

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.	:	

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INTRODUCTION

Property adjacent to Beaver Creek and the Wabash River in Mercer County has flooded intermittently for almost a century. Respondents agree that, over this period of time, property owners along the Beaver Creek and Wabash River in Mercer County have occasionally experienced severe flooding, especially in 2003. Contrary to Relators' arguments, Respondents do not concede or agree that the necessary public safety action they took to replace a faulty spillway at Grand Lake St. Marys ("GLSM") in 1997 is the genesis or cause of the flooding about which Relators currently complain.

Before considering the engineering evidence submitted in this case, this Court must decide whether Relators' suit is timely. It is not. Relators knew about the State's spillway modifications that took place in 1997, but did not file this action until more than a decade after the spillway was changed, and more than four years after the catastrophic floods of 2003. The statute of limitations to sue for relief from a physical taking of real property is four years. Relators' argument that Respondents' yearly failure to rectify the flooding situation tolls the running of the statute of limitations was squarely rejected by this Court earlier this year in the *Nickoli* case. Accordingly, Relators' suit is time-barred.

Even if this Court finds that Relators' suit is timely, Relators have not proven their mandamus claims by the required clear and convincing evidence. Relators try to alleviate their evidentiary burden by suggesting, without a fully-developed argument, that Respondents are precluded from litigating the issue of causation, based on the *Post* and *Case Leasing* cases. But Ohio issue-preclusion law requires mutuality, and Relators do not show circumstances warranting an exception to this requirement. Both *Post* and *Case Leasing* involved different properties owned by different parties, and Relators were not in privity with those parties.

Moreover, *Case Leasing* also involved a different cause of action (negligence) with a different burden of proof. Therefore, Relators cannot successfully assert non-mutual issue preclusion against Respondents regarding causation or any other material issue.

Relators have not proven by clear and convincing evidence that their lands were physically taken as a result of Respondents' actions. The evidence shows that the Beaver Creek and Wabash River endured an epic flood in 2003 after a literal once-in-a-lifetime rain event struck the greater Celina area. Although Relators have submitted considerable evidence of their own and other lay-witness observations of flooding in Mercer County, expert evidence is necessary because issues of flooding causation and frequency are very complex.

Relators' expert scientific evidence is limited to that which their engineer conducted four years earlier in *Case Leasing*—a case that involved different properties in close proximity to the spillway. Relators' experts did not talk to any Relators or visit any of their properties. They do not know whether any Relator parcels are closer to the spillway than the *Case Leasing* parcels, or whether any parcels actually experienced more frequent and severe flooding because of the new spillway. They did not study any storm events in Mercer County since 1997, or look at any data or reach any conclusions about how long standing water remains on the property under the new spillway versus the old spillway.

Respondents' experts, on the other hand, used state-of-the-art hydrologic and hydraulic studies by esteemed experts in their fields. Their reports show that any actual increased flooding attributed to the 1997 spillway modification is significantly less than Relators allege, and it in no way substantiates Relators' claims. While Respondents respect the fact that the historical flooding problems some Relators have experienced are real and significant, the responsibility for

those problems cannot at this point be fairly placed upon the taxpayers of the State of Ohio based upon the evidence submitted to this Court.

Relators are not entitled to a writ of mandamus to compel Respondents to appropriate their properties. However, if this Court finds that Relators have proved a taking, then Respondents should not have to appropriate all of the subject land because most of it is subject to the State's prescriptive easement, which the State acquired in 1925, 21 years after it built the spillway in 1914 to regulate flooding.

STATEMENT OF THE CASE AND FACTS

A. Since 1914, Grand Lake St. Marys has had a spillway on its western shore that discharges excess water into Beaver Creek.

Grand Lake St. Marys ("GLSM" or "the lake") was not designed or built for flood-control. Rather, the State of Ohio created GLSM in the mid 1800's to supply water for the Ohio and Erie Canals. Respondents' Evid. Tab A, Ex. A, Apr. 29, 2010 report ("Stantec Analysis") p. 1.1. Originally, GLSM supplied a feeder canal on the eastern edge of the lake to maintain a minimum level of water, thereby allowing shallow drafted canal boats to pass through the channel. Later, following the decline of canal traffic, the canal infrastructure became unnecessary. Nevertheless, ever since 1914 there has been a spillway ("old spillway") on the western shore of the lake discharging excess water into the Beaver Creek, a channel which continues west from GLSM for approximately ten miles until it merges with the Wabash River. *Id.*, Tab 112. While GLSM has a surface area of 20 square miles and drains an area of 113 square miles, Respondents' Evid. Tab A, Ex. A, March 18, 2010 report ("Stantec Discussion") at 2.2, the drainage area of Beaver Creek just before the confluence with the Wabash River is 163 square miles. Stantec Discussion p. 2.2; Stantec Analysis at Plate 1, Watersheds 1-9. The drainage area of the Wabash River at the Ohio-Indiana border is 314 square miles. *Id.* The

drainage area of the Wabash River at the Linn Grove (Indiana) gauge is 506 square miles. Respondents' Evid. Tab A, Ex. B, May 26, 2010 ("Stantec Memo") p. 1.

In 1949, GLSM was transferred to the newly-created Ohio Department of Natural Resources ("ODNR"), and dedicated as a State park open for public use and enjoyment. Relators' Evid. Tab 112. The old spillway was 39.4 feet long, *id.*, and, until 1988, the top of the spillway was at 870.24 feet above mean sea level. However, in 1988, ODNR added four-inch flash boards, taking the top of the spillway to 870.60 feet above mean sea level, in an effort to facilitate the recreational use of GLSM. Jt. Ex. Tab 69, Glen Cobb Dep. p. 35; Tab 78, De Groot Dep. Ex. B.

During the period that the old spillway was in place, most Relators and their fact witnesses acknowledge that the properties at issue suffered some flooding. As evidenced by Relators' anecdotal evidence of flooding and the Stantec reports and modeling, flooding existed to substantially the same degree before the spillway was modified. Jt. Ex. Vol. 1, Tab 2, Richard Adams Dep. p. 31; Tab 6, Janet Doner Dep. pp. 24-27; Vol. 2, Tab 10, Lawrence Dwenger Dep. pp. 12-13; Vol. 3, Tab. 16, David L. Granger Dep. pp. 21-22; 42-43; Vol. 5, Tab 31, William Muhlenkamp Dep. p. 12; Tab 44, Carl Rose Dep. pp. 17-19, 21-22. Flooding under the old spillway caused damage similar to that claimed by Relators under the new spillway, including crop loss, siltation of drainage tiles, debris, and land erosion, as well as damage to roads, fills, bridges, culverts, and utilities. Stantec Discussion Ex. A, report of Army Corps of Engineers ("Corps Report") pp. 17-19, tables 2 & 3.

B. ODNR modified the spillway in 1997.

In 1997, ODNR further modified the spillway to comply with dam safety regulations and safely withstand a Probable Maximum Flood. Stantec Analysis p. 1.1. The 1997 spillway ("new

spillway”) has a crest height of 870.75 feet above mean sea level and a length of 500 feet. In the middle of the new spillway is a 50-foot notch, which is 870.60 feet above mean sea level. The notch was designed to pass a 10-year storm event. Jt. Ex. Vol. 11, Tab 69, Glen Cobb Dep. p. 48; Tab 70, Gary Harsanye Dep. p. 41. Because the new spillway keeps the very same elevation at the notch previously achieved in 1988 through the flash-board augmentation (870.60 feet above mean sea level), ODNR has likewise maintained the same normal pool level for GLSM post-1997. Jt. Ex. Vol. 15, Tab 78, Philip De Groot Dep. Ex. B; Relators’ Evid. Tab 112.

C. Beaver Creek experienced persistent, frequent, severe flooding before ODNR replaced the spillway at the lake.

Unfortunately, the farmland and property bordering Beaver Creek suffers from a long history of flooding.¹ This well-known fact caused the Army Corps of Engineers (“the Corps”) to study the flood prone area 30 years ago in an effort to develop the recommendations designed to ameliorate damages caused by persistent flooding along Beaver Creek. Stantec Discussion Appx. C. In 1981, the Corps issued the report of its study of the region, which the Corps conducted “to investigate flood and related water resource problems . . . [and] to determine the need for and the feasibility of improvements to solve these problems.” Corps Report, syllabus. In so doing, the Corps documented “significant” flood events during January 1949, December 1957 through January 1958, March through April 1964, March 1965, and May 1972. *Id.* p. 15. Relators’ expert, Pressley Campbell, testified that he had no reason to doubt the accuracy of the Corps Report or that flood events occurred in these years. Jt. Ex. Tab 76, Campbell Dep. p. 85.

¹ See Corps Report Appx. C p. 14 (“Flooding has been reported for years . . . along Beaver Creek. Periodic flooding of primarily agricultural land along Beaver Creek is attributed to a combination of factors including a very limited flood control capability of [GLSM], poor surface drainage, low stream gradient (1.5 feet per mile), high stream stages which cause inadequate outlet conditions for numerous artificial agricultural drains, and constrictions to flow from vegetation on the banks, shoals, and debris throughout the entire 10.6-mile reach.”); Harsanye Dep. pp. 26-27 (“flooding issues were part of the reason why the project was done.”).

At the time of the Corps Report, it was estimated that “[f]lood damages to crop, non-crop transportation facilities, and public utilities in the Beaver Creek reach from its confluence with the Wabash River upstream to the western outlet of [GLSM] [and are] estimated at \$85,000 [in 1979 dollars] annually. Of this total, approximately 74 percent [was] damage to major crops produced – corn, soybeans, and hay.” Corps Report p. 61. Not surprisingly, the Corps Report found that flooding under the old spillway caused damage similar to that claimed by Relators in this case - crop loss, siltation of drainage tiles, debris, land erosion as well as damage to roads, fills, bridges, culverts and utilities. *Id.* pp. 17-19, tables 2 & 3.

Notably, the Corps considered “flood control” along Beaver Creek to be a “primary planning objective” for its study. *Id.* p. 33. Accordingly, the Corps reviewed a range of alternatives to address the flooding, including detention basins on tributaries, diversion of water to Four Mile Creek to the east, modification of the east outlet, natural impoundments, weather modifications, lake regulation, channel clearing and cleaning, channel enlargement, agricultural levees, pre-flood emergency action, flood proofing and permanent evacuation, flood forecasting and temporary flood evacuation, and flood insurance. *Id.* pp. 34-37, 42-46. Despite these efforts, the Corps found that non-structural flood protection measures were not viable “because of the agricultural character of the Beaver Creek flood plain.” *Id.* p. 61. The Corps concluded that “[c]hannel clearing and cleaning is the most cost effective measure for reduction of flood damages along Beaver Creek.” *Id.* p. 70.

Consistent with the Corps’ conclusion, Mercer County has maintained the length of Beaver Creek from GLSM to the confluence with the Wabash River (10.6 miles) since the early 1980s. Respondents’ Evid. Tab 126, Keith Earley Dep. pp. 22-24. Despite Mercer County’s maintenance efforts, flooding remained an ongoing problem for Beaver Creek in the 1980s and

1990s. *Id.* pp. 47-48, 62-63. As former Mercer County Engineer Keith Earley² stated, between 1983 and 1997, “along the Beaver Creek . . . it would flood relatively regularly. It would get out of its banks . . . and sometimes it would even back up in the Wabash River.” *Id.* p. 47. Earley likewise testified that roads crossing Beaver Creek (including U.S. 127, Meyer Road, and county roads) were impacted more than once by flooding from 1983 to 1997. *Id.* pp. 46, 62-64.

The Federal Emergency Management Agency (“FEMA”) also studied pre-1997 flooding in the area. In its flood insurance study of the region, first completed in 1989 and then revised in June 2001,³ FEMA found the region to have “flood problems” caused by a combination of factors:

Flood problems from Beaver Creek are caused by a combination of a limited flood control capability of [GLSM], poor surface drainage, low stream gradient, constrictions to flow, and high stream stages for a long period of time that cause inadequate outlet conditions for numerous artificial agricultural drains.

