

IN THE SUPREME COURT OF OHIO

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

Relators,

v.

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

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

RELATORS' REPLY BRIEF IN SUPPORT OF WRIT OF MANDAMUS

Bruce L. Ingram (0018008)
(Counsel of Record)
Joseph R. Miller (0068463)
Thomas H. Fusonie (0074201)
Kristi Kress Wilhelmy (0078090)
Martha C. Brewer (0083788)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel.: (614) 464-6480
Fax: (614) 719-4775
blingram@vorys.com
jrmiller@vorys.com
thfusonie@vorys.com
kkwilhelmy@vorys.com
mcbrewer@vorys.com

Attorneys for Relators

William J. Cole (0067778)
(Counsel of Record)
Mindy Worly (0037395)
Jennifer S.M. Croskey (0072379)
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Tel: (614) 466-2980
Fax: (866) 354-4086
william.cole@ohioattorneygeneral.gov
mindy.worly@ohioattorneygeneral.gov
jennifer.croskey@ohioattorneygeneral.gov

Dale T. Vitale (0021754)
Daniel J. Martin (0065249)
Assistant Attorneys General
Environmental Enforcement Section
2045 Morse Road # D-2
Columbus, Ohio 43229
Tel.: (614) 265-6870; Fax: (614) 268-8871
dale.vitale@ohioattorneygeneral.gov
rachel.stelzer@ohioattorneygeneral.gov
daniel.martin@ohioattorneygeneral.gov

Attorneys for Respondents

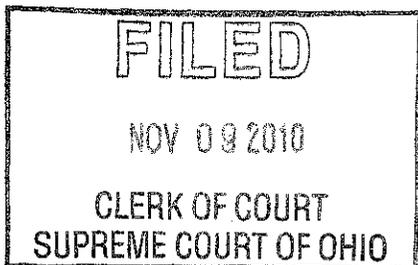


TABLE OF CONTENTS

	PAGE
<u>Reply to Respondents' Proposition of Law No. 1: Relators Timely Filed Their Action.</u>	2
1. When The Condemnor Denies Even Possessing Private Property, Only A 21-Year Limitations Period Should Apply.	2
2. The Same Tolling Principles That Apply To Periodic Flooding Trespass Claims Apply To Periodic Flooding Takings Claims.....	3
3. An Owner Should Have The Same Stabilization Period As Standard Engineering Practices Require To Determine The Impact Of The Spillway And ODNR's Lake-Level Management Decisions.....	7
4. Relators' Four-Year Limitations Period Did Not Begin To Accrue Until 2007 When It Became Apparent That ODNR Had Violated Revised Code § 163.59(J).....	9
<u>Reply to Respondents' Proposition of Law No. 2: Respondents' Sworn Admissions In Post And The Final Factual Findings Of The Courts In Post Confirm ODNR's Widespread Taking Of Relators' Land West Of The Spillway.</u>	9
<u>Reply to Respondents' Proposition of Law No. 3: Relators Have Presented Overwhelming Evidence That ODNR Has Taken Relators' Parcels.</u>	10
1. Relators Have Presented Sufficient Undisputed Evidence That ODNR Has Caused Increased Flooding Interfering With Relators' Use Of Their Property.....	11
2. Expert Testimony Establishes That ODNR Causes Increased Flooding, More Frequent Flooding, Longer Lasting Flooding, And/Or Flooding That Would Not Otherwise Have Occurred.....	13
3. ODNR's Serial Hypothetical Modeling/Mapping Defies Reality And Is Riddled With Fatal Defects.....	14
4. The New Spillway And ODNR's Lake-Level Management Decisions Cause Flooding Sufficient To Constitute A Taking.....	17
<u>Reply to Respondents' Proposition of Law No. 4: ODNR Never Acquired A Prescriptive Easement To Flood Any Of Relators' Properties.</u>	18
CERTIFICATE OF SERVICE	21
APPENDIX A	
APPENDIX B	
APPENDIX C	

TABLE OF AUTHORITIES

PAGE

CASES

<i>Arnold v. Cleveland</i> (1993), 67 Ohio St.3d 35	10
<i>Broom v. Strickland</i> (C.A. 6 2009), 579 F.3d 553	6
<i>Chesapeake & Hocking Ry. Co. v. Snyder</i> (App. 1931), 38 Ohio App. 279	7
<i>Corp. Ctr. Assoc. v. Twp. of Bridgewater</i> (C.A. 3 1996) 101 F.3d 320	6
<i>Del., Lackawanna & W.R.R. v. Morristown</i> (1928), 276 U.S. 182.....	3
<i>Hensley v. Columbus</i> (C.A.6 2009), 557 F.3d 693	5
<i>Hinman v. Barnes</i> (1946), 146 Ohio St. 497.....	19
<i>Lindsey v. Greenville</i> (S.C. 1966), 146 S.E.2d 863	18
<i>Masley v. Lorain</i> (1976), 48 Ohio St.2d 334	10, 18
<i>McNamara v. Rittman</i> (C.A.6 2007), 473 F.3d 633	5
<i>Miami Conserv. Dist. v. Bowers</i> (1919), 100 Ohio St. 317	2
<i>Miller v. U.S.</i> (Ct. Cl. 1978), No. 66-75, 1978 U.S. Ct. Cl. Lexis 752.....	18
<i>Monterey v. Del Monte Dunes at Monterey, Ltd.</i> (1999), 526 U.S. 687.....	11
<i>Muskingum Watershed Conserv. v. Haynes</i> (App. 1937), 55 Ohio App. 284	7
<i>Nichols v. Cleveland</i> (1922), 104 Ohio St. 19	2
<i>Oh. Midland, Inc. v. Oh. Dept. of Transp.</i> (C.A. 6 2008), 286 Fed.Appx. 905	5, 6, 7
<i>Painesville Mini Storage, Inc. v. Painesville</i> (2010), 124 Ohio St. 3d 504	6
<i>Sexton v. Mason</i> (2008), 117 Ohio St.3d 275	4, 5, 6
<i>Simmons v. Trumbull Co. Eng.</i> (Dec. 14, 2007), 2007-Ohio-6735	20
<i>State ex rel. A.A.A. Inv. v. Columbus</i> (1985), 17 Ohio St.3d 151	2
<i>State ex rel. Blank v. Beasley</i> (2009), 121 Ohio St.3d 301	5, 7
<i>State ex rel. Gilbert v. Cincinnati</i> (App. 2009), 2009-Ohio-1078	12
<i>State ex rel. Nickoli v. Bd. of Park Comm'rs</i> (2010), 124 Ohio St.3d 449.....	5, 6, 7
<i>State ex rel. Post v. Speck</i> , (App. 2006), 2006-Ohio-6339	9, 10, 12
<i>State v. Swartz</i> (2000), 88 Ohio St.3d 131	4
<i>Tennebaum v. Caldera</i> (C.A. 6 2002), 45 Fed.Appx. 416.....	6
<i>The Penn. Rd. Co. v. Donovan</i> (1924), 111 Ohio St. 341.....	19
<i>Twinsberry Farm v. Consol. Rail, Corp.</i> (2010), 11 Ohio App.3d 182.....	20

