway and lake-level management, ODNR has a history of avoiding its duties to the downstream farmers. During the design and construction of the Spillway, ODNR ignored the warning and concerns of various Mercer County officials, including the Mercer County Engineer, and of farmers downstream of the Spillway, that a 500-foot spillway would discharge greater volumes of water than the Beaver Creek channel could handle, causing increased flooding downstream. ODNR also knew that the discharge from the new 500-foot spillway would be greater. However, it took no steps to alleviate the flooding the Spillway would cause, other than to design a notch that was purportedly designed to handle a 10-year precipitation event.<sup>1</sup> ODNR further knew the 500-foot Spillway would cause longer lasting flooding than what had previously occurred in the Beaver Creek and Wabash River watersheds.

Despite the warnings and ODNR’s knowledge of the increased flooding that the Spillway would cause, ODNR began implementing a new 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 potential flooding during spring-thaw of the lake. In addition, ODNR has the ability, in anticipation of reasonably foreseeable rain events, to lower the lake-level. However, it has repeatedly elected not to do so, including in 2003, 2005, 2008, 2009 and 2010. JE 68, Dep. Kim Caris, at 38-40, 51, 55 & Exs. 4-5; JE 69, Dep. Glenn Cobb, at

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<sup>1</sup> In their Amended Merit Brief, Relators explain how that notch could only have been designed for an event that occurs when the soil is dry and lake elevation is low, a situation under which the Spillway causes substantially less flooding than it does for even smaller precipitation events when the lake elevation is high and/or ground is already wet.

41-44, 65-66, 104; JE 72, Dep. Craig Morton, at 22-23. *See generally* charts in Relators' Appendix to Amended Merit Brief summarizing Relators' evidence related to flooding including in 2003, 2005, 2008, 2009, and 2010.

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 has a clear public duty to compensate the owners of that land for physical interference with their use and enjoyment of the property. *State ex rel. Gilbert v. City of Cincinnati*, 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); *Masley v. Lorain* (1976), 48 Ohio St.2d 334, Syl. ¶1, 336, 340-341, 358 N.E.2d 596 (when a city causes "material damage to a downstream landowner, as a result of flooding from rains or other causes which are reasonably foreseeable, and that flooding constitutes 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, then such owner has a right to compensation for the property taken under Section 19, Article I of the Ohio Constitution").<sup>2</sup>

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, thus resulting in flooding. ODNR could decrease the frequency of these flood events or their magnitude by conducting annual draw downs of the GLSM or by taking other flood prevention

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<sup>2</sup> *See also State ex rel. Livingston Court v. Columbus* (1998), 130 Ohio App.3d 730, 735, 721 N.E.2d 135 (recognizing that "[a] long line of Ohio Supreme Court cases holds that a taking may result where sewage or storm water from a governmental authority causes damage to a property owner" 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).

measures, but ODNR chooses not to do so. It could also minimize flooding by drawing down the lake level in advance of reasonably anticipated rain events, but it has chosen not to do this, either. Finally, it could take other measures to eliminate or minimize the flooding, but has done nothing.

The combination of the new Spillway and ODNR's annual decision not to draw down the lake interferes with the use and enjoyment of downstream property along the Beaver Creek and Wabash River. Over 75 landowners and their fact witnesses have testified that ODNR, through the Spillway and new lake-level management practices, has caused flooding to the Relators' parcels that would not otherwise occur. This compelling and competent firsthand evidence includes the testimony of farmers who have lived and farmed along the Beaver Creek or Wabash River for 30, 40, and even 50 years. ODNR has not rebutted any of the Relators' firsthand direct evidence, but rather relies on flawed "modeling." That modeling itself establishes that ODNR physically interferes with most of the Relators' parcels causing flooding that would not otherwise occur but for the Spillway and ODNR's lake-level management practices. 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.

ODNR is causing more acres to flood, more frequent flooding, and longer-lasting flooding. The interference with the farmers' use and enjoyment is obvious when more acres are inundated or when flooding occurs more often, but longer-lasting flooding is equally intrusive. The longer water remains on farm property, the greater interference with the farmers' use and enjoyment of the property as it leads to all of the following: greater soil compaction, damaging the quality of the soil; destruction of growing crops; delay in planting, thereby reducing crop

yield; potential loss of tillable acres entirely if the water sits for several weeks or months; and greater health risks associated with long-standing stagnant water.