Respondents’ Evid. Tab A, Ex. A, FEMA Study p. 4. Many of the properties for which Relators seek compensation are in the FEMA-designated flood plain. *Id.*; Jt. Ex. Vol 12, Tab 72, Craig A. Morton Dep. pp. 47-49. The flood-plain designation for this area existed well before the 1997 spillway modification.

Relators cite the affidavits of Jason and Emily Hines, stating that they are no longer able to obtain flood insurance because of Respondents’ actions. This is not substantiated by the facts. The National Flood Insurance Act of 1968 provides that flood insurance can be denied when

² Relators have presented Earley’s opinions and refer to him as an expert. Earley is not an expert. Earley explained that he has not had any recent education on hydraulics and that the hydraulics courses he took were for his bachelor’s degree in the 1970’s. Earley Dep. pp. 15, 20. Earley also acknowledged that he has not written any professional work in the area of hydraulics or testified in court as an engineer. *Id.* pp. 18-19.

³ FEMA studied the Wabash River and Beaver Creek by detailed methods for the 1989 study and studied Buck Creek by detailed methods for the 2001 study. FEMA Study p. 2.

property owners build or change structures in violation of flood plain management regulations.
42 U.S.C. 4023; 44 C.F.R. 61.5 & Part 73.

Moreover, most Relators and their fact witnesses acknowledge that flooding occurred on their properties when the old spillway was in place. Relators' Evid. Tab 1, Aff. Janet Doner ¶ 8; Tab 2, Aff. Wayne Doner ¶ 8; Tab 5, Aff. Richard Adams ¶ 9; Tab 7, Aff. Wayne Baucher ¶ 8; Tab 8, Aff. Joyce Dwenger ¶ 8; Tab 9, Aff. Lawrence Dwenger ¶ 8; Tab 18, Aff. David Granger ¶ 8; Tab 19, Aff. Michael Highley (8/24/2009) ¶ 8; Tab 20, Aff. Michael Highley (8/25/2009) ¶ 13; Tab 21, Aff. Patricia Highley ¶ 11; Tab 24, Aff. Robert Highley ¶ 11; Tab 30, Aff. Daniel Johnsman ¶ 8; Tab 33, Aff. David Johnsman ¶ 9; Tab 35, Aff. Andrea Knapke ¶ 11; Tab 36, Aff. Chad Knapke ¶ 11; Tab 37, Aff. Mark Knapke ¶ 7; Tab, 42, Aff. Darrell Kuhn ¶ 9; Tab 50, Aff. David McNeilan ¶ 8; Tab 52, Aff. Laura McNeilan ¶ 8; Tab 53, Aff. Lois McNeilan ¶ 8; Tab 54, Aff. Charles Meier ¶ 9; Tab 56, Aff. Amy Meyer ¶ 8; Tab 59, Aff. William Muhlenkamp ¶ 8; Tab 61, Aff. James Post (8/24/2009) ¶ 8; Tab 63, Aff. Michael Post ¶ 9; Tab 64, Aff. Brenda Powell ¶ 8; Tab 66, Aff. Jerry Powell ¶ 10; Tab 67, Aff. Thomas Powell ¶ 8; Tab 70, Aff. Carl Rose ¶ 8; Tab 72, Aff. Lucile Rose ¶ 8; Tab 73, Aff. Bonita Searight ¶ 8; Tab 74, Aff. Robert Searight ¶ 8; Tab 76, Aff. Duane Sheets ¶ 8; Tab 77, Aff. Linda Sheets ¶ 9; Tab 78, Aff. Rodney Sheets ¶ 9; Tab 80, Aff. Mark Sieftring (8/24/2009) ¶ 10; Tab 81, Aff. Mark Sieftring (12/15/2009) ¶ 6; Tab 82, Aff. Ronald Sieftring ¶ 10; Tab 84, Aff. David Suhr ¶ 8; Tab 86, Aff. Rita Suhr ¶ 7-8; Tab 87, Aff. Carl Sutter ¶ 8; Tab 89, Aff. Gale Thomas ¶ 8; Tab 90, Aff. Nelda Thomas ¶ 8; Tab 91, Aff. Gary Uhlenhake ¶ 8; Tab 92, Aff. Jerry Weisman ¶ 8; Tab 94, Aff. Vicki Weisman ¶ 8; Tab 95, Aff. Charles Zumberge ¶ 7-8; Tab 97, Aff. Michael Zumberge ¶ 10.

Several Relators initially denied in their affidavits that their property had flooded with the old

spillway in place, but backtracked in deposition testimony. Jt. Ex. Tab 13, Lee Fennig Dep. pp. 30-34; Tab 14, Mary E. Gilbert Dep. p. 26; Tab 15, H. Edward Gilbert Dep. pp. 38-43.

Some Relators claim that their properties flooded in 2005 and 2009, but cannot describe to what extent the properties were flooded or how long their properties remained flooded. See, e.g., Joyce Dwenger Dep. pp. 21-23. As repeatedly documented by the evidence they provided in support of their case, Relators knew that the spillway was modified in 1997.

D. Relators claim their lands first experienced persistent, frequent, increased severe flooding due to ODNR's actions more than four years before they filed their takings case against Respondents in 2009.

Relators claim that, as a result of ODNR's actions, their properties have persistent, frequent, and increased severe flooding. According to their and other fact-witness testimony, such flooding first occurred more than four years before they sued Respondents in June 2009, with the most extensive flooding occurring in the summer of 2003: Relators' Evid., Vol. 1, Tab 1, Aff. Janet Doner ¶¶ 6, 9; Tab 2, Aff. Wayne Doner ¶¶ 6, 9; Tab 5, Aff. Richard Adams ¶¶ 7, 10; Tab 7, Aff. Wayne Baucher ¶¶ 6, 9; Tab 8, Aff. Joyce Dwenger ¶¶ 6, 9; Tab 9, Aff. Lawrence Dwenger ¶¶ 6, 9; Tab 13, Aff. Carman R. Ellis ¶ 13; Tab 14, Aff. Jill Ellis ¶ 9; Tab 15, Aff. Lee A. Fennig ¶ 9; Tab 16, Aff. H. Edward Gilbert ¶ 9; Tab 17, Aff. Mary E. Gilbert ¶ 9; Tab 18, Aff. David L. Granger ¶¶ 6, 9; Tab 19, Aff. Michael Highley (8/24/2009) ¶¶ 6, 9; Tab 20, Aff. Michael Highley (8/25/2009) ¶¶ 9, 10, 14, 15; Tab 21, Aff. Patricia Highley ¶¶ 9, 12-15; Tab 24, Aff. Robert Highley ¶¶ 9, 12-15; Vol. 2, Tab 26, Aff. Emily Hines ¶¶ 6, 9, 11; Tab 27, Supp. Aff. Emily Hines ¶ 3; Tab 28, Aff. Jason Hines ¶¶ 6, 9, 11; Tab 29, Supp. Aff. Jason Hines ¶ 3; Tab 30, Aff. Daniel W. Johnsman ¶¶ 6, 9-11; Tab 31, Supp. Aff. Daniel W. Johnsman ¶¶ 4, 7; Tab 33, Aff. David A. Johnsman ¶¶ 7, 10; Tab 34, Supp. Aff. David A. Johnsman ¶ 6; Tab 35, Aff. Andrea Knapke ¶¶ 8, 12-14; Tab 36, Aff. Chad Knapke ¶¶ 8, 12-14; Tab 37, Aff. Mark L.

Knapke ¶¶ 8, 12-14; Tab 38, Aff. Timothy Alan Knapke ¶¶ 6, 8; Tab 40, Aff. Thomas L. Krick ¶¶ 8, 12, 15; Tab 41, Supp. Aff. Thomas L. Krick ¶¶ 4, 6; Tab, 42, Aff. Darrell Kuhn ¶¶ 7, 10, 11, 14; Tab 45, Aff. Marilyn Kuhn ¶¶ 6,9; Tab 46, Aff. Linda Linn ¶¶ 8, 9; Tab 47, Supp. Aff. Linda B. Linn ¶ 4; Tab 50, Aff. David J. McNeilan ¶¶ 9-12, 18, 19; Tab 52, Aff. Laura B. McNeilan ¶ 9; Tab 53, Aff. Lois J. McNeilan ¶¶ 9, 10, 15; Vol. 3, Tab 54, Aff. Charles J. Meier ¶¶ 7, 10, 11; Tab 55, Aff. Mary K. Meyer ¶¶ 5, 7, 10; Tab 56, Aff. Amy L. Meyer ¶¶ 6, 9, 10; Tab 57, Aff. Jerome L. Meyer ¶¶ 7, 13-15; Tab 59, Aff. William Muhlenkamp ¶¶ 6, 9 ; Tab 61 Aff. James Post (8/24/2009) ¶ 9; Tab 63, Aff. Michael Post ¶¶ 7, 10, 11; Tab 64, Aff. Brenda S. Powell (10/15/2009) ¶¶ 6, 9; Tab 66, Aff. Jerry W. Powell ¶¶ 8, 11, 12; Tab 67, Aff. Thomas L. Powell ¶¶ 6, 9, 10; Tab 68, Aff. William Ransbottom ¶¶ 6-8; Tab 70, Aff. Carl W. Rose ¶¶ 6, 9; Tab 71, Aff. Carl W. Rose ¶¶ 6, 9; Tab 72, Aff. Lucile M. Rose ¶¶ 6, 9; Tab 73, Aff. Bonita S. Searight ¶ 6, 9; Tab 74, Aff. Robert Searight ¶¶ 6, 9; Tab 75, Supp. Aff. Robert E. Searight ¶ 4; Vol. 4, Tab. 76, Aff. Duane R. Sheets ¶ 9; Tab 77, Aff. Linda Sheets ¶¶ 7, 10; Tab 78, Aff. Rodney Sheets ¶¶ 7, 10; Tab 80, Aff. Mark Sieftring (8/24/2009) ¶¶ 8, 11, 12; Tab 81, Aff. Mark Sieftring (12/15/2009) ¶¶ 4, 7, 8; Tab 82, Aff. Ronald J. Sieftring ¶¶ 8, 11-13; Tab 84, Aff. David J. Suhr ¶¶ 6, 9, 10; Tab 86, Aff. Rita Suhr ¶¶ 6, 9-11; Tab 87, Aff. Carl A. Sutter ¶¶ 6, 9; Tab 89, Aff. Gale A. Thomas ¶¶ 6, 9, 10; Tab 90, Aff. Nelda G. Thomas ¶¶ 6, 9, 10; Tab 91, Aff. Gary Uhlenhake ¶ 9; Tab 92, Aff. Jerry Weisman ¶¶ 6, 9; Tab 94, Aff. Vicki L. Weisman ¶¶ 6, 9; Tab 95, Aff. Charles F. Zumberge ¶¶ 6, 9-11; Tab 96, Aff. Jennifer Zumberge ¶¶ 6, 7, 10; Tab 97, Aff. Michael Zumberge ¶¶ 8, 11-13; Jt. Ex. Vol. 1, Tab 1, Nancy L. Adams Dep. Ex. A ¶ 5; Tab 2, Richard L. Adams Dep. pp. 21-25, 52-53; Tab 3, Paul A. Agnello Dep. p. 23 & Ex. A. ¶ 5; Tab 4, Wayne M. Baucher Dep. pp. 9, 10; Tab 5, David M. Doner Dep. pp. 20-22, 30 & Ex. A ¶ 5; Tab 6, Janet K. Doner Dep. pp. 15-21, 24, 30, 36, 38; Tab 7, Karen S. Doner Dep. pp. 18-19,