<i>U.S. v. Dickinson</i> (1947), 331 U.S. 745	7, 8
<i>U.S. v. Fuller</i> (1973), 409 U.S. 488	3
<i>Ward v. Caulk</i> (C.A. 9 1981), 650 F.2d 1144	6
<i>Weade v. Washington</i> (1955), 128 N.E.2d 256	19
<i>Wood v. Vill. of Kipton</i> (2005), 160 Ohio App.3d 591	19

STATUTES

R.C. 163.59(J)	1, 9
R.C. 2305.04	2, 3
R.C. 2305.09	3, 9

CONSTITUTIONAL PROVISIONS

Ohio Constitution, Art. I, § 19	2
---------------------------------------	---

As their comprehensive firsthand evidence shows, flooding caused by Respondents' (collectively "ODNR's") 500-foot spillway and lake-level decisions for Grand Lake St. Marys ("the Lake") interferes with Relators' use and enjoyment of their land. Yet, ODNR refuses to accept its constitutional and statutory duty to initiate appropriation actions to compensate Relators for taking a flood easement across their land. R.C. 163.59(J) mandates: "No head of an acquiring agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of the owner's real property." ODNR repeatedly floods Relators' land, including in 2008 and/or 2009 (*see* Appendix A), yet it has not complied with R.C. 163.59(J).¹ Relators filed this suit, yet ODNR did not comply. Relators submitted 98 affidavits (many with visual evidence) and gave 70 depositions about ODNR's flooding, yet ODNR did not comply. ODNR flooded Relators again in 2010 (*see* Appendix A), but still ODNR did not comply. Relators filed their Merit Brief, and the Ohio Farm Bureau Federation filed its amicus curiae brief, but still ODNR did not comply. ODNR has rejected every chance to fulfill its duty. This Court is Relators' only hope of ODNR ever doing what is right and required by law.

In its Merit Brief, ODNR makes excuses for failing to comply with its clear legal obligations. It argues that Relators filed their claim too late. Yet, under any applicable accrual principle, that contention lacks merit. ODNR claims Relators have not presented competent evidence that ODNR caused sufficient flooding to constitute a taking. ODNR ignores the firsthand and uncontested observations of life-long Mercer County residents that ODNR causes new and increased flooding that interferes with their use and enjoyment of their land. Every court that has heard this question agrees that ODNR causes new and increased flooding from the Spillway to the Indiana state line. Every expert to look at the Spillway and ODNR's lake-level

¹ Of the 91 parcels, only 2 parcels owned by the Kricks did not flood in 2008 and/or 2009. Those parcels have flooded though twice in the last seven years.

decisions has concluded that downstream of the Spillway ODNR causes new and increased flooding, more frequent flooding, and longer lasting flooding, confirming Relators' firsthand observations. Yet, ODNR urges this Court to accept the serial hypothetical modeling of its expert, modeling riddled with defects and manipulations which conveniently decrease the extent of ODNR's flooding. Worse yet, that expert ignored the photos and videos of flooding even though such evidence refutes his conclusions as to the magnitude of ODNR's flooding. ODNR also now claims a prescriptive right to flood Relators' land. This is nonsensical. No government entity should deny and deny flooding Relators' land and then in a final attempt to avoid its duty, claim it has a prescriptive right to flood those lands. That ODNR goes to such measures reinforces Relators' need for a writ to protect them from such abusive governmental invasions of their land and livelihood. ODNR excuses the substantial harm it causes to Relators' land and livelihood because just compensation may come from taxpayer dollars. Relators are Ohio taxpayers and their taxpayer dollars should not be used to deprive them of their inviolable property rights and force them to shoulder the costs and burden of ODNR's flooding.

Reply to Respondents' Proposition of Law No. 1: Relators Timely Filed Their Action.

1. When The Condemnor Denies Even Possessing Private Property, Only A 21-Year Limitations Period Should Apply.

Under Ohio Constitution, Art. I, § 19, compensation "shall" first be "made or secured" before a taking occurs. *Miami Conserv. Dist. v. Bowers* (1919), 100 Ohio St. 317, 318; *Nichols v. Cleveland* (1922), 104 Ohio St. 19, 27. Until then, the owner retains unencumbered title to his property rights, and thus, the rights cannot be "taken" for failure to initiate a mandamus action within a specific time period. An adverse possessor does not acquire a vested property right until the expiration of 21 years – Ohio's prescriptive period – and neither should the government. See R.C. 2305.04; *State ex rel. A.A.A. Inv. v. Columbus* (1985), 17 Ohio St.3d 151, 152-53.

