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.	:	
SEAN D. LOGAN, Director, Ohio Department of Natural Resources, et al.,	:	
Respondents.	:	

MEMORANDUM OF RESPONDENTS IN OPPOSITION TO RELATORS' MOTION FOR LEAVE TO SUBMIT APPENDIX OUT OF RULE

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I. INTRODUCTION

Relators ask this Court for leave to file an "Appendix" to their amended merit brief, which is comprised of four tables (collectively, the "Summaries"). Their amended merit brief runs fifty (50) pages long – meeting the Court's page limitation on the nose. The Summaries add eighteen (18) pages to Relators' amended merit brief—not to mention another three (3) pages of argument in Relators' supporting memorandum.

The Summaries are nearly identical to the exhibits to the affidavit of attorney Martha Brewer ("Brewer Affidavit") which has been stricken by the Court. It is clear from the titles of the Summaries: (A) "Index of Interference with Use and Enjoyment"; (B) "Relators' Evidence Establishing Right to Requested Writ"; (C) "ODNR's Admissions of Interference with Use and Enjoyment"; and (D) "Stantec's Serial Revisions to Data and Mapping," that these tables and charts are argumentative and a one-sided characterization of the evidence as composed and organized by Relators' attorneys. Moreover, the Summaries are misleading. For example, Relators' first

Summary ("Chart A") is five (5) pages long and *does not include a single citation to the evidence filed in this case.* Nonetheless, Relators cite to "Chart A" throughout their amended merit brief as if the chart itself is in evidence. (See, e.g., Relators' Am. Merit Br., p. 8 ("The increased flooding has impacted over 2,500 acres of Relators' lands. Relators' Appendix Chart A."); see, also, *id.* pp. 9, 10, 33, 35.)

While Relators claim that their "Appendix" is an attempt to "catalogue and index Relators' claims, testimony, and evidence for the convenience of the Court," the Summaries are really their attempt to exceed this Court's page-limit on merit briefs and to resubmit what this Court has stricken from their evidence. As such, Relators' motion should be denied.

II. ARGUMENT

In original actions to this Court, "[a]ll merit briefs shall conform to the requirements set forth in S.Ct.Prac.R. 6.1 through 6.8 and 8.1 through 8.7, to the extent those rules are applicable." S.Ct.Prac.R. 10.8. Merit briefs shall not exceed fifty (50) pages, exclusive of the table of contents, table of authorities cited, certificate of service, and any appendix. S.Ct.Prac.R. 6.2(C). Relators are now trying to circumvent this requirement by submitting an additional eighteen (18) pages of material that summarize their argument and mischaracterize the evidence, which they label as an "Appendix." Permitting Relators to submit 18 pages of argument and one-sided characterizations of the evidence—material that is nothing more than a compilation of contested contentions formulated by Relators that, if included at all, should have been contained within the body of Relators' amended merit brief—would effectively eviscerate this Court's page-limit rules.

Despite its label, Relators' "Appendix" is not appendix. Supreme Court Practice Rule 6.2(B)(5) provides a list of documents appropriate for an appendix to the merit brief. Although the rule applies to an appellate brief, its requirements shed light on a proper appendix envisioned by the Practice Rules (and, pursuant to S.Ct.Prac.R. 10.8, apply to briefs in original actions to the extent they are applicable). The appendix shall contain copies of all of the following:

> (a) The date-stamped *notice of appeal* to the Supreme Court, the notice of certified conflict, or the federal certification order, whichever is applicable;
> (b) The *judgment or order* from which appeal is taken;
> (c) The *opinion*, if any, relating to the judgment or order being appealed;
> (d) All *judgments, orders, and opinions* rendered by any court or agency in the case, if relevant to the issues on appeal;
> (e) Any *relevant rules or regulations* of any department, board, commission, or any other agency, upon which appellant relies;
> (f) Any *constitutional provision, statute, or ordinance* upon which appellant relies, to be construed, or otherwise involved in the case;
> (g) In appeals from the Public Utilities Commission, the appellant's *application for rehearing*.

(Emphases added.) S.Ct.Prac.R. 6.2(B)(5). Not by any tortured parsing of this Rule would a one-sided summary of the evidence such as that submitted by Relators be appropriately included in the appendix.

Relators' Appendix merely re-packages most of the same information contained in the Brewer Affidavit. (See Relators' Evid. Vol. 10, Tab 128.)[1] As such, Relators' motion for leave is a creatively-designed motion to this Court to reconsider its decision to strike the Brewer Affidavit from Relators' evidence.

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[1] Indeed, the only difference appears to be that the titles of the four charts are changed. See, also, Relators' motion, p. 3 ("Some of the information charted was originally filed as exhibits to an Affidavit of Martha Brewer . . . and included in Relators (sic) Presentation of Evidence.").

Finally, Relators misconstrue the following statement made earlier by Respondents: "While . . . [the Summaries] are perhaps appropriate for Relators' legal brief, they have no place in Relators' presentation of evidence." (Respondents' Motion to Strike, p. 12, filed June 18, 2010.) Respondents did not and will not concede that the Summaries are appropriate *as an appendix* to Relators' amended merit brief. And Relators would seem, until very recently, to have agreed with Respondents' position, having said that "[i]t 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." (Emphases added.) (Relators' Memorandum Contra to Respondents' Motion to Strike Evidence, p. 19.)

Relators' admissions regarding the nature of the material presented in the so-called "Appendix" reveal that, if at all appropriate, it should be part of Relators' brief. However, in this case, Relators' proposed Appendix has already been stricken by the Court. (See Entry dated July 13, 2010.)

III. CONCLUSION

For these reasons, this Court should deny Relators' Motion for Leave to Submit Appendix out of Rule.

Respectfully submitted:

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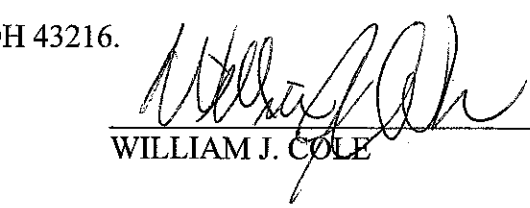
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular and electronic mail on August 23, 2010, to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, Kristi Kress Wilhelmy and Martha C. Brewer, Vorys, Sater, Seymour and Pease, LLP 52, East Gay Street, P.O. Box 1008, Columbus, OH 43216.



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