24 & Ex. A ¶ 5; Vol. 2, Tab 9, Joyce A. Dwenger Dep. pp. 21-23; Tab 10, Lawrence J. Dwenger Dep. pp. 13-15, 21; Tab 11, Stanley M. Ebbing Dep. pp. 9, 10; Tab 12, Vicki L. Ebbing Dep. pp. 14, 22; Tab 13, Lee A. Fennig Dep. p. 38; Vol. 3, Tab 14, Mary E. Gilbert Dep. p. 31, 36, 44; tab 15, H. William Gilbert Dep. p. 49, 51, 53-55; Tab 16, David L. Granger Dep. p. 21; Tab 17, Patricia Highley Dep. pp. 14-15, 22, 29, 35, 46; Tab 18, Robert E. Highley Dep. 13-14, 25; Tab 19, Daniel W. Johnsman Dep. pp. 11, 17-18, 20, Ex. B ¶¶ 6, 9, 10, Ex. C ¶ 4; Tab 20, Andrea Knapke Dep. pp. 17-19, 21, 24-25, 30-31, 35, 37; Vol. 4, Tab 21, Chad M. Knapke Dep. pp. 13, 17-18, 20, 22, 25, 27, 30-32, 34-35; Tab 22, Mark L. Knapke Dep. pp. 13, 16-18, 23-24; Tab 23, Timothy Alan Knapke Dep. pp. 15-19, 44-45; Tab 24, Darrell Kuhn Dep. pp. 15, 17-18, 20-21, 23, 30-33 & Ex. A ¶¶ 7, 10-11, 14; Tab 25, Marvin Kuhn⁴ Dep. pp. 17-18 & Ex. A ¶¶ 6, 9; Tab 26, Linda B. Linn Dep. pp. 13-15, 20, 22, 39, 41; Tab 27, David McNeilan Dep. p. 12; Tab 29, Amy Meyer Dep. pp. 12, 23-24, 28 & Ex. B ¶¶ 9-10; Vol. 5, Tab 30, Jerome L. Meyer Dep. pp. 15, 25 & Ex. B ¶¶ 7, 14; Tab 31, William Muhlenkamp Dep. pp. 13-14, 17 & Ex. A ¶¶ 6, 9; Tab 32, Carolyn Pierstorff Dep. p. 16; Tab 33, James A. Post Dep. p. 16 & Ex. A ¶ 9; Tab 34, Betty L. Powell Dep. Exs. B-D; Tab 35, Brenda Powell Dep. pp. 22, 25, 34; Tab 36, Jerry W. Powell Dep. pp. 37, 42-45, 54-55; Tab 37, M. Leone Powell Dep. pp. 23, 26-27; Vol. 6, Tab 39, Thomas Powell Dep. pp. 25-27, 29, 34, 40 & Aff. ¶¶ 6, 9-10; Tab 40, Larry V. Pugsley Dep. pp. 27-28, 30-31, 39, 44; Tab 41, William Ransbottom Dep. pp. 19, 21-25, 30, 33 & Ex. A ¶¶ 6-8; Tab 42, Thomas D. Rasawehr Dep. pp. 28-31; Tab 43, Timothy Rasawehr Dep. pp. 28, 33, 40-45; Tab 44, Carl W. Rose Dep. pp. 21, 23, 26-28, 31, 45-48, 54-57, Ex. A ¶¶ 6, 9, Ex. B ¶¶ 6, 9; Tab 45, Lucile M. Rose Dep. pp. 22-24, 26, 35-39 & Ex. A ¶¶ 6, 9; Tab 46, Bonita S. Searight Dep. pp. 43-46 & Ex. A ¶¶ 6, 9; Vol. 7, Tab 47, Robert E. Searight Dep. pp. 53-54, 56 & Ex. A ¶¶ 6, 9,

⁴ The deposition transcript of Marvin Kuhn incorrectly indicates the deponent is "Melvin Kuhn."

Ex. B ¶ 4; Tab 48, Duane Sheets Dep. pp. 33-34 & Aff. ¶ 9; Tab 49, Linda Sheets Dep. p. 13 & Ex. A ¶¶ 7, 10, 13; Tab 50, Rodney Sheets Dep. pp. 10-15, 29 & Ex. A ¶¶ 7, 10, 13; Tab 51, Carol L. Siefring Dep. pp. 7, 17; Tab 52, Jerry A. Seifring Dep. pp. 18, 30-34; Vol. 8, Mark Siefring Dep. pp. 32, 46, 76, 102, 160-62, 174, 177-78, 183 & Exs. D & P ¶ 4; Tab 54, Mary K. Siefring Dep. pp. 13-14; Tab 55, Neil J. Siefring Dep. pp. 13, 16; Tab 56, Ronald J. Siefring Dep. pp. 11-13, 35-37, 44, 46 & Ex. H ¶¶ 8, 11-13; Tab 57, David J. Suhr Dep. pp. 13, 17-20 & Ex. A ¶¶ 6, 9-10; Vol. 9, Tab 58, Rita K. Suhr Dep. pp. 17, 21-27 & Ex. A ¶¶ 6, 9-11; Tab 59, Carl A. Sutter Dep. pp. 16; Tab 60, Judith Ann Sutter Dep. pp. 9-10; Tab 61, Gale A. Thomas Dep. pp. 13-14, 19, 28, 38 & Ex. B ¶¶ 6, 9, 10; Vol. 10, Tab 63, Marilyn L. Uhlenhake Dep. pp. 15; Tab 64, Jerry Weisman Dep. pp. 22, 43, 48-51 & Aff. ¶¶ 6, 9; Tab 65, Vicki L. Weisman Dep. pp. 24-26, 31, 34 & Ex. A ¶¶ 6, 9; Tab 66, Jennifer Zumberge Dep. pp. 22, 25, 29, 35, 37, 40 & Ex. A ¶¶ 7, 10; Tab 67, Michael Zumberge Dep. pp. 13-20, 23-26, 43, 46 & Ex. A ¶¶ 8, 11-13.

ARGUMENT

Respondents' Proposition of Law No. 1:

Relators' suit is barred by the statute of limitations because it was not brought within four years of when their cause of action accrued.

- A. **The four-year statute of limitations in R.C. 2305.09(E), which this Court recently held constitutional, applies to Relators' action because Relators are seeking relief for an alleged taking of their lands.**

In Ohio, the statute of limitations on suits "for relief on the grounds of a physical or regulatory taking of real property" is four years after the cause thereof accrued. R.C. 2305.09(E). By its plain and unambiguous terms, R.C. 2305.09(E) applies to eminent domain actions, including Relators' current mandamus suit. Relators, however, contend in their third proposition of law that the statute of limitations on their suit is twenty-one years under R.C.

2305.04, which applies to actions “to recover the title to or possession of real property.” They argue that R.C. 2305.09(E) does not apply to physical takings claims because the Ohio Constitution provides that compensation must first be made or secured before property can be taken. In effect, Relators assert that R.C. 2305.09(E), at least as applied to physical takings of real property, is unconstitutional.

Relators’ constitutional attack upon R.C. 2305.09(E) is identical to that made by landowners in another recent mandamus case before this Court. See *State ex rel. Nickoli v. Erie MetroParks*, Case No. 2009-0026, relators’ reply br. pp. 4-5 (filed June 24, 2009). In a decision rendered only a few months ago, this Court summarily rejected that argument. *Nickoli*, 124 Ohio St. 3d 449, 2010-Ohio-606, ¶ 29, fn. 1, reconsideration denied, 125 Ohio St. 3d 1417, 2010-Ohio-1893.

Relators—who are represented by the same counsel who represented the landowners in the *Nickoli* case—argue that adhering to *Nickoli* leaves property owners in limbo because after the four-year limitations period runs, they will no longer be able to quiet title in their property or eject the condemner. Relators’ Am. Merit Br. p. 42. Relators’ argument misses the point. R.C. 2305.09(E) does not limit the time to sue to obtain (or to prevent the government from obtaining) property rights through prescription or adverse possession; the statute only limits the time to sue for compensation for an alleged taking. Relators offer no persuasive reason why this Court should so quickly abandon its recent precedent.

As alleged in Relators’ complaint, “ODNR’s confiscation, destruction, seizure, use and possession of Relators’ property constitute unconstitutional takings. As a result, ODNR has violated Relators’ fundamental property rights and caused Relators to suffer substantial property damages.” Compl. at ¶ 154. R.C. 2305.04 does not apply to Relators’ case because Relators are

not suing to recover title to or possession of their lands. Rather, R.C. 2305.09(E) applies because Relators are suing for relief from an alleged physical taking of real property. Compl. at ¶ 152 (indicating that Relators are seeking just compensation for ODNR's taking of their property.)

Even if R.C. 2305.04 has any potential applicability, R.C. 2305.09(E) governs because it more specifically applies to Relators' claims. See *Minster Farmers Coop. Exch. Co., Inc. v. Meyer*, 117 Ohio St. 3d 459, 2008-Ohio-1259, ¶ 25, citing R.C. 1.51. Most importantly, however, this Court has recently held that the running of R.C. 2305.09(E)'s statute of limitations bars a suit sounding in eminent domain. *Nickoli*, 2010-Ohio-606 at ¶ 30.

Although the General Assembly enacted R.C. 2305.09(E) in 2004, several years after ODNR modified the spillway, Relators still had a reasonable time to sue (if any time remained) for relief. A limitations period may be statutorily shortened as long as a reasonable time to sue was provided. *Nickoli*, 2010-Ohio-606 at ¶ 29. Even if Relators in 2004 had more than four years to sue Respondents, the enactment of R.C. 2305.09(E) merely shortened their time (to four years) to sue. Four years is certainly a reasonable time for Relators to bring their claims, which concern well-documented conditions along Beaver Creek. Other cases from this Court have held shorter durations sufficient. See, e.g., *Adams v. Sherk* (1983), 4 Ohio St. 3d 37, 40 (one year after discovery of medical malpractice); *Cook v. Matvejs* (1978), 56 Ohio St. 2d 234, 237 (two years after minor reaches majority).

B. Relators' claims accrued when their lands were allegedly flooded by Respondents' actions and not when they were discovered by Relators.

Except for suits for identity fraud, R.C. 2305.09's statute of limitations begins to run four years "after the cause thereof accrued." Generally, a cause of action accrues when the wrongful act is committed. *Harris v. Liston* (1999), 86 Ohio St. 3d 203, 205; *State ex rel. Teamsters Local Union 377 v. Youngstown* (1977), 50 Ohio St. 2d 200, 203-04. For statute of limitations

purposes, the predicate “wrongful” act in this case is the alleged physical invasion of Relators’ lands by increased severe flooding as a result of the spillway modification. Compl. at ¶¶ 152, 154-56. Recognizing that rigid application of the statute of limitations may be unjust, this Court in *Harris* held that the statute of limitations on actions for damage to real property under R.C. 2305.09(D) begins to run when the damage is discovered or through reasonable diligence should have been discovered. 86 Ohio St. 3d at 207.

The discovery rule does not apply to Relators’ mandamus claims. R.C. 2305.09, as it read when Relators sued Respondents in 2009 (and reads now), specifies in its last paragraph the actions where the discovery rule applies (i.e., for trespassing under ground, injury to mines, wrongful taking of personal property, and fraud). Although an action for relief on grounds of a physical taking of real property is included in subsection (E) of the statute, such action is not included within the discovery-rule paragraph. Under the rule of statutory construction, *expressio unius est exclusio alterius*, the expression of one or more items of a class implies the exclusion of those not identified. *State v. Droste* (1998), 83 Ohio St. 3d 36, 39. Therefore, the statute of limitations on Relators’ mandamus claims—which seek relief on grounds of a physical taking of real property—is not subject to the discovery rule because Relators’ claims are not included within the discovery-rule paragraph.

Relators’ cause of action against Respondents accrued when the alleged “wrongful act” first occurred. Their testimony shows that their lands first had increased severe flooding, allegedly due to ODNR’s actions, more than four years before they sued Respondents. See, *supra*, pages 9-12. In most cases, the most invasive flood occurred in 2003. *Id.* Thus, their suit is untimely. (Even if Relators’ claims are subject to the discovery rule, their suit is still untimely

because they knew about the increased flooding on their lands more than four years before they sued Respondents.)