Grants of eminent domain authority require “strict construction.” *Del., Lackawanna & W.R.R. v. Morristown* (1928), 276 U.S. 182, 192. Under ODNR’s reading of R.C. 2305.09, a governmental entity can avoid paying compensation by denying that it has invaded private property, and then after four years claim it has taken the property. If the owner then brings a claim to eject the government from his property, his claim will fail because the government has an absolute defense: it has taken the property. Thus, the owner has lost his property to a squatter after only four years. This outcome cannot be what the General Assembly envisioned, especially given it made no express change to R.C. 2305.04. The constitutional requirement of just compensation “derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.” *U.S. v. Fuller* (1973), 409 U.S. 488, 490. Thus, constitutional principles further show the conflict between R.C. 2305.04 and R.C. 2305.09(E). These statutes can be harmonized by applying a 21-year limitations period to ongoing physical takings where the government denies invading the property and a 4-year limitations period to temporary takings, regulatory takings, and physical takings where the government does not dispute invading the property.² This reading honors the revision to R.C. 2305.09(E) but protects the equities of just compensation. Under this reading, Relators’ claims are timely.

2. The Same Tolling Principles That Apply To Periodic Flooding Trespass Claims Apply To Periodic Flooding Takings Claims.

Finding a continuous partial takings claim for periodic flooding is consistent with Ohio law and prevents the property rights abuses described above. This Court should apply the same tolling principles applied to periodic flooding trespass claims. *See* Rels’ Br., 42-47. As this Court explained in *Sexton v. Mason*, those principles mandate that where a landowner engages in actions on his land that cause periodic flooding of another’s land and that owner retains control

² In *State ex rel. Nickoli v. Bd. of Park Comm’rs* (2010), 124 Ohio St.3d 449, 455, the board never disputed being on the property and made its possession the focus of its limitations defense.

over his property, the limitations period under R.C. 2305.09 is tolled. (2008), 117 Ohio St.3d 275, 283 n.2.³ The statute of limitations is tolled until either the tortfeasor no longer controls his property or he acquires a prescriptive right over the other person's land. *Id.* As such, when the activity causing the flooding is ongoing, it is "perpetually creating fresh violations of the plaintiff's property rights" until the ongoing violation becomes a prescriptive right in the tortfeasor. *Id.* at 280-84. If an owner's actions create fresh trespasses, then similar actions (i.e., periodic flooding) create fresh violations of an owner's most fundamental property right. Indeed, this Court has held that such tolling principles apply to criminal nuisance claims arising from flooding and extend the time to file suit. *State v. Swartz* (2000), 88 Ohio St.3d 131, 133-35.

ODNR does not dispute that it has controlled the Spillway and Lake since 1997, and that it can lower the lake-level in winter and in advance of heavy rains. ODNR does not dispute that since 1997, it has engaged in at least annual decisions to not draw down the Lake. On those facts, the principles from *Sexton* must apply, and this Court should hold that Relators' claims are timely. Applying these principles makes sense where the conduct is temporary but recurring, in contrast to a permanent trespass. Under this approach, an owner is not left divining the point at which a taking caused by increased frequency of periodic flooding has occurred.

None of ODNR's arguments supports its position that Relators' claims are time-barred. ODNR attempts to side-step *Sexton* by arguing that Relators are bringing their claims as continuous violation claims under federal law. Resp'ts Br., 16. On the contrary, Relators are primarily relying on this Court's periodic flooding tort and criminal nuisance tolling cases. *Rel.* Br, 42-47. To the extent this Court considers the federal continuous violation cases, the Sixth Circuit recognizes the possibility of a continuous violation takings claim. *McNamara v. Rittman*

³ In making its discovery rule argument, ODNR ignores this Court's holding that the limitations period for periodic flooding trespasses and nuisances can be tolled.

(C.A.6 2007), 473 F.3d 633, 639-40; *Hensley v. Columbus* (C.A.6 2009), 557 F.3d 693, 697-98 (recognizing that *McNamara* found a continuous violation for a physical takings claim).

Likewise, in a decision issued just days before this Court's decision in *Nickoli*, the Northern District of Ohio recognized that relief can be granted on continuous violations takings claims.⁴ Also, as *Sexton* recognized for continuous trespass claims, the prescriptive period provides a limit to the tolling of the limitations period. Just as no continuous trespass claim can be asserted after the prescriptive period, neither can a physical takings claim based on periodic flooding. This alleviates the concern that a takings claim would have no limitations period, as raised in *Nickoli* and in *Oh. Midland, Inc. v. Oh. Dept. of Transp.* (C.A. 6 2008), 286 Fed.Appx. 905. Only where the government engages in activity on its own property that causes a periodic physical invasion on another's land would the taking be continuous, and it would only be continuous while the government retains control of the land causing the invasion.⁵

ODNR claims that a taking is complete when it occurs and, thus, cannot be continuous. Resp'ts Br., 17.⁶ None of ODNR's cases directly address this issue. These cases instead either address a regulatory taking from a regulatory act, or just generally discuss the landowner's right to recover compensation as of the date of intrusion. ODNR also claims that Relators assert a taking caused by a single act – the construction of the Spillway. Resp'ts Br., 16. ODNR reaches to analogize Relators' claim to the single act like constructing a permanent bike path (*Nickoli*),

⁴ *McNamara v. Rittman* (N.D. Ohio Feb. 23, 2010), No. 5:09 CV 00523, 2010 U.S. Dist. LEXIS 16009. ODNR urges this Court to disregard *McNamara*, claiming that had the court been aware of *Nickoli*, it would have reached a different result. ODNR is wrong because the court decided whether a continuous takings violation claim could be stated under federal (not state) law.

⁵ If the government sold or rented the land, tolling would end. If it temporarily occupied land, the limitations period would begin to run at the expiration of the government's temporary easement. *State ex rel. Blank v. Beasley* (2009), 121 Ohio St.3d 301, 2009-Ohio-835, ¶ 2, 31.