“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*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E. 2d 1115, at ¶ 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. This Court’s role “is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure . . . that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination or improper purpose.” *Id.* at ¶ 69. Here, that critical role requires this Court to find that ODNR has a clear duty to initiate the requested appropriation actions to compensate the Relators for the taking of their property to the extent established by the Relators’ firsthand evidence.

***Proposition of Law II: ODNR’s Takings By Periodic Flooding Are Ongoing And Recurring And Subject To General Tolling Principles For Real Property Claims Brought Under R.C. § 2305.09.***

ODNR is attempting to avoid its clear public duty to appropriate by claiming that the Relators’ mandamus action is time-barred. However, this Court should reject that attempt by applying long-standing Ohio law on tolling in cases where one landowner is subjecting another to periodic flooding.

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

In 2004, the General Assembly added takings 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 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*, 117 Ohio St.3d 275, 2008-Ohio-858, 883 N.E.2d 1013, ¶ 29-40 (citing and quoting extensively *Valley Ry. Co. v. Frantz* (1885), 43 Ohio St. 626, 4 N.E. 88) (O'Connor, J.).

Where trespasses and nuisances are recurring, the limitations period (now codified in R.C. § 2305.09) is tolled until the tortious conduct ceases. *Sexton*, at ¶ 1, 18-28. This Court has addressed the issue of the limitations period for recurring trespasses and nuisances in the flooding context several times. In *Sexton*, this Court held that ongoing or recurring trespasses “occur[] when there is some continuing or ongoing allegedly tortious activity attributable to the defendant.” *Id.* at ¶ 41. 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 34-48. The Court also cited to *State v. Swartz*, 88 Ohio St.3d 131, 2000-Ohio-277, 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 ¶ 46-50.

The same principles of law as apply to private actors must apply to the State. 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 continuous trespass and nuisance claim that the defendant maintains the ability to “rectify the situation” applies equally to physical takings claims. *See Sexton*, at n.2. The government could acknowledge its taking and pay just compensation to rectify its physical invasion. Likewise, the government could take steps on its property to end the physical invasion.<sup>3</sup> Either of these possibilities explains why the limitations period 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 that the public entity directs a force, like surface water, onto private property without paying just compensation is “an additional cause of action” against it. *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.”).

Both *Valley Ry.* and *Swartz* are particularly instructive on determining that a taking by recurring flooding is continuous for statute of limitations 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,

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<sup>3</sup> Here, ODNR acknowledges that it has the ability to draw-down GLSM at scheduled times or in advance of rain events. It simply and continuously chooses not to do so. Dep. Caris, at 38-40, 51, 55 & Exs. 4-5; Dep. Cobb, at 41-44, 65-66, 104; Dep. Morton, at 22-23.

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. In 1992, the defendant in *Swartz* 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 the neighbor's property is flooded. *Id.* at 133. The court of appeals affirmed, holding that the tortious act was completed in 1992, when he constructed the bridge and culvert, or in 1995, when the neighbor investigated why the water was flooding his property and contacted the county engineer. *Id.* This Court disagreed. *Id.* Relying in *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.

Further instructive is a decision applying *Sexton* to a recurring trespass caused by the discharge of water from a neighbor's pond. In *Wojcik v. Pratt* (Sept. 30, 2009), 9th Dist. Case No. 24583, 2009-Ohio-5147, the Ninth District applied *Sexton* to a trespass claim brought by landowners for the discharge of water from a neighboring pond, which the neighbor had expanded in 1988, seventeen 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 continuous.

In doing so, the court 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*, at ¶ 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 constituted a

continuous trespass, 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 twenty-one years, and the landowners filed their continuous trespass claim only seventeen 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 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. *Dep. Cobb*, at 65-66, 104; *Dep. Caris*, at 55-57; *JE 70*, *Dep. Gary Harsanye*, at 76. Consequently, ODNR's continuing course of conduct and ongoing control over the sources of the increased flooding (the Spillway and the lake level) and its ongoing ability to rectify the situation toll 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 Recurring 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. Nor do they stem from the single event of the construction of the Spillway. This is not a case of a single release of water by

ODNR permanently submerging Relators' properties. Instead, this is a case of frequent and recurring separate flood events caused by ODNR; each an unlawful act that causes new material damage to Relators' property and causes further interference with the Relators' use and enjoyment of the property. As the Relators detail in their affidavits and deposition testimony, the increased flooding subjects their properties to new inundations of water, new bank erosion, new soil erosion, new soil compaction, new losses of tillable acres, new flooding to structures, new losses of topsoil and new mounds of debris, sand, and silt.<sup>4</sup> All of this causes increased material damage to the property, causing new and further interference with Relators' use and enjoyment.