C. Respondents' yearly "failure" to rectify the situation is not a continuous violation that tolls the statute of limitations.

Relators argue in their fourth proposition of law that under the "continuous-violation" doctrine, their takings-suit against Respondents is not time-barred. Developed primarily from federal case law, this tort-law doctrine "is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Nickoli*, 2010-Ohio-606 at ¶ 32, quoting *Broom v. Strickland* (C.A.6, 2009), 579 F. 3d 553, 555, quoting *Ward v. Caulk* (C.A.9, 1981), 650 F. 2d 1144, 1147. "[T]he present effects of past [violations] . . . do not trigger a continuing violations exception." (Brackets & ellipsis sic.) *Id.*, quoting *Ohio Midland, Inc. v. Ohio Dep't of Transp.* (C.A.6, 2008), 286 Fed. Appx. 905, 912, quoting *Tenenbaum v. Caldera* (C.A.6, 2002), 45 Fed. Appx. 416, 419. Rarely applied outside the context of Title VII employment discrimination, *id.* at ¶ 31, the continuous-violation doctrine focuses on the affirmative acts of the defendants. *Delaware State College v. Ricks* (1980), 449 U.S. 250, 258; *Corp. Ctr. Assoc. v. Twp. of Bridgewater* (C.A.3, 1996), 101 F. 3d 320, 324.

Tolling the statute of limitations for continuous violations is a principle of common law and is not a statutory command. *Hensley v. Columbus* (C.A.6, 2009), 557 F. 3d 693, 697.⁵ Relators argue that, by adding takings suits to R.C. 2305.09, the General Assembly "unmistakably" mandated that the statute of limitations on takings suits must be subject to

⁵ Before R.C. 2305.09 was amended to include takings suits, this Court held that the six-year limitation period of R.C. 2305.07, which governs actions based on "a contract not in writing, express or implied," was appropriate for mandamus actions to compel appropriation proceedings, reasoning that "when the state takes property, it is impliedly contracting that it will pay the property owner just compensation." *State ex rel. R.T.G. v. State*, 98 Ohio St. 3d 1, 2002-Ohio-6716, ¶¶ 30-31.

established tolling principles that apply to real-property torts, like continuous trespass and nuisance. R.C. 2305.09, however, says nothing about tolling the limitations period. If the General Assembly meant to apply tort-law tolling principles to takings suits, it would have manifested such intent in unmistakable statutory language. Or, the General Assembly could have amended subsection (A), which applies to trespass actions, to read “For trespassing upon real property, or for the physical or regulatory taking of it,” as it did in subsection (B) for actions for recovering or taking personal property. Instead, the General Assembly simply added a provision for takings suits, which is now codified in subsection (E). This shows only that the General Assembly intended to specify that takings and other actions are subject to a four-year statute of limitations, and did not “unmistakably” expand tort-law tolling principles as Relators would have this Court believe.

Moreover, the continuous-violations doctrine should not apply to taking suits because a taking is complete when it occurs. *Coniston Corp. v. Hoffman Estates* (C.A.7, 1988), 844 F. 2d 461, 463, citing *First English Evangelical Church v. Cty. of Los Angeles* (1987), 482 U.S. 304, 320, fn. 10. On that date, the property owner’s cause of action accrues. *Id.*; *Kirby Forest Indus., Inc. v. United States* (1984), 467 U.S. 1, 5 (where the government physically occupies land without condemnation proceedings, the landowner may sue on the date of the intrusion). Twice this year this Court has rejected applying the continuous-violations doctrine to taking suits: *Nickoli*, 2010-Ohio-606 at ¶¶ 31-37; *Painesville Mini Storage, Inc. v. Painesville*, 124 Ohio St. 3d 504, 2010-Ohio-920, ¶ 3.

Relators try to support their continuous-violation argument by discussing several trespass and nuisance cases. Relators’ Am. Merit Br. pp. 43-47. They only claim in passing that federal courts recognize “continuous takings,” based on three cases. *Id.* p. 43, fn. 19, citing *McNamara*

v. *Rittman* (C.A.6, 2007), 473 F. 3d 633; *Hensley v. Columbus* (C.A.6, 2009), 557 F. 3d 693; *McNamara v. Rittman* (N.D. Ohio 2010), No. 5:09-CV-523, 2010 U.S. Dist. Lexis 16009. But these cases do not help them. In the Sixth-Circuit *McNamara* case, the court declined to consider a continuous-violation claim because it was not ripe for review. 473 F. 3d at 639-40. In *Hensley*, the Sixth Circuit concluded there was no ongoing state activity to give rise to a continuous violation. 557 F. 3d at 697.

Only the unreported district-court *McNamara* case (which was decided before *Nickoli* and *Painesville Mini Storage*, and not mentioned in either decision) even arguably supports Relators' claim. In that case, the district court denied the city's motion for judgment on the pleadings because the court concluded that the plaintiffs had pleaded a claim for continuing violations. *McNamara*, 2010 U.S. Dist. Lexis 16009, at *9-10. But the city had only argued—in its reply brief—that the Sixth Circuit has not yet recognized the continuous-violation issue. See 2009 U.S. Dist. Ct. Motions Lexis 76853, at *8-10. Thus, when the district court ruled, it did not have the opportunity to consider a full argument on the merits against the applicability of the plaintiff's continuous-violation claim, an argument that would today undoubtedly refer to this Court's directly-applicable holdings in *Nickoli* and *Painesville Mini Storage*.

Even if this Court finds that the continuous-violation doctrine can apply to certain taking suits, it should not apply the doctrine here because the alleged recurring increased flooding on Relators' lands stems from a single triggering act—ODNR's modification of the spillway in 1997. While Relators complain that ODNR continues to control the spillway and allows it to cause recurring increased flooding downstream, they present no evidence that Respondents have made any further changes to the spillway, or did anything else to affect resulting lake levels, after ODNR modified the spillway.

Relators assert that their mandamus claims do not stem from a single flood event, but from recurring floods which they claim are caused when “ODNR decides at least yearly” not to attempt to minimize the recurring flooding by drawing-down the lake level, despite having the capability to do so. Relators’ Am. Merit Br. pp. 47-48. According to Relators, each time Respondents fail to eliminate or minimize the flooding constitutes a new act that restarts the statute of limitations on Relators’ claims. This argument, however, flies in the face of this Court’s contrary holding in *Nickoli*, which rejected the landowners’ position that the takings of their lands were continuous until Erie MetroParks reversed its decision to open the recreational trail to the public. 2010-Ohio-606 at ¶¶ 35-36. This Court found that adopting that position “would eviscerate the statute of limitations, which would be an untenable result.” *Id.* at ¶ 35. The Court also quoted approvingly from the Sixth Circuit:

“If this court were to accept the plaintiffs’ theory that a taking is continuous until it is reversed, then all takings would constitute ‘continuing violations,’ tolling the statute of limitations. There would effectively be no statute of limitations, and the plaintiffs’ theory could easily be extended to many other violations outside the takings context. This is not the law.”

Id. at ¶ 36, quoting *Ohio Midland, Inc. v. Ohio Dep’t of Transp.* (C.A.6, 2008), 286 Fed. Appx. 905, 913. Relators, therefore, cannot base their continuing-violation argument on Respondents’ yearly “failure” to alleviate the flooding. At most, the recurring floods on Relators’ lands are the “continual ill effects” of a single act—ODNR’s modification of the spillway—and are not continuous violations.

Relators also cannot toll the statute of limitations under the rule announced in *United States v. Dickinson* (1947), 331 U.S. 745. That case held that the statute of limitations did not bar a federal Tucker-Act damages suit⁶ in the United States Court of Federal Claims against the

⁶ The Tucker Act contains a six-year statute of limitations. *Dickinson*, 331 U.S. at 747.

federal government for a taking by flooding where it was uncertain at what stage the land had become appropriated for public use. *Id.* at 747-48. *Dickinson* also held that when the government brings about a taking by a continuing process of physical events, “the owner is not required to resort either to piecemeal or premature litigation to ascertain the just compensation for what is really ‘taken.’” *Id.* at 749. Relators argue that, under *Dickinson*, their suit is timely because one of Respondents’ experts indicated that standard engineering practices require 10-15 years of records to produce meaningful hydraulic statistics, and thus, they could not ascertain the full extent of the alleged taking until at least 2007.⁷ Relators’ Am. Merit Br. p. 49.

First, *Dickinson* is inapposite because it concerns a federal statute of limitations that applies to certain damage suits against the federal government. Although Relators’ suit is based on both the state and federal constitution, the state statute of limitations applies to the federal taking claims because the Fifth Amendment has no limitations period. *287 Corp. Ctr. Assocs. v. Twp. of Bridgewater* (C.A.3, 1996), 101 F. 3d 320, 323-24; see, also, *Wilson v. Garcia* (1985), 471 U.S. 261, 269 (holding that state law governs “the length of the limitations period, and closely related questions of tolling and application” in 42 U.S.C. 1983 suits). Accordingly, this Court must follow Ohio law. Cf. *Peterson v. Putnam Cty.* (Tenn. App. 2006), No. M2005-02222-COA-R3-CV, 2006 Tenn. App. Lexis 677, at *22-23 (rejecting the *Dickinson* rule because Tennessee law provides that the statute of limitations for an inverse taking cause of action accrues when the plaintiff realizes or should realize that his or her property is permanently damaged).

⁷ Interestingly, Relators performed no analysis of hydrologic or hydraulic statistics relating to their properties nor did they review any records in advance of filing this lawsuit rendering their claims moot. Moreover, the 10 to 15 years of records Stantec refers to is the need to compare apples to apples regarding time periods. To put Stantec’s comment in context, Stantec properly suggests that records of a 10 to 15 year time period should be compared to a time period of a similar duration, not occurrences taking place over a period of 70 plus years.

Additionally, unlike the *Dickinson* plaintiffs who sued for damages, Relators are suing Respondents in mandamus to compel appropriation proceedings. The Court in this case has no jurisdiction to determine how much, if any, compensation is owed from a taking, but only to determine whether Relators have proven that a taking has occurred. Concerns about pursuing piecemeal or premature litigation to ascertain compensation are therefore premature.

Even if this Court finds that *Dickinson* is the law in Ohio, its tolling rule does not apply in this case. There is no confusion that, all Relators admit that their lands experienced the most severe and extensive flooding in 2003, which is more than four years before they sued Respondents. See, *supra*, pages _____. Accordingly, the statute of limitations on Relators' mandamus suit can not be tolled under *Dickinson*.

Respondents' Proposition of Law No. 2:

Respondents are not precluded from litigating any contested issues, because the Post and Case Leasing cases involved different parties and different issues

Hoping to alleviate their evidentiary burden (which is clear and convincing evidence—see, *infra*, pages 27-28), Relators suggest, without making a fully-developed argument, that the previous lower-court decisions in *State ex rel. Post v. Speck* (3d Dist.), No. 10-2006-001, 2006-Ohio-6339, and *Case Leasing & Rental, Inc. v. Ohio Dep't of Natural Resources* (10th Dist.), No. 09-AP-498, 2009-Ohio-6573, preclude Respondents from litigating the issue of causation. Relators' half-hearted attempt to invoke non-mutual issue preclusion offensively against Respondents cannot succeed because *Post* and *Case Leasing* involved different properties owned by different parties not in privity with Relators (*Case Leasing* also involved a different cause of action with a different burden of proof), and Relators do not show circumstances warranting an exception to the mutuality requirement.