⁶ In its brief, ODNR cites to federal cases but asks this Court to disregard the Sixth Circuit's *McNamara* and *Hensley* decisions and the Northern District of Ohio's ruling in *McNamara*.

destroying a ramp (*Midland*), an act of discrimination (*Ward v. Caulk* (C.A. 9 1981), 650 F.2d 1144, 1147; *Tennebaum v. Caldera* (C.A. 6 2002), 45 Fed.Appx. 416, 419-20), an act of zoning, (*Corp. Ctr. Assoc. v. Twp. of Bridgewater* (C.A. 3 1996) 101 F.3d 320); or creating lethal injection protocols which will injure the plaintiff only once (*Broom v. Strickland* (C.A. 6 2009), 579 F.3d 553, 555). As this Court held in *Sexton*, each flood is a new, discrete trespass. 117 Ohio St.3d 275, 280-81. If each flood is a new discrete act of trespass, then it must be the same for a takings claim, a claim designed to protect inviolable property rights. Moreover, the periodic flooding by ODNR is not caused solely by the Spillway, but by ODNR's decisions not to draw down the Lake; each decision causes new flooding that ODNR could prevent.⁷

ODNR ignores that in contrast to *Nickoli* and *Painesville Mini Storage, Inc. v. Painesville* (2010), 124 Ohio St. 3d 504, 2010-Ohio-920, Relators continue to incur material damage after the date ODNR thinks Relators' claims expired (an undefined date that ODNR hints may be 2001 or 2007). In *Nickoli*, the condemnor erected a permanent trail, exercising exclusive control over the property, which represented the maximum damage to the property; damage did not continue to accrue.⁸ This case is far different. Relators have submitted evidence of increasing material damage caused by ODNR and, thus, increasing interference with their use of their land.⁹ ODNR's appraiser documents significant increasing damage to the market value of properties over which ODNR has illegally taken a flowage easement. PE 122, at Ex. A, pg 73 & Ex. B, pg. 2, 134.¹⁰ The increasing damage to the value of the properties confirms that each flood ODNR

⁷ Relators experienced recent floods that would not have occurred or been less severe had ODNR drawn down the Lake. PE 5 Second Supp. Aff. of W. Doner; PE 93 Supp. Aff. of J. Weisman.

⁸ In *Painesville*, the decrease in the value of the landowners' real property interest was complete as soon as the roadway on the tract was no longer accessible. 2010-Ohio-920, ¶ 3.

⁹ Incredibly, ODNR asks this Court to equate ODNR's flooding with the placement of a bench or historical marker which this Court found in *Nickoli* did not further damage the relators' property.

¹⁰ After analysis, the appraiser determined that any pre-1997 flooding did not affect property

causes is a new and discrete act further interfering with the utility of Relators' land.

3. An Owner Should Have The Same Stabilization Period As Standard Engineering Practices Require To Determine The Impact Of The Spillway And ODNR's Lake-Level Management Decisions.

Concluding that the frequent flooding is not a single act is consistent with the holding in *U.S. v. Dickinson* (1947), 331 U.S. 745, 749. “[W]hen the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really ‘taken.’” *Id.* *Dickinson* is consistent with Ohio law requiring juries to award compensation for a taking based on the maximum use of the property rights taken. *Chesapeake & Hocking Ry. Co. v. Snyder* (App. 1931), 38 Ohio App. 279, syl. ¶ 2 & 285; *Muskingum Watershed Conserv. v. Haynes* (App. 1937), 55 Ohio App. 284, 286. Maximum use cannot be ascertained until sufficient time passes to allow a landowner to determine: 1) his property is being flooded by the government; 2) it is being flooded with sufficient frequency, extent, and duration to constitute a taking; and 3) the full extent of the property rights taken.

ODNR urge this Court to follow Tennessee law rather than this Court's recognition of *Dickinson* in *Nickoli*. It also tries to distinguish *Dickinson* claiming that this action seeks a writ, whereas *Dickinson* sought damages. Resp'ts Br., 20. That distinction is meaningless; in each case, the issue is when a taking accrues.¹¹ Also, as in *Dickinson*, and unlike *Nickoli* or *Midland*, piecemeal/premature litigation is a concern. Owners must be able to determine the extent of the take before bringing suit so that a final account can occur, otherwise “he jeopardize[s] his rights, as soon as his land is invaded, other contingencies would be running against him,” including the

values. PE 122, at Ex. B, pgs. 33-34. All property value damage arises from post-1997 flooding.
¹¹ ODNR suggests Relators should have waived their right to a jury trial and sued for damages in the Court of Claims. Mandamus, however, “is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.” *State ex rel. Blank v. Beasley* (2009), 121 Ohio St.3d 301, 2009-Ohio-835, ¶ 12.

uncertainty of the damage and the risk of res judicata against future unknown damages. *Dickinson*, 331 U.S. at 749. Litigating before the extent of the take is determined creates piecemeal litigation, but bringing suit too quickly risks a res judicata finding of no taking.

ODNR's contention that even if *Dickinson* is the law it cannot apply because "all of the Relators admit that the most severe and extensive flooding they experienced was in 2003" fails. Resp'ts Br., 21. Despite ODNR's attempt to rewrite his sworn testimony, ODNR's expert admitted that it requires at least 10 to 15 years of records or more to produce "meaningful" hydraulic statistics. RE, Tab A at Ex. A, Discussion of Results & Other Analysis 3.1.¹² ODNR wants to hold Relators to a higher standard. *Dickinson* rejects that double standard: "[T]here is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck." 331 U.S. at 749. The same analysis must apply here.

ODNR claims that the July 2003 flooding was a biblical event as opposed to one caused or exacerbated by the Spillway and ODNR's lake management practices. Yet, ODNR claims that Relators should have known in 2003, as they stood in the ruins of their flooded fields and homes, that ODNR had caused the damage, the extent of the property ODNR had taken, the frequency of the take, and the duration of each periodic flooding under the take. ODNR's position is absurd. The moment of stabilization in this case is even more difficult to discern than in *Dickinson*, where the government systematically, over several years, raised the water elevation

¹² Without any support, ODNR argues that Relators' claims are "moot" because they did not perform a statistical analysis of the flooding and did not review any records in advance of filing this suit. Relators analyzed the flooding on their property through years of observations.

to a set point. Here, the frequency, increased duration, and continued recurrence of ODNR's flooding could not stabilize until enough years passed to establish that the flooding had become more frequent, covered more acres, lasted longer, and would recur. In fact, for several landowners, **July 2003 was the first time their properties had ever flooded.** See PE 40, Krick Aff. at ¶ 10; PE 13, Ellis Aff. at ¶ 5; PE 28, Hines Aff. at ¶ 8; PE 45, Kuhn Aff. ¶ 8; PE 46, Linn Aff. at ¶ 6. It was not until their property flooded again in 2005, 2008, and/or 2009 that Relators could have reasonably determined the extent of ODNR's taking.