In addition, ODNR makes at least an annual decision not to attempt to minimize the flooding caused by the GLSM by drawing down the lake level. Each annual 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 lake events, but it has also chosen not to do this, including 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, ODNR's decisions are not a single administrative act, such as granting a building permit, as in *Painesville Mini Storage, Inc. v. Painesville*, 124 Ohio St.3d 504, 2010-Ohio-920, 924 N.E.2d 357, at ¶ 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 v. Erie MetroParks*, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588. *Nickoli* is further inapposite as it concerned an act solely

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<sup>4</sup> The evidence of the impact to the Relators' parcels is summarized in the charts included in Relators' Appendix to their Amended Merit Brief.

on the claimants' land, i.e., the construction of a recreational trail, and did not involve conduct on the defendants' land that then affected the claimants' property. In stark contrast, here, each flooding event is a new, discrete act of casting new water onto Relators' property caused by new decisions by ODNR. *See Valley Ry.* at 627. Further, the flooding is caused by ODNR's conduct on the state's land – the Spillway and lake – and, thus, ODNR retains control over the source of the invasion of Relators' properties. *Sexton*, at ¶ 50 & n.2.

Were the Court to determine that the ongoing and frequent flooding by ODNR is a “single event,” then this Court would be 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 that remains in the control of the invader to rectify.

C. *The Process Of Periodic Flooding Requires At Least Ten Years Of Events To Ascertain The Extent Of What Is Really Taken, And Thus, Relators' Claims Are Not Time-Barred.*

Finally, concluding that the ongoing and frequent flooding is not a single act is consistent with the United States Supreme Court decision in *United States 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 faced by Relators 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 the 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 autumn of 1997 and winter of 1998, Relators could not have ascertained the full extent of the taking until, at the earliest, late 2007 or early 2008.

Any lawsuit filed before late 2007 to early 2008 would have been premature and created piecemeal litigation. Since the full extent of the taking could not have been known until late 2007 to early 2008, Relators timely filed this lawsuit in July 2009. 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 and historical data. *Dickinson*, 331 U.S. at 749 (holding that “The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous” and explaining “[A]s there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck”). Forcing private property owners to do so subverts the mandates of this Court – that inviolable and cherished property rights should not be trod upon lightly.

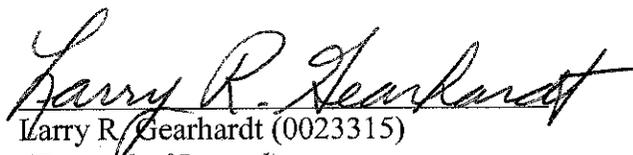
For all of the above reasons, Relators’ claims are not time barred.

## CONCLUSION

Farmers and other landowners should not have to endure burdensome mandamus litigation to force a State entity like ODNR to be accountable for its conduct, to fulfill its public duty, and honor private property owners' Constitutional rights. Yet, ODNR continues to cast high volumes of surface water onto hundreds of acres of land downstream of its Spillway, and refuses to do anything about it unless ordered by a court. ODNR owes the Relators a duty, a duty to appropriate their property to the extent set forth as established by the Relators' competent and compelling firsthand evidence. ODNR has taken in excess of **2,500** acres of Relators' farm land by encumbering it with a right to flood their land as ODNR deems necessary. This Court should grant Relators' writ and order ODNR to commence appropriation actions immediately, which will further the larger public good of protecting private property rights.

Dated: August 11, 2010

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via hand delivery this 11<sup>th</sup> day of August, 2010:

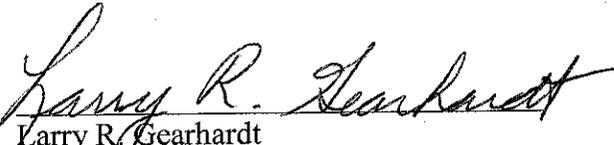
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