The doctrine of issue preclusion, a.k.a. collateral estoppel, “precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action.” *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1999), 81 Ohio St. 3d 392, 395. Unlike federal law, Ohio law also requires “that the parties to the subsequent action must be identical to or in privity with those in the former action.” *Kirkhart v. Keiper*, 101 Ohio St. 3d 377, 2004-Ohio-1496, ¶ 8. Unless there is some narrow and specific issue such as ownership, control or status which was actually litigated, directly determined, and essential to the prior judgment for which the nonparty seeks an exception for use in subsequent litigation, issue preclusion operates only where all parties to the present proceeding were bound by the prior judgment. *Goodson v. McDonough Power Equip., Inc.* (1982), 2 Ohio St. 3d 193, 200. Thus, unless an exception applies, a judgment must preclude both parties before it will preclude any party from re-litigating an issue. *Id.*

Despite Ohio’s mutuality requirement, Relators cite to *Hicks v. De La Cruz* (1977), 52 Ohio St. 2d 71, 74, in an effort to have this Court mistakenly believe that unless there are special circumstances present, Ohio no longer requires mutuality for collateral estoppel. Relators’ Am. Merit Br. p. 31, fn. 12. Previously considering the same contention, this Court concluded:

In review of the particular facts surrounding the determination in *Hicks*, and all of the pronouncements on the subject prior to and subsequent to that case, we conclude that this court has not, within the limited ruling of *Hicks*, abandoned the mutuality rule, but has only shown that it is willing to relax the rule where justice would reasonably require it.

Goodson, 2 Ohio St. 3d at 199.

Mutuality is required for issue preclusion to apply unless and until there is sufficient justification warranting an exception to serve justice within the framework of sound public

policy. *Id.* at 202. Here, Relators make no claim that justice requires the relaxation of the mutuality rule, despite the fact that the burden of proof rests on the party asserting the exception.

Moreover, there are no public policy reasons to grant Relators an unrequested exception. When issue preclusion is used offensively, a later plaintiff has no incentive to intervene in the first action but, rather, can wait for a favorable outcome and attempt to assert the prior judgment against the defendant in a subsequent lawsuit. See *Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322, 331 (holding offensive issue preclusion is disfavored when the second plaintiff “could easily have joined in the earlier action.”)⁸ Such a wait-and-see tactic has become emblematic of what appears to be Relators’ preferred litigation strategy.

Likewise, before applying issue preclusion, courts must determine whether the identical issue was actually decided in the former case. If the issues previously decided and presently before the court are not identical, there can be no waiver of the mutuality rule. Thus, the judicial resources sought to be saved in the name of judicial economy are needlessly expended on questions collateral to the case. *Goodson*, 2 Ohio St. 3d at 203. Since Relators make no claim they were either parties or in privity⁹ with the parties in the *Post* or *Case Leasing* litigation, they are not entitled to assert issue preclusion offensively against Respondents in this action.¹⁰

⁸ Additionally, “the use of offensive claim preclusion is generally disfavored.” *Nickoli*, 2010-Ohio-606 at ¶ 25, quoting *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, ¶ 6.

⁹ Privity is not created simply because the Relators own property adjoining either the property of the *Post* or the *Case Leasing* plaintiffs. See *Nickoli*, 2010-Ohio-606 at ¶ 24.

¹⁰ If Relators were parties to, or in privity with the parties in the *Post* and/or *Case Leasing* litigation, they would be precluded from filing this lawsuit by the doctrine of claim preclusion, a.k.a. *res judicata*, which prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of an occurrence that was the subject matter of a previous action. See *Nickoli*, 2010-Ohio-606 at ¶¶ 21-22. Relators claim their property was flooded as a result of the 1997 modification of the self-regulating spillway, the very same occurrence that was the subject matter of the previous actions filed by the *Post* relators and the *Case Leasing* plaintiffs. Accordingly, if Relators participated in or had any control over the *Post* or *Case Leasing*

Moreover, the issues in this case are not identical to those in *Post* or *Case Leasing*. The facts that Relators must prove to show a taking are parcel-specific and were not litigated in either of those cases.

Further, the party asserting issue preclusion must prove the identity between the issue presented and the issue previously decided. *American Fiber Sys., Inc. v. Levin*, 125 Ohio St. 3d 374, 2010-Ohio-1468, ¶ 20. The issues considered in the *Post* and *Case Leasing* cases are not identical to those in this case. *Case Leasing* was a negligence case, where the court of claims determined that ODNR owed the plaintiff a duty, that ODNR's acts or omissions resulted in a breach of that duty, and that the breach proximately caused the plaintiff's injuries. In so doing, the court ruled, based on a preponderance of the evidence, that ODNR's design choice for the replacement spillway and change in the management of the water level were unreasonable and resulted in the flooding of the racquet and health club. *Case Leasing*, 2008-Ohio-3411 at ¶¶ 8, 27-28.

Whether ODNR investigated historical storm and lake-level data, examined actual historical lake levels, performed a sensitivity analysis, adequately considered cost-effective alternative measures, or unreasonably managed the lake level post-1997, while perhaps relevant to a negligence claim, is irrelevant in a mandamus action to determine whether the Relators' property has been taken. Such a case involves different elements, different facts, different properties, and a different burden of proof.¹¹ An appropriation action is not a tort action; the

litigation, they would be precluded from bringing this subsequent lawsuit asserting additional claims that could have been raised previously.

¹¹ As noted by this Court in *Goodson*, the central danger of issue preclusion lies in the simple but devastating fact that the first-litigated determination of an issue may be wrong. 2 Ohio St. 3d at 202. The risk of error runs far beyond the proposition that most matters in civil litigation, unlike the present case, are determined according to the preponderance of the evidence. Accordingly, the Court concluded it would not be prudent to raise a decision made by one fact finder in the

issue is not whether the public entity acted negligently or contrary to authority. *Post*, 2006-Ohio-6339 at ¶ 56. Thus, the concept of duty as it applies to negligence liability is irrelevant to a takings case, which requires that a servitude has been imposed upon the land.

Similarly irrelevant to this case is the *Post* litigation, in which the trial court found that necessary modifications to the spillway constituted a taking of 16 individual parcels of land belonging to plaintiffs Leo Post, Richard Baucher, Jack Minch, Steve Zumberge and Terry Linn. To establish a taking, a landowner must prove the governmental entity caused a substantial or unreasonable interference with *his* property rights. *State ex rel. OTR v. Columbus* (1996), 76 Ohio St. 3d 203, 206. Whether the frequency and predictability of alleged flooding results in a taking is a factual question that must be based in part on the character and use of the land. *Id.*, citing *Baird v. United States* (1984), 5 Cl. Ct. 324, 329. Thus, the central issue in a taking case is whether the specific property in question was in fact physically appropriated.

There was no testimony in *Post* regarding the cause, frequency, or severity of flooding on any parcel of land belonging to any of the Relators in this action. Likewise, there was no testimony in *Post* regarding the character and use of the lands involved in this case. To the contrary, the only issue actually litigated and directly determined in *Post* was the cause, frequency, and severity of flooding of the plaintiffs' properties. Contrary to Relators' claims, whether there has been any general increase in downstream flooding to the properties adjacent to the Beaver or the Wabash as a result of ODNR's actions was not at issue, was not actually litigated, was not directly determined, and was not essential to either the *Post* or *Case Leasing* judgments.

context of one set of facts to the standard under which all subsequent cases involving separate underlying factual circumstances are judged.

By contrast with these prior decisions, 91 discrete parcels of real property are involved in this action, none of which were even considered in either of those cases. “[T]he law has long recognized that each piece of real estate is unique, and that no two pieces of realty are the same in location, quality, or value.” *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 415 (Gibson, J., dissenting). See, also, *Tucson Airport Auth. v. Freilich* (Ariz. 1983), 665 P. 2d 1002, 1005 (“[I]t is . . . a basic tenet of condemnation law that that every parcel of land is unique.”). Even contiguous real estate parcels are notoriously different in topography, location, access, development, mineral content, soil composition, and forestation. No court has determined whether any of these 91 distinct Relator parcels have experienced an increase in frequency or severity of flooding sufficient to constitute a taking that was caused by Respondents’ actions. Nor has the alleged increased flooding of Relators’ lands ever been essential to any prior court judgment.

Relators have the burden of proof on issue preclusion; yet they have made no effort to demonstrate any identity between the specific issues in the present litigation and the issues directly litigated, determined, and essential in the *Post* and *Case Leasing* cases. Respondents do not contest that ODNR constructed the self-regulating spillway in 1997. Absent the requisite proof of a special circumstance and the identity of issues presented, Relators’ attempted use of non-mutual offensive issue preclusion regarding any issue (other than ODNR’s conceded control of the self-regulating spillway) is neither fair to Respondents nor would it promote judicial efficiency. Accordingly, this Court should give the *Post* and *Case Leasing* decisions no preclusive effect.

Respondents' Proposition of Law No. 3:

Relators have not proven their mandamus claims by the requisite evidence.

- A. Because this is a mandamus action, Relators must prove their claims by clear and convincing evidence, not just by a preponderance of the evidence.**

In the opening paragraph to their argument, Relators state the elements for mandamus relief and correctly admit they have the burden of proving those elements. Relators' Am. Merit Br. p. 28. See *State ex rel. BSW Dev. Group v. Dayton* (1998), 83 Ohio St. 3d 338, 344. Relators then state, incorrectly, that the burden of proving the mandamus elements in a takings case is by a preponderance of the evidence "in order to ensure the minimum protections of the Fifth and Fourteenth Amendments of the U.S. Constitution." Relators' Am. Merit Br. p. 28, citing *Kingsport Horiz. Prop. Regime v. United States* (2000), 46 Fed. Cl. 691, 693.

Relators are mistaken. The burden of proof in a mandamus action is clear and convincing evidence. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St. 2d 141, 161. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, syllabus ¶ 3.

Appellate courts in this State have consistently applied the clear-and-convincing burden in mandamus cases where the relator seeks to compel appropriation proceedings for an alleged taking. See *State ex rel. Stamper v. Richmond Hts.* (8th Dist.), No. 94721, 2010-Ohio-3884, ¶¶ 23, 31; *State ex rel. Gilbert v. Cincinnati* (1st Dist.), 174 Ohio App. 3d 89, 2007-Ohio-6332, ¶ 18; *Conner v. Caledonia* (3d Dist.), No. 9-04-48, 2005-Ohio-1427, ¶ 14; *Shanahan v. Perry* (6th Dist. 1987), No. S-87-1, 1987 Ohio App. Lexis 9373, at *5; *State ex rel. Goldsberry v. Weir*

(10th Dist. 1978), 60 Ohio App. 2d 149, 153; *Millington v. Weir* (10th Dist. 1978), No. 78AP-359, 1978 Ohio App. Lexis 9946, at *4. Respondents found no mandamus decision in Ohio that applied the lesser preponderance burden where the relator claimed a governmental taking.

The federal takings case that Relators cite is inapposite. *Kingsport* is not a mandamus case; it involved a suit for compensatory damages against the federal government in the United States Court of Federal Claims. Relators, however, elected to sue Respondents for a writ of mandamus, not damages.¹² Further, there is no language in *Kingsport* (or in *Sanguinetti v. United States* (1924), 264 U.S. 146,¹³ the case that *Kingsport* cites) that supports Relators' assertion that the lesser preponderance burden of proof necessarily applies in takings cases to ensure minimum Fifth- and Fourteenth-Amendment protections.

Accordingly, Relators' burden of proof in this mandamus action is clear and convincing evidence.

B. Relators do not have clear and convincing expert evidence showing that Respondents' actions have caused flooding on Relators' properties that is reasonably expected to recur at least once in every 15 years.

To show a taking of a flowage easement on their lands based on flooding, Relators must prove by clear and convincing evidence that (1) the new spillway causes Relators' lands to be "subject to intermittent, frequent, and inevitably recurring floodings," and (2) such flooding is reasonably expected to occur at a particular recurrence intervals. *Fromme v. United States* (1969), 188 Ct. Cl. 1112, 1196-1197, citing *United States v. Cress* (1916), 243 U.S. 316. See, also, *Cooper v. United States* (1996), 37 Fed. Cl. 28, 36, ("Proof of damage alone does not

¹² The court of claims has jurisdiction over takings suits against the State for compensatory damages. *Estep v. Johnson* (10th Dist. 1998), 123 Ohio App. 3d 307, 316; *Kermetz v. Cook-Johnson Realty Corp.* (10th Dist. 1977), 54 Ohio App. 2d 220, 227.