4. Relators' Four-Year Limitations Period Did Not Begin To Accrue Until 2007 When It Became Apparent That ODNR Had Violated Revised Code § 163.59(J).

ODNR claims that the taking stabilized in 2003. R.C. 163.59(J) states that a public agency must bring an appropriation action when taking private property, rather than forcing a landowner to bring suit to compel an appropriation action. The accrual of the limitations period in R.C. 2305.09 must harmonize with R.C. 163.59(J)'s mandate. If the taking occurred in July 2003, as ODNR claims, then Relators would not have known whether ODNR would comply with its statutory duty under R.C. 163.59(J) until July 2007, four years later. Only then would ODNR's taking have stabilized— as Relators would only then know that they had to file a mandamus action to compel ODNR to comply with R.C. 163.59(J). Not until July, 2007 did Relators' mandamus claim accrue. Thus, Relators timely filed this action.

Reply to Respondents' Proposition of Law No. 2: Respondents' Sworn Admissions In Post And The Final Factual Findings Of The Courts In Post Confirm ODNR's Widespread Taking Of Relators' Land West Of The Spillway.

ODNR mischaracterizes Relators' reliance on *Post* and *Case Leasing* (Cl. Cl. 2008), 2008-Ohio 3411. Relators rely on the sworn testimony of ODNR representatives and the findings in *Post* and *Case Leasing* to confirm the taking of Relators' property, and not for purposes of issue preclusion. Based in part on the sworn testimony of ODNR and its expert, the

court in *Post* found increased, more frequent, and longer lasting flooding (all of which ODNR's expert in this action confirmed) for properties downstream of the Spillway adjacent to the Beaver Creek and Wabash River and extending to the Indiana state line. *See* Rels' Merit Br. 31. The court in *Post* reached that finding only after ODNR exhaustively litigated whether the Spillway and new lake management practices cause increased flooding downstream to the Indiana state line. The Sixth Appellate District affirmed the trial court, finding that even setting aside the 2003 and 2005 flooding, the landowners in *Post* all "testified that they have experienced an increase in the extent of flooding and its duration since the [old] spillway was replaced in 1997." 2006-Ohio-6339, ¶ 75. That testimony constituted "sufficient evidence to establish that the extent of the flooding and its duration has increased since the new spillway was installed." *Id.* Based on these findings, the Court held that ODNR causes severe, frequent and persistent flooding from the Spillway to the Indiana State line. This finding supports Relators' claims that the Spillway and ODNR's lake-level management decisions are likewise causing flooding of and damage to Relators' property.¹³ ODNR cannot deny these fully litigated facts.

Reply to Respondents' Proposition of Law No. 3: Relators Have Presented Overwhelming Evidence That ODNR Has Taken Relators' Parcels.

Where the government increases the amount or frequency of flooding, "it must pay compensation for the property taken" if the "owner is deprived of *any* of the use and enjoyment of his property." *Masley v. Lorain* (1976), 48 Ohio St.2d 334, 335, 341. Here, whatever evidentiary burden (preponderance or clear and convincing¹⁴) this Court applies to Relators'

¹³ Some land in *Post* could not flood without Relators' land flooding. For example, the Doners' property must flood before *Post* relator Terry Linn's property. JE 8, W. Doner Dep. at 47-48.

¹⁴ Relators submit that the appropriate standard is the preponderance of the evidence. States "may not deny individuals . . . the minimum level of protections mandated by the federal Constitution." *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 42. The U.S. Supreme Court has held that a preponderance of the evidence is the appropriate standard to establish a taking of

takings claims, Relators have shown that ODNR causes increased and more frequent flooding which interferes with Relators' use of their property, thus effecting a taking of their property.

1. Relators Have Presented Sufficient Undisputed Evidence That ODNR Has Caused Increased Flooding Interfering With Relators' Use Of Their Property.

Relators have presented overwhelming and undisputed firsthand evidence that ODNR floods more acres, floods Relators' lands for longer periods of time, and floods those lands more often and after less rainfall than prior to 1997. Relators have submitted firsthand evidence (testimony, videos, and photos) of flooding that would have never occurred before 1997. JEs 1-67, Rels' Affs.; PEs 1-97, Rels' Deps.; Rels' App. Charts A-D. Likewise, Relators have submitted firsthand evidence that this increased flooding has substantially interfered with Relators' use and enjoyment of their property through crop loss, severe erosion, debris, and damage to their homes and buildings. *Id.* Since 1997, Relators and fact witnesses, many of whom are life-long Mercer County farmers and residents, have observed new and increased flooding, more frequent flooding, and longer lasting flooding, all of which causes significant interference with the use of their properties and those of their neighbors. *Id.* While heavy rains occurred before 1997, these lifelong residents testified that their property never suffered as badly, never flooded as frequently, and was never inundated with water for as long. *Id.*

ODNR had the opportunity to find someone to testify to his firsthand observations of flooding. All ODNR has mustered are misleading citations to the testimony of 6 out of 86 Relators, each of whom allegedly testified that "flooding existed to substantially the same degree

private property under the Fifth Amendment. *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999), 526 U.S. 687, 700-01, 704. Ohio must provide at least the same level of constitutional protections (i.e., a preponderance of the evidence standard) for takings claims.

before the spillway was modified.”¹⁵ Resp’ts Br., 4. In reality, those six Relators testified that the flooding since 1997 has been more frequent and/or persistent, is at a greater depth, impacts a larger number of acres, or remains on the property for a longer period of time. See Appendix B.