¹³ *Sanguinetti* is not a mandamus case, but an appeal from a decision of the United States Court of Federal Claims.

establish a taking. . . . Plaintiff must also prove that the government action was the natural and probable cause of the flood.”). In *Fromme*, the court found that the evidence failed to show “inevitably recurring floodings” because the floodings were not “reasonably expected to recur at intervals of about once in every 15 years on the average.” *Id.*

Several Ohio cases have found that the recurrence interval must be more frequent than 15 years. See, e.g., *Accurate Die Casting Co. v. Cleveland* (8th Dist. 1981), 2 Ohio App. 3d 386, 391 (“The potential of plaintiff’s property to flood at intervals of ‘not substantially more than ten years’ . . . does not constitute the frequent flooding required by decisions of the Supreme Court”); *Proctor v. N & E Realty, LLC* (11th Dist.), No. 2005-T-0051, 2006-Ohio-3078, ¶ 27 (“Flooding attributable to public improvements caused by ‘ten year’ rains does not constitute a compensable taking at Ohio law.”). See Addendum, Appx. A (10-year table), Appx. B (10-year map).

1. Relators’ lay evidence is not sufficient to prove causation.

Relying primarily on their own lay testimony, Relators argue that Respondents’ actions must have caused additional flooding, because they and their fact witnesses observed more flooding on Relators’ lands after the spillway was modified than before. While Relators and their fact witnesses can testify to their own observations, they cannot render a reliable opinion on the critical issue of causation. *Id.* “A substantial body of case law in the Court of Federal Claims stands for the proposition that proof of causation in flood and erosion cases is a complex issue best addressed by experts.” *Cooper*, 37 Fed. Cl. at 36, citing *Baskett v. United States* (1985), 8 Cl. Ct. 201, 212; *Loesch v. United States* (1981), 227 Ct. Cl. 34, 45; *Herriman v. United States* (1985), 8 Cl. Ct. 411, 420. “Ascertaining the cause of such a complex natural occurrence [as flooding] requires the analysis of many variables and cannot be reduced to simple

answers. Therefore, . . . the testimony of experts is particularly appropriate, given the fact that the court has been presented with evidence of a highly technical nature involving geotechnical, hydrologic, hydraulic, geological and climatic matters.” *Id.* And as the *Post*-court noted, “[f]looding issues are very complex matters and therefore, generally, require the use of expert testimony to prove the cause and frequency of flooding.” 2006-Ohio-6339 at ¶ 61.

Relators and their fact witnesses are simply not expert witnesses. They do not have sufficient knowledge, skill, experience, training, or education in engineering, hydrology, and/or hydraulics to testify on what caused the alleged increased flooding on Relators’ lands. See Evid.R. 702. Relators’ lay testimony cannot establish the complex issue of causation of flooding within the Beaver Creek and Wabash River watersheds.

Relators accuse Respondents of “[disparaging] the farmers as *too dumb* to understand what they see with their own eyes.” (Emphasis added.) Relators’ Am. Merit Br. p. 2. That accusation could not be further from the truth. Courts in similar situations as this one have found lay testimony to be “quite credible,” and found the witnesses were “good observers,” but acknowledged that “erosion is a complex phenomenon,” and that “testimony of experts is particularly appropriate, given the fact that the court has been presented with evidence of a highly technical nature involving geotechnical, hydrologic, hydraulic, geological and climatic matters.” *Baskett*, 8 Cl. Ct. at 211-212. It is therefore surprising that Relators’ experts made no effort to scientifically evaluate the impacts of the new spillway on individual Relator properties.

- 2. Relators’ expert Campbell did not talk to any Relators, visit any of their properties, study any post-1997 storm events in Mercer County, know which parcels experienced more frequent and severe flooding because of the new spillway, or look at hydrologic and hydraulic modeling to form his opinion; he instead based his opinion on his work in the 2006 *Case Leasing* case, which involved different property.**

As noted earlier, real estate is unique; no two parcels of land are the same. See, *supra*, page __. The properties in the floodplain of the Beaver and Wabash undeniably differ to some degree in elevation and topography, location, access, development, mineral content, soil composition and forestation. A detailed hydrologic and hydraulic model and study is necessary to show exactly how, if at all, the new spillway impacts any flooding that may be occurring on Relators' properties. Relators have not shown that their properties are similar to those involved in *Case Leasing* or *Post*. Their arguments in this area are simply a back-door assertion of issue preclusion. Contrary to Relators' assertion, the causation of flooding is beyond mere common sense, and must be decided on expert scientific evidence.

Despite the conclusory statements of Relators' expert, Pressley Campbell, that increased lake elevations and increased discharge from the spillway have necessarily caused more severe flooding on Relators' properties, there is no evidence in the record to support such claims.¹⁴ The only attachments to the Campbell affidavit are Campbell's curriculum vitae (Ex. A), a graph created by Campbell showing the discharge of water over the spillway at GLSM during certain historical storm events (Ex. B), a summary of GLSM surface-level measurements (Ex. C) and correspondence to and from ODNR personnel written at or near the time of the spillway modification (Ex. D). Relators offer no other *expert* evidence on the causation of the alleged flooding on their lands.

Noticeably absent from Campbell's affidavit is any hydrologic and hydraulic modeling of the Beaver Creek and Wabash Rivers downstream from GLSM.¹⁵ Campbell confirmed that he

¹⁴ This Court has stricken Campbell's May 20, 2010 affidavit and exhibits (Relators' Evid. Tab 124) from the Record. Entry dated July 13, 2010.

¹⁵ This absence is in stark contrast to the thorough hydrologic and hydraulic modeling that Stantec produced in this case. See Respondents' Evid. Tab A, Mar. 3, 2010 Report and HEC-

did not analyze or model the new spillway's impact on the Relators' properties nor did he even look at any modeling in forming his opinion. Jt. Ex. Vol. 16, Tab 76, Campbell Dep. pp. 76, 171-72.

Campbell did not talk to any Relators or visit any of their parcels. *Id.* p. 90. He does not know whether any Relator parcels are closer to the spillway than the Case Leasing parcels. *Id.* p. 110. He did not study any storm events in Mercer County since 1997. *Id.* p. 112. He does not know which Relator parcels actually experienced more frequent and severe flooding because of the new spillway. *Id.* pp. 126, 133, 135-36, 139. He did not look at any data or reach any conclusions about how long standing water remains on the property under the new spillway versus the old spillway. *Id.* p. 166.

Instead, Campbell relied on his work from the 2006 *Case Leasing* case. *Id.* at 130-31 ("I used the work that I had done in the *Case Leasing* case. I did not rerun anything for this case.") *Case Leasing* is a negligence case that involved one single property that is only several hundred yards from the new spillway and not any parcels at issue in this case. *Id.* at 110. Campbell's conclusions reached in *Case Leasing* cannot be extrapolated to all Relators' properties; therefore his opinions are irrelevant, or at best unreliable and insufficient to sustain Relators' burden of proof.

Instead of looking at hydrologic and hydraulic modeling to form his opinion, Campbell looked at historical precipitation measurements, lake elevations, and records from the Linn Grove flow gauge in determining whether the new spillway caused additional flooding on Relators' properties. However, he only considered flow from the spillway and not contributions from the many sources within the Beaver Creek and Wabash River basins which cause the peak

HMS and HEC-RAS modeling; Apr. 29, 2010 HEC-HMS and HEC-RAS modeling; and Stantec Memo at plates 1-40.

flood depths for much of Beaver Creek and Wabash River. Stantec Discussion, "Discussion of Results and Other Analysis," p. 3.1.

3. Campbell's calculations contain significant errors.

Campbell incorrectly concludes that fifteen storm events would have caused the Beaver Creek and Wabash to flow out of bank between 1927 and 2006 if the new spillway had been in place, but finds that only one storm event would have caused the same overtopping with the old spillway configuration. Relators' Evid. Tab 99, Aff. Campbell at ¶ 14. However, the Army Corps of Engineers documented six "significant" flood events between 1949 and 1972 alone. Corps Report p. 15. Campbell testified that he had no reason to doubt the accuracy of the Corps Report or that flood events occurred in these years. Campbell Dep. p. 85.

Campbell fails to take into consideration that the new spillway would have let more water out of the lake sooner in the storm event. Therefore, lake levels never would have reached that same elevation. See Henson revised report p. 3.0. In order to correctly calculate the discharge, he would have needed the timing of the inflow into the lake. *Id.* Campbell also failed to consider the drainage below the dam in calculating when Beaver Creek would overtop. *Id.* This provides further evidence that Campbell's modeling is incorrect and unreliable

Campbell's analysis of lake elevation data is also flawed. Campbell compared lake elevations from a 70-year period to those of a 9-year period concluding that lake elevations have been consistently higher after 1997 and opining that the higher elevations result in increased discharge over the spillway. Campbell Aff. at ¶ 15. More specifically, he compared lake elevations between 1927 through 1997 and 1997 through 2006, claiming that from 1927 to 1997 the lake elevation was above 870.6 feet for 21.4 percent of the measurements versus 73.3 percent of the measurements during the 1997 to 2006 time period. *Id.* Additionally, Campbell claims

that since 1997, lake levels have been above 871.5 feet 26.3 percent of the time versus 2.4 percent of the time prior to 1997. *Id.* Campbell's analysis fails to account for the 1988 addition of flash boards to the spillway crest, which increased the lake level by four inches.¹⁶ Jt. Ex. 69, Glen Cobb Dep. pp. 35-36. Because of the addition of the flash boards, any comparison of lake elevations after 1997 can only be made to lake elevations between 1989 and 1997. Stantec Discussion "Discussion of Results and Other Analysis," pp. 3.1-3.2. If Campbell had done this calculation, his numbers would have come out very differently. In fact, Stantec did do this and found that "66 percent of measurements taken reflect lake elevations above 870.6¹⁷ and that 19 percent of measurements reflect lake elevations greater than 871.5." Stantec Discussion at 3.2; Henson Dep. pp. 86-90.

Finally, Campbell's reliance on measurements from the Linn Grove stream gauge is misplaced. The Linn Grove gauge is located 20 miles downstream from the GLSM spillway. At this gauge the Wabash River drains 506 square miles, a 300 percent greater area than the drainage area of Beaver Creek. Stantec Memo pp. 1-2. The measurements from this gauge do not distinguish what flow is from GLSM, what flow is from the tributaries upstream or what flow is run-off from the additional drainage area.

Campbell acknowledged that "there is an increased trend in the amount of precipitation over history" and that increased rainfall could account for increased flow at the Linn Grove gauge. Campbell Dep. pp. 142-43. He also admitted that there are other potential causes of flooding in the region such as backwater and increased rainfall. *Id.* pp. 101-03. Campbell

¹⁶ Relators suggest that the new spillway increased the pool level 4 inches. Relators' Am. Merit Br. p. 6. However, this is mischaracterizing the facts. ODNR used stop logs to raise the pool elevation 10 years prior to the spillway modification. The new spillway did not raise the pool elevation, it simply removed the need for the stop logs. Jt. Ex. 69, Glen Cobb Dep. pp. 35-36.

¹⁷ The measurement appearing in Stantec Discussion is a typographical error.

testified that “the further you get away from the spillway, the less it’s affected by the spillway and the more it’s affected by backwater.” *Id.* However, again, Campbell did not determine what effects that backwater from the Wabash River had on individual Relator parcels, *id.* p. 104, despite testifying that “there’s no question [backwater] has an effect.” *Id.* p. 102.

4. Respondents’ expert evidence shows that significantly less area has been impacted by increased, severe flooding from the new spillway than what Relators allege.

If their claims are not barred by the statute of limitations, Relators still bear the burden of proving their case by clear and convincing evidence and have failed in that regard. Respondents have, by contrast, provided this Court with an abundance of evidence showing that if there is any taking at all, it is substantially less than what Relators claim. Relators have much to say about what Respondents supposedly “admit” and “concede.” Simply stated, Respondents acknowledge that their expert has opined that during an event having a recurrence interval of 15 years, 16 Relators, owning a total of 863 acres in 16 parcels, experience some increased flooding on 68 acres as a result of changes to the dam at GLSM. Respondents’ Evid. Tab A, Ex. B, May 26, 2010 Stantec Memo p. 14. Whether that opinion is sufficient factual support to show a taking is for this Court to decide.

By their references to *Post* and *Case Leasing*, Relators suggest that this Court should order Respondents to take Relators’ properties because lower courts in these two different cases, involving 17 different properties found that ODNR was negligent (*Case Leasing*) and inferred causation from the *Post*-relators’ expert, John Warns, testimony that more water is passing over the spillway. In this case, Relators ignore the fact that their properties are necessarily different from those in *Post* and *Case Leasing*. And they submitted no evidence to show that their properties are similar to the properties involved in *Post* and *Case Leasing* with respect to

topography, location, access, development, mineral content, soil composition, and forestation. Relators also have not submitted any evidence to show that any increase in the flooding of their land results from anything that Respondents have done.

Stantec, however, considered all of these characteristics in analyzing the properties using hydrologic and hydraulic modeling. Respondents' Evid. Tab A, Ex. A, Apr. 29, 2010 ("Stantec Analysis") p. 2.2. Stantec used Light Detection and Ranging (LiDAR) to obtain topographical data about the parcels in this case and used that data to help delineate watersheds and map peak areas inundated. *Id.* p. 2.2 & Plate 1; Stantec Discussion Plate 2 (updated at Stantec Memo Plate 39) (attached hereto as Appx. C). Stantec mapped the parcels in this case to show their location in respect to the spillway. Stantec Discussion, Plate 2 (updated at Stantec Memo Plate 39). Stantec considered development (land use), soil composition, and forestation to determine runoff. Stantec Analysis p. 2.2, Plates 2 and 3.

Analyzing runoff is important because "large, slow moving systems of soaking rains . . . happen over the entire watershed." Stantec Discussion p. 2.2. These storm systems contribute water directly to Beaver Creek as well as GLSM. Stantec concluded that it would not be proper to assess the impacts of the spillway modification "without considering the contribution of runoff below the dam." *Id.* Stantec's modeling found that, for the 15-year event at the Indiana state line, less than ten percent of the peak flow comes from the spillway at GLSM. *Id.* p. 2.3. Stantec concluded that "the majority of the flooding, especially as the distance downstream of the spillway increases, results from runoff that enters the stream below the spillway *and not a direct result of the spillway itself.*" (Emphasis added.) *Id.*

To fully understand the significant flooding event that occurred in July 2003, Stantec obtained gauge-adjusted radar rainfall data. Stantec Analysis p. 2.4. "[T]he 2003 rainfall has a

return period of about 240-years, i.e., a 0.4 percent chance of occurring in any given year.” *Id.* A 15-year event, on the other hand, arguably the relevant frequency at issue in this case, has a 7-percent chance of occurring in any given year. Stantec Discussion p. 1.1. Indeed, the raw data filed with this Court shows not only that July 2003 was an unusual month with more than fourteen inches of rain, but 2003 was an unusual year with five consecutive months of more than 6 inches of rain each month and a yearly total of more than sixty inches of rainfall. Respondents’ Evid. Tab B (“Rainfall Data”) hardcopy summary attached as Appendix D. This data shows that Moir’s assertion that the July 2003 storm was two consecutive 14-year events is unlikely. Further, Stantec calculated the probability that two 14-year events would occur in the same year to be 0.05 percent. Stantec Memo pp. 5-6. And, the likelihood that two such events would occur in a four day period is much less than a half of a percent. *Id.*

Historical rainfall data confirms that 2003 was an unusual year and that rainfall has increased in the Beaver Creek watershed after 1997. Between 1985 and 1996, there were never two consecutive months with more than six inches of rainfall. *Id.* In fact, during that eleven year period, there were only five months with rainfall in excess of six inches. *Id.* But, in the eleven years after the spillway modification, there were thirteen months with rainfall in excess of six inches. *Id.* In addition to 2003, Relators testified about flooding in 1998, 2005, and 2008. The Rainfall Data in evidence shows that Celina experienced two consecutive months of more than six inches of rainfall in 1998. January 2005 saw more than eight inches of rainfall. February 2008 saw more than 6 inches and June 2008 saw more than eight inches.

After Moir’s deposition, Stantec implemented as many of Moir’s suggestions as possible with the limited time and resources available. Stantec Memo p. 1. Stantec chose not to use Linn Grove gauge data to calibrate its hydrologic model because doing so would be contrary to

recently-modified FEMA standards. *Id.* p. 2. Stantec also stands firm in its decision to use average antecedent moisture conditions. Because Stantec compared conditions as they existed before the spillway modification to conditions as they existed after the spillway modification, whatever antecedent condition is assumed (wet, dry, or average) would have equal impact on the before condition as it would on the after condition. Stantec Memo p. 4. Stantec also looked at the spillway rating curves and concluded that Moir's weir coefficients are incorrect because Moir used pool levels measured in NAVD88¹⁸ but spillway crest elevations measured in NGVD29. Stantec converted measurements in NGVD29 to NAVD88 because the newly available LiDAR data Stantec used is measured in the more current NAVD88. Stantec also stands firm in its decision to use an unsteady flow model. The reality is that the flow in Beaver Creek attenuates as it moves downstream, meaning that "[s]ome flow overtops the banks and is stored in the adjacent fields and some flow continues downstream." Stantec Memo p. 7. As Moir indicated, the unsteady flow model allows flow to attenuate. That attenuation is a feature that more accurately models reality. Further, Moir's suggestion that a steady flow model be used for hydraulics is inconsistent with his recommendation to use more detailed infiltration and transform methods for hydrology. *Id.*

Stantec did make a number of changes to its hydraulic model based on Moir's comments. For instance, Stantec "added just over 2 miles of the Wabash River upstream of the confluence with Beaver Creek," concluding that the addition "has limited impact on the computed maximum water surface elevations (+0.09 to -0.06 feet) in Beaver Creek and the Wabash but does allow for a more accurate estimation of water surface elevations for those properties adjacent to the Wabash. *Id.* pp. 2-3. Stantec also "reviewed the use and locations of levees and ineffective

¹⁸ The North American Vertical Datum of 1988 replaced the National Geodetic Vertical Datum of 1929, which is also known as mean sea level.

flows in the modeling and made a couple of changes,” thereby concluding that in some areas the peak elevation increased by a maximum of 0.29 feet and in other areas the peak elevation decreased by a maximum of 0.05 feet. *Id.* p. 3. Stantec modified the cross sections for the bridges at SR 49 and Mud Pike. *Id.* The modification for the bridge at SR 49 caused the water surface elevation to decrease by 1.1 feet just upstream of the bridge. *Id.* The modification for the bridge at Mud Pike caused an increase in the maximum surface elevation by about 0.09 feet upstream of the bridge and a decrease the maximum water surface elevation by 0.03 feet below the bridge. *Id.* Stantec changed the Manning’s n value from 0.045 to 0.032. This modification caused a “maximum decrease of 0.89 feet and an average decrease of 0.51 feet to the maximum water surface elevations.” *Id.* Stantec also modified the downstream boundary condition by obtaining a HEC-2¹⁹ model of CR 235 from the Indiana Department of Natural Resources.

Stantec found increased depth and duration for a 15-year event as well, but increased depth and duration are questions of damages, and are only relevant if a taking has first been found to have occurred. While increased duration, depth and/or velocity of flood waters may be relevant to a determination of damages, they do not constitute a taking. “We cannot conclude that the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness...has the effect of a taking.” *Danforth v. United States* (1939), 308 U.S. 271, 286-87, cited in *Carroll Weir Funeral Home v. Miller* (1965), 2 Ohio St. 2d 189, 193. In this case, there are very few parcels that experienced an increased extent or area of flooding. The remaining parcels never get to the question of damages because, as discussed below (see, *infra* pages 44-47), they were subject to the State’s prescriptive easement and, thus, were not taken.

¹⁹ HEC-2 is a precursor to HEC-RAS.

5. Relators' criticisms of Stantec's expert work are unfounded.

Relators base much of their criticism of ODNR's expert modeling on the opinions of Moir and Campbell.²⁰ Additionally, Moir admitted that he had only looked at the original model briefly before his deposition. Moir Dep. p. 57. If he had looked more closely, or even tried to run the model himself with the changes he thought were necessary, he would have recognized that these changes would make no significant difference in the results. In fact, when Stantec made changes suggested by Moir, the updated modeling showed the new spillway had *less* of an impact on the Relators' properties. Stantec Memo p. 8. However, when faced with the damaging results of the changes their own expert suggested, Relators resort to making grand sweeping statements about Stantec's "obfuscation and abandonment of basic engineering principles," Relators' Am. Merit Br. p. 22, without citing anything to support their aggrandized claims.

a. HEC-HMS and HEC-RAS are considered standard by the industry.

One of the few substantive criticisms Moir had of Stantec's modeling revolved around the actual programs it used: specifically HEC-HMS and HEC-RAS. While Moir claims there are better programs to use when performing an unsteady flow model, Relators' other expert, Campbell, acknowledges that the HEC models are standard and readily accepted in the industry for both hydrology and hydraulic modeling. Campbell Dep. p. 25. And Campbell admits that not only does he frequently use and accept these models himself, he has in the past five years reviewed and accepted HEC models that were run in both steady and unsteady flow mode. *Id.* pp. 20-21, 25.

²⁰ Moir's May 19 and 30, 2010 affidavits (Relators' Evid. Tabs 125 & 129), which state Moir's ultimate opinion on Stantec's reports, have been stricken from the record. July 13, 2010 Entry. Therefore, Relators may rely only on Moir's deposition testimony, which was taken *before* Moir ever looked at Stantec's revisions to the original model. Jt. Ex. Tab 80, Moir Dep. p. 115.

FEMA lists HEC-HMS and HEC-RAS as current nationally-accepted models to be used for flood-hazard mapping.²¹ Both models were created and are accepted by the Army Corps of Engineers.²² *Aff. Henson (5/27/2010)* at ¶ 4. HEC-RAS has an unsteady flow-mode option. To suggest that using a program specifically for a purpose for which it was designed is somehow an “abandonment of basic engineering principles” is beyond comprehension. Additionally, as Stantec engineer Henson explained, “the unsteady model allows flow to attenuate as it moves down stream. This is a reality of what happens in the Beaver Creek. Some flow overtops the banks and is stored in the adjacent fields and some flow continues downstream.” *Stantec Memo* p. 7. Stantec replicated the existing conditions of the watershed with a program that is not only readily accepted, but also considered standard by the industry. Relators’ attempt to discredit this work is simply a vain effort to deflect the focus from their own lack of scientific evidence, and their failure to meet their burden of proof in this case.

b. The Stantec model was properly calibrated using both high water marks along Beaver Creek and lake elevation measurements from the 2003 flood.

Relators likewise criticize the calibration of the Stantec models, which were calibrated to data measured within the actual study reach. *Stantec Memo* pp. 1-2. Specifically, Stantec calibrated its models using both the high water marks along the Beaver Creek and Wabash River and the lake elevation, measurements taken during the 2003 flood event. *Id.* In contrast to these accurate, measured, and uncontroverted data points, Relators inexplicably allege the Stantec models should have been calibrated using only data from the Linn Grove stream gauge, which is located *twenty miles downstream* in Indiana. *Relators’ Am. Merit Br.* p. 23. Such criticism is

²¹ See http://www.fema.gov/plan/prevent/fhm/en_modl.shtm

²² See <http://www.hec.usace.army.mil/software/hec-hms/> and <http://www.hec.usace.army.mil/software/hec-ras/>.

simply unfounded. Henson indicated that, “[b]ased on our professional judgment, the lake level data and high water marks for the July 2003 event that are available within the actual study reach are far more valuable to calibrate and verify the models than the Linn Grove gage.” Stantec Memo p. 2.