Worse yet, ODNR attempts to trivialize the overwhelming evidence by claiming Relators cannot provide competent evidence because they are not experts. Relators, many of whom have farmed and lived in the area for decades, are able to provide competent evidence based on their firsthand observations. See *State ex rel. Gilbert v. Cincinnati* (App. 2009), 2009-Ohio-1078, ¶ 9-11 aff’d 2010-Ohio-1473, ¶¶ 28-30; *State ex rel. Post v. Speck*, (App. 2006), 2006-Ohio-6339, ¶¶ 62-69.¹⁶ Relators have observed that the only changes since 1997 are ODNR’s construction of a spillway nearly 13 times the size of the old one and ODNR’s decisions to maintain lake levels without draw downs. Their firsthand knowledge, when combined with their expert evidence that the new Spillway causes increased flooding downstream, is sufficient to establish a taking. In *Post*, similar firsthand evidence of increased flooding in frequency, extent, and duration coupled with expert testimony that the new Spillway caused increased flooding downstream was sufficient competent and credible evidence to establish that ODNR had taken their property. 2006-Ohio-6339, ¶¶ 62-69. Likewise, in *Gilbert*, the relators established a taking based on firsthand evidence that a pump station overflowed sewage into a creek and the sewage was seen repeatedly passing through the creek on relators’ property. 2009-Ohio-1078, ¶ 9-11.

¹⁵ ODNR also relies on a 1981 Army Corps report that generally mentions 5 sporadic floods along the Beaver Creek in 32 years, yet since 1997, Relators have suffered more frequent flooding, which ODNR admits lasts longer and covers more acres.

¹⁶ In this regard, the Court in *Post* stated: “[A]ll of the appellees testified that after the new spillway was constructed, that the flooding along Beaver Creek and the Wabash River was more frequent, more extensive, and did not recede as quickly. Such testimony, although not expert testimony, supports the hypothetical analysis that flooding will increase because of the new spillway. Appellees were not required to prove that every increased flooding event they had experienced was solely caused by the change in the spillway design.” *Id.* at ¶ 66.

Equally here, Relators have met their burden.

2. Expert Testimony Establishes That ODNR Causes Increased Flooding, More Frequent Flooding, Longer Lasting Flooding, And/Or Flooding That Would Not Otherwise Have Occurred.

The uncontested opinions of experts, Pressley L. Campbell, John Warns, and Keith Earley confirm that the Spillway and ODNR's lake-level decisions cause increased and/or new flooding, longer lasting flooding, and more frequent flooding. Even ODNR's expert concedes that under every scenario, the new Spillway and ODNR's lake-level management practices caused increased flooding, more frequent flooding, and longer lasting flooding. Rels' Merit Br.

24. ODNR does not dispute that under every scenario, there is a substantial increase in the volume of water over the new Spillway. RE, Tab A, Ex. A, Apr. 2010 Tech. Report, Table 2-5, p. 2.8. ODNR does not dispute that under every scenario, the decisions to not draw down the Lake at least annually, increases the frequency and extent of flooding. RE, Tab A, Ex. JE 79, Henson Dep. at 81-82 & Ex. L, RE, Tab A, Ex. B, at Tables 4 & 5

ODNR attacks one of Relators' experts, Dr. Campbell. Its attacks on Dr. Campbell are unfounded. Dr. Campbell's opinion is not based solely on his work in the *Case Leasing* litigation. Dr. Campbell worked with other engineers, Jim Moir and Juraj Cunderlik, to complete his report, and these two engineers visited the Spillway and the surrounding area in conjunction with their analysis. JE 76, Dep. Campbell at 89, 92-93. Moir and Cunderlik took photos during their visit, which Dr. Campbell reviewed along with additional photos and records of flooding. Id. at 94-95, 117, 148. Dr. Campbell based his opinions on historical precipitation and water elevation data, and surveying records from the 2003 flood. PE 99, Aff. Campbell, 9/29/09, ¶¶ 5-7. From this data, Dr. Campbell calculated that had the 500-foot spillway been constructed in 1927, 15 storm events between 1927 and 2006 would have resulted in flooding, whereas only 1 storm event would have resulted in flooding under the old spillway and ODNR's drawdown

practices. Id. at ¶¶ 5, 14 & Ex. B. Dr. Campbell also studied historic lake elevation data and observed that since ODNR has chosen not to manage lake levels, daily lake level measurements have been significantly higher and more often above 870.6 feet MSL (Mean Sea Level). Id. at ¶ 15.a, ¶ 15.b, & Ex. C. Id. at ¶ 15.a & Ex. C. This difference is critical: “[i]f the lake is at or above that elevation when a storm event occurs, the storm is more likely to cause flooding outside the banks of Beaver Creek and the Wabash [River] regardless of the severity of the events.” Id. at ¶ 16. Dr. Campbell also observed that the records of the one available flow gage in Linn Grove, Indiana which records the daily mean discharges of the Wabash River since October 1964 reveals that the discharge from the Lake has been higher between 1997 and 2010 than before. JE 76, Dep. Campbell at 112-13, 122, 141.¹⁷ Dr. Campbell concluded that ODNR causes frequent and severe flooding of downstream property. Aff. Campbell at ¶¶ 17-20, 25, 27.

That Dr. Campbell did not prepare hydrologic/hydraulic models of the flooding does not render his opinion unreliable. Instead of attempting to model the flooding accurately, a task that has proven impossible for ODNR’s expert even after multiple tries, Dr. Campbell examined actual historical data for rainfall, lake level, and stream flow. In the face of such analysis, modeling is unnecessary, and as noted in § C infra, is unreliable and unreflective of reality. Dr. Campbell’s calculations are accurate and reflect reality. ODNR is wrong to suggest otherwise.¹⁸

3. ODNR’s Serial Hypothetical Modeling/Mapping Defies Reality And Is Riddled With Fatal Defects.

In the face of the overwhelming eyewitness testimony and expert consensus, ODNR

¹⁷ The drainage area of the Linn Grove gauge is irrelevant as ODNR offers no reason other than the new Spillway for why the peak flows at Linn Grove have substantially increased since 1997.
¹⁸ Dr. Campbell responded to ODNR’s criticisms in a second affidavit, explaining the accuracy of his calculations. PE 124, Aff. P. Campbell, 5/20/10. For an unstated reason, this Court struck Dr. Campbell’s affidavit, thereby permitting ODNR to criticize Relators’ experts without giving Relators an opportunity to rebut those criticisms (let alone an opportunity to criticize ODNR’s expert). In fairness, this Court should reconsider reviewing Dr. Campbell’s second affidavit.

points only to its expert modeling and mapping, arguing: 1) Relators were required to prepare hypothetical modeling/mapping on a parcel by parcel basis to prove their claim; and 2) in the absence of such evidence, this Court should accept ODNR's modeling/mapping (which shows increased flooding on 68 additional acres¹⁹ and increased flood duration of 1-2 additional days). Resp'ts Br. at 35; RE Tab A, Ex. B at 14; Id. at Ex. A at Mar. Discussion, 1.0, pg. 2.2. Not only has ODNR failed to set forth any precedential authorities requiring Relators to conduct such modeling/mapping, ODNR's "expert" modeling/mapping fails to comport with reality.

Stantec's modeling/mapping manipulations and errors show why landowner testimony is sufficient, credible evidence to establish a taking. In concocting its modeling, Stantec ignored eyewitness testimony of the actual flooding. JE 79, Henson Dep. 113-114. For example, Relators presented photos showing the flooding of Carman and Jill Ellis' property and Charles Meier's property, both of which were flooded by the Spillway in 2003, 2005, and 2008. PE 13, Ellis Aff. at ¶¶ 11 & 13 & Exs. 3 & 4; PE 54, Meier Aff. at ¶¶ 12-15 & Exs. 3-4. Stantec's modeling shows these properties flooding only during a 100-year rain event, an event ODNR does not contend occurred in 2005 or 2008.²⁰

¹⁹ ODNR calculates 68 acres based on unsworn modeling of a 10-year rain event, ignoring Stantec's modeling for 15 and 100-year events, which show that 79 of the 91 parcels have increased flooding. Rels App. Chart C. This is deceptive as with the increased Spillway discharge and no draw downs, 15 and 100-year events now occur regularly. *Supra* p. 18 & n. 25.

²⁰ Relators presented photos establishing that one of David Johnsman's parcels flooded several times including July 2003, and March 2010. PE 34, Johnsman Supp. Aff. Yet, Stantec's modeling does not show the land flooding even in July 2003. RE Tab A, Ex. A at Mar. Discuss., Appx July 2003 Map (Parcel 23). Relators presented testimony and photos that portions of the property owned by Wayne Doner and his family remain flooded for months. PE 2, W. Doner Aff. ¶ 7 & Exs. P1-9; JE 8 Doner Dep. 13-15. Stantec shows that for a 15-year rain event, the flooding lasts only 5.5 days (i.e., 1.5 days longer than any pre-1997 flooding). RE Tab A, Ex. A at Mar. Discuss., Appx 15-Year Storm -Time Series (Parcels 5-9). Relators presented video and testimonial evidence of the Doners' property prior to and during flooding in March 2010 which occurred only after 1.5" of rain and the Spillway overtopped. PE 4, Doner Sec. Supp. Aff. Stantec has offered no explanation for this flooding after only 1.5" of rain.

Stantec has made repeated efforts to revise and correct its modeling,²¹ yet despite those efforts, it remains fatally flawed. Stantec ignores historical crest data for the Wabash River. That crest data shows that 40 of the 44 highest crests since 1964 have occurred after completion of the Spillway. RE, Tab A, Ex. B at Plate 21. Stantec has pointed to no other explanation for this fact, and data in its own report confirms that high water levels have been much more frequent subsequent to the new Spillway. Id. Stantec's modeling also uses an incorrect and underestimated lake level for July 2003 versus the actual lake elevation.²² Stantec uses that incorrect level to miscalculate peak discharge from the Spillway, thereby undercalculating peak flood elevation and the extent of the July 2003 flooding. Stantec uses that incorrect level to "verify" its modeling of hypothetical events, again resulting in undercalculating peak discharge, peak flood elevation, and extent of flooding. These flaws substantially marginalize the impact of the Spillway and the extent and severity of flooding its causes. For example, increasing peak elevation from 871.0' to 871.4' increases peak flow from 154 cfs to 650 cfs. The greater the peak flow, the greater the flooding downstream. Thus, Stantec's errors underestimated both the extent of ODNR's flooding in 2003 and the flooding for Stantec's hypothetical events.

Equally egregious is Stantec's false claim that it tried to determine the full impact of the Spillway on flooding. RE, Tab A, Ex. B at 1. It did not. It used average antecedent conditions (which results in average run-off of rain water into the Lake), as opposed to wet antecedent

²¹ Apparently, its efforts continue today as shown by the unsworn and unauthenticated new "chart and map" attached as Appendices A and B to Resp'ts' Merit Brief.

²² Stantec used a "modeled" peak elevation of 872.26' as opposed to the correct lake level elevation of 872.64'. JE 79, Dep. T. Henson at Ex. D, p. 3 & Appx. B at 07/09-10/03 Entries; RE, Tab A, Ex. A, Table 2-3 & Figure 3. It downplayed the peak flow from the Spillway and the resulting extent of the July, 2003 flooding. Stantec also "verified" its modeling of hypothetical rain events based on the observed peak elevation for the Lake from July, 2003, but it used the incorrect observed elevation. As proven by ODNR's own surveyor, the observed peak elevation was not 872.13', but 872.64'. JE 79, at Ex. D, p. 3 & Appx. A & B at 07/09-10/03.

conditions (which results in increased run-off because the ground is saturated prior to the rain event). ODNR misleads this Court by claiming that comparing average conditions under the old and new Spillways is the same as comparing wet conditions under the old and new Spillways. Common sense says this is wrong. Under wet antecedent conditions, more rainwater during a rain event drains into the Lake. More drainage into the Lake increases the lake elevation, which in turn increases the peak flow of water over the Spillway and the duration of flow over the Spillway. The higher the peak flow, the more flooding downstream in both acres and duration. RE Tab A, Ex A, Mar. 2010 Discussion, Tables 1-2, 4-5; Apr. 2010 Tech Report, Table 2-5.