FEMA guidelines and specifications dictate that gauge data should only be used if the reach area to be modeled drains between 50% and 150% of the drainage area measured by the gauge. *Id.* pp. 1-2. It is therefore significant that while the Wabash River drains 506 square miles at the Linn Grove gauge station, it only drains 312 square miles at the Ohio-Indiana border. *Id.* Equally significant is the fact that Beaver Creek drains only 163 square miles. Stantec Discussion p. 2.2; Stantec Analysis at Plate 1, Watersheds 1 through 9. In other words, the Linn Grove gauge measures a drainage area which is 300% greater than that of the Beaver Creek and 162% greater than that of the Wabash River at the state line. *Id.* pp. 1-2. Pursuant to FEMA’s present standards, relying on the Linn Grove gauge data alone to calibrate the Stantec models would have been intrinsically unreliable. *Id.*

As part of its analysis and to test the results, Stantec decided to also perform Relators’ suggested computations using the outlier Linn Grove data. In so doing, the Linn Grove gauge data “further [validated] both the HMS and RAS [models].” Stantec Memo p. 2.

Moir also suggests that Stantec used incorrect lake-level data in its calibration. This is simply untrue. Moir fails to consider that Stantec converted the lake elevations to the North American Vertical Datum of 1988 (NAVD88) because this is what the HEC-RAS program uses.

Additionally, Relators contend that Stantec failed to account for antecedent soil moisture conditions when determining rain water infiltration and run-off. Because Stantec compared conditions as they existed before the spillway modification to conditions as they existed after the

spillway modification, whatever antecedent condition is assumed (wet, dry, or average) would have equal impact on the before condition as it would on the after condition. Stantec Memo p. 4.

Ironically, Moir admitted to running his own calculation using several different infiltration numbers and concluded that different infiltration showed no significant difference in lake levels between the old spillway and the new spillway. Moir Dep. pp. 113-14. Additionally, Stantec's modeling compared old- and new-spillway conditions. Stantec Memo p. 4. Any changes to the infiltration or soil condition data would be changed for both scenarios and the resulting difference would remain the same. *Id.* Finally, and perhaps most importantly, Relators overlook the fact that using average soil conditions in modeling the before and after conditions actually reproduced lake levels and high water marks that *matched* those that were measured and recorded during the 2003 flood. *Id.* This provides further evidence of the accuracy and reliability of Stantec's model.

Lastly, Relators claim that Stantec purposely added levees to Beaver Creek to minimize flooding and failed to consider the tributaries to the Beaver Creek and Wabash River. Relators' Am. Merit Br. p. 22. Notwithstanding this gross misrepresentation of the facts, the suggestions that Moir made for both of these scenarios were addressed and incorporated in Stantec's revised, final report. Stantec Memo pp. 2-3. The result of that change showed the new spillway had *less* of an effect on Relators' properties. *Id.* p. 8.

Relators should have created and run their own models. Instead, they spend a great deal of effort vainly trying to discredit Respondents' expert evaluation on causation of flooding on their properties, while offering no credible expert evidence of their own evaluation. Relators'

unfounded criticism of Respondents' expert evidence and modeling is not clear and convincing evidence of a taking.

Respondents' Proposition of Law No. 4:

Even if this Court finds a taking, Respondents should only have to appropriate the new spillway's impacts because the State has a prescriptive right to temporarily and intermittently overflow the banks of the Beaver Creek and Wabash River onto Relators' properties during periods of high precipitation.

Relators cannot show a taking over most of the subject properties because ODNR previously acquired a prescriptive right to temporarily and intermittently overflow the banks of the Beaver Creek and Wabash River onto Relators' properties during periods of high rainfall. That prescriptive right ripened prior to and was not extinguished by the new spillway's construction.

Governmental entities may acquire an interest in land by adverse possession. *State ex rel. AAA Investments v. Columbus* (1985), 17 Ohio St.3d 151, 152. Such acquisition is not a compensable taking. *Id.* at 152-53. "To establish a prescriptive easement by adverse use, a party bears the burden of proving the use of another's property 1) openly, 2) notoriously, 3) adversely to the owner's property rights, 4) continuously, and 5) for at least 21 years." *Simmons v. Trumbull Cty. Eng'r* (11th Dist. 2007), No. 2007-T-0049, 2007-Ohio- 6735, ¶ 21, citing *Penn. Rd. Co. v. Donovan* (1924), 111 Ohio St. 341, syllabus ¶ 1.

Ohio courts have held that one may obtain a prescriptive right to flood another's land if such flooding existed for the prescribed period to substantially the same degree. *Twinsberry Farm v. Consol. Rail Corp.* (9th Dist. 1983), 11 Ohio App. 3d 182, 184; *Shelton v. Mosier* (4th Dist. 1924), 19 Ohio App. 89, 91 ("If . . . the dam has been for that period causing a neighbor's land to overflow he has by that prescription obtained . . . the right to overflow the neighbor's land.").

The old spillway was built in 1914, well beyond the prescriptive period. See, also, *State ex rel. Post v. Speck* (3d Dist. 2006), No. 10-2006-001, 2006-Ohio-6339, ¶ 8 (noting the headwaters of the Wabash and St. Marys rivers were dammed between 1837 and 1841 to create GLSM). Beaver Creek was used to discharge excess water from GLSM since that time. The new spillway was not completed until 1997. During the period that the old spillway was in place, most Relators and their fact witnesses acknowledge that the properties at issue suffered persistent flooding. See, supra, page 4. As evidenced by Relators' anecdotal evidence of flooding and the Stantec reports and modeling, flooding existed to substantially the same degree during the prescriptive period. See, supra, page 4. Flooding under the old spillway caused damage similar to that claimed by Relators under the new spillway, including crop loss, siltation of drainage tiles, debris, and land erosion, as well as damage to roads, fills, bridges, culverts, and utilities. Corps Report, pp. 17-19, Tables 2 & 3.

ODNR acquired the prescriptive right to temporarily and intermittently overflow the banks of the Beaver Creek and Wabash River onto Relators' properties during periods of high precipitation. That prescriptive right ripened prior to, and was not extinguished by, the new spillway's construction. "[A] user's acknowledgment that the title holder has the paramount right will not extinguish a fully matured prescriptive easement After the prescriptive easement results from prior adverse use, the user does not forfeit the established easement by acting as if it did not exist." *J.F. Gioia, Inc. v. Cardinal Am. Corp.* (8th Dist. 1985), 23 Ohio App. 3d 33, 39-40.

Stantec's findings show that the new spillway has increased the area subject to flooding during the 15-year, 96-hour event, on only 16 Relator properties that total about 68 acres. Respondents' Evid. Tab A, Stantec Memo p. 15, table 7 (copy attached as Appendix A). On

seven of these properties, the additional acreage flooded is less than one acre. *Id.* On several parcels, the acreage impacted has remained the same, but the new spillway has increased the duration of out-of-bank flooding for some properties adjacent to Beaver Creek and the Wabash River. Stantec Discussion p. 2.2. The duration of out-of-bank flooding is increased by up to two days for the 15-year, 96-hour event. *Id.*; Stantec Memo pp. 9-10, table 2.²³ Although a change in use can extinguish an easement, that rule should not apply here because there has been no meaningful change in use; the easement is still used to temporarily and intermittently overflow the banks of the Beaver Creek and Wabash River onto Relators' properties during periods of high precipitation.

This Court has addressed a similar issue in *Munn v. Horvitz Co.* (1964), 175 Ohio St. 521. In holding that a governmental entity had a prescriptive right to divert surface water by means of a sewer system, this Court stated that such prescriptive right extends to a diversion of all water that might run off as a result of the land being developed and put to reasonable use:

[T]he prescriptive right acquired by defendants [a city and the State of Ohio] is one to drain a particular area rather than to drain a given quantity or volume of water. Area appears to be the best standard by which the right acquired may be defined. The quantity or volume of water drained at any time is variable, subject to many inconstant factors, such as rainfall intensity, soil saturation, perviousness of surface, and runoff characteristics. The only constant factor is the area drained. . . . In short, there being the right to divert the surface water from a watershed, such right extends to a diversion of all water that might run off as a result of the land being developed and put to reasonable use.

Id. at 528. See, also, *McGlashan v. Spade Rockledge Terrace Condo. Dev. Corp.* (1980), 62 Ohio St. 2d 55 (discussing *Munn* and laying out the reasonable-use rule for disputes involving surface-water controversies). Similarly, the new spillway continues to outlet or drain, through Beaver Creek, the same area (GLSM) during periods of high precipitation.

²³ An increase in duration, depth and/or velocity of flood waters is an "incidental consequence" of the construction of a public works, not a change in use. *Danforth*, 308 U.S. at 287.

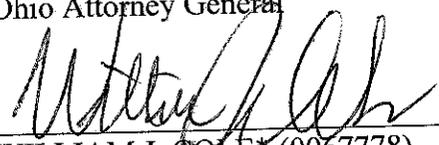
ODNR has acquired a prescriptive right to outlet or drain GLSM, as necessary in periods of high precipitation, through Beaver Creek. Accordingly, even if this Court finds that Relators have proved a taking (they have not), Respondents should only be required to appropriate a flowage easement for the extended areas flooded solely by the new spillway.

CONCLUSION

For the foregoing reasons, Relators' demand for a writ of mandamus to compel Respondents to initiate appropriation proceedings should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief of Respondents* was served by regular and electronic mail this 30th day of September, 2010, upon the following counsel:

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WILLIAM J. COYLE



Stantec

PARCEL	OWNER	Parcel Area acres	Peak Area Inundated (acres)				Percent of Property Impacted
			10-yr Old Spillway	10-yr New Spillway	Additional Acres Impacted	10-year event	
26-047200.0100	EBBING STANLEY M & VICKI L	68.4	10.3	10.4	0.1	0.1%	
26-038300.0200	JOHNSMAN DANIEL W	25.7	2.8	2.9	0.1	0.5%	
26-038300.0000	JOHNSMAN LEROY J & RUTH TRUST	29.8	3.0	3.1	0.1	0.4%	
26-038100.0000	MCDONOUGH DAVID J & DEBORAH A	38.6	12.7	13.4	0.7	1.8%	
26-027400.0000	MCNEILAN DAVID J	28.2	6.8	7.8	0.9	3.3%	
26-027300.0500	MCNEILAN DAVID J	54.0	17.2	19.8	2.5	4.7%	
26-027500.0000	MCNEILAN DAVID J & LAURA B	49.2	1.9	5.6	3.7	7.4%	
26-027200.0000	MCNEILAN LOIS J	79.4	18.2	19.7	1.5	1.9%	
26-052600.0000	MEIER CHARLES J	18.8	3.4	6.6	3.2	17.2%	
26-052700.0000	MEIER CHARLES J	60.3	9.2	11.8	2.6	4.4%	
26-049500.0000	Z FARMS INC	80.4	16.4	17.7	1.3	1.6%	
26-022600.0000	ZUMBERGE CHARLES ETAL	81.6	2.6	3.6	1.1	1.3%	
26-052900.0000	ZUMBERGE CHARLES ETAL	120.2	15.1	19.3	4.2	3.5%	

Impacts to Peak Flooding due to Spillway Improvements for 10-year Flood Event

Mercer County, Ohio



Parcel Legend

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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.	:	

MERIT BRIEF OF RESPONDENTS

APPENDIX C

Attachment not scanned

IN THE SUPREME COURT OF OHIO

STATE 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

Original Action in Mandamus

MERIT BRIEF OF RESPONDENTS

APPENDIX D