Stantec's reports also improperly compare flood events under the old and new Spillways. The new Spillway results in a higher peak discharge for any rain event. For example, now a 5-year rain yields a peak discharge that is **higher than the peak discharge for a 100-year rain under the old Spillway**. RE, Tab A, Ex. A, Apr. 2010 Modeling, Tech. Rep., at Table 2-5 on p. 2.8. Because of the increased discharge, the alleged historic flooding that occurred under the old Spillway now occurs more often under the new Spillway.²³ The critical problems with Stantec's modeling/mapping, its serial efforts to "correct" its errors²⁴ and its manipulation of data to obtain a desired result demonstrate why the firsthand observations of area farmers is the most reliable and all the evidence Relators need to demonstrate that ODNR has taken Relators' property.

4. The New Spillway And ODNR's Lake-Level Management Decisions Cause Flooding Sufficient To Constitute A Taking.

While minimal spring flooding occurred sporadically pre-1997 on some of Relators' land,

²³ Beaver Creek has a capacity of 500 cfs. PE 111, Stipulations at No. 25. With the old spillway, peak flow was 345 cfs for a 100-year rain event under average conditions. RE, Tab A, Ex. A, Table 2-5 on p. 2.8. Now peak flow for a 10-year rain event is 650 cfs under average conditions. Id. Thus, even Stantec's modeling of "average" conditions confirms more frequent flooding.

²⁴ In a May 26, 2010 memo, nearly three months after the supposed expert witness deadline, Mr. Henson attempted to correct Stantec's many flaws. This Court permitted him to do so, but for an unstated reason rejected Mr. Moir's May 30, 2010 affidavit (PE 129) addressing Mr. Henson's claim that he fixed Stantec's errors and stopped manipulating the data to aid ODNR.

ODNR ignores that the flooding has now increased in extent, frequency, depth, and duration. Increasing the frequency of flooding is itself sufficient to establish a taking. *Masley*, 48 Ohio St.2d at 335 (taking occurred when city caused more frequent and greater flooding).²⁵ The undisputed evidence establishes that flooding is occurring more frequently and recurs frequently enough to amount to a taking. JEs 1-67, Rels' Affs.; PEs 1-97, Rels' Deps.; Rels' App. Charts A-D; RE, Tab A, Ex. A, Tech. Rep., at Table 2-5 on p. 2.8. Likewise, increasing the period of time in which land is flooded constitutes a taking. *E.g.*, *Lindsey v. Greenville* (S.C. 1966), 146 S.E.2d 863, 866-67; *Miller v. U.S.* (Ct. Cl. 1978), No. 66-75, 1978 U.S. Ct. Cl. Lexis 752, *28, vac'd on other grounds. Here, longer flooding is a taking as the flooding lasts for days, weeks, and months, killing crops, delaying/preventing planting, depleting the soil, and causing severe soil compaction. JEs 1-67, Rels' Affs.; PEs 1-97, Rels' Deps.; Rels' App. Charts A-D.

ODNR tries to blame increased rainfall for the increased flooding. Resp'ts Br., 36-37. Rainfall data, however, does not save ODNR. In 2010, for example, there was only minor rainfall, yet that rainfall resulted in significant flooding. *E.g.* PE 4 Sec. Supp. Aff. W. Doner & PE 44 Sec. Supp. Aff. D. Kuhn. Likewise, prior to 1997, there were heavy rainfall events such as July 1990, July 1992, and October 1996, yet those events did not result in the destructive flooding that has occurred since 1997. Resp'ts' Appx. D. Flooding is now occurring with minimal rainfall, and increased severe flooding is now occurring during heavy rainfalls. Increased rainfall is not the problem; the problem is the Spillway and increased lake levels.

Reply to Respondents' Proposition of Law No. 4: ODNR Never Acquired A Prescriptive Easement To Flood Any Of Relators' Properties.

For the first time and without evidentiary support, ODNR claims that at some unknown point in the past, it acquired a prescriptive right to "temporarily and intermittently" flood

²⁵ ODNR conceded that Relators satisfied the frequency requirement when previously it described the 2010 flooding as "cumulative." Resp'ts Mot. to Strike, 7-8.

Relators' land "during periods of high rainfall." Resp'ts Br., 44. ODNR's eleventh-hour claim lacks merit.²⁶ To establish a prescriptive right, ODNR must prove that it used Relators' property openly, notoriously, adversely, continuously, and for at least 21 years. *The Penn. Rd. Co. v. Donovan* (1924), 111 Ohio St. 341, syl. ¶ 1. ODNR must prove these elements by "clear and convincing evidence." *Wood v. Vill. of Kipton* (2005), 160 Ohio App.3d 591, 595-96. Evidence "must be strictly construed against the person claiming a prescriptive right to an easement." *Hinman v. Barnes* (1946), 146 Ohio St. 497, at syl. ¶ 2. ODNR's claimed right fails because ODNR has not "used" Relators' land prior to 1997. In fact, some of Relators' parcels never flooded before 1997.²⁷ ODNR could not have a prescriptive easement on these parcels. As for the remaining parcels which may have experienced some flooding prior to 1997, ODNR has cited no evidence that it ever caused such flooding.²⁸ In the absence of such evidence, ODNR has not proven it used Relators' parcels, let alone used them in the manner required to acquire a prescriptive easement. Further, ODNR cites no evidence when it began using the land, how often it used the land, and the extent of its use. With no proof, ODNR has not met its burden.²⁹

Even if prior to 1997 ODNR acquired a prescriptive easement to flood Relators' land, that right expired after ODNR built the new Spillway, stopped drawing down the Lake, and

²⁶ At no point before its Merit Brief, did ODNR claim an interest in any of Relators' land. PE 104, Ans. to Req. to Admit 62. Its failure to raise the defense (let alone plead it specifically) is fatal to its newfound claim of right. *E.g., Weade v. Washington* (1955), 128 N.E.2d 256, syl. ¶ 1.

²⁷ Parcels owned by the Ellises, Lee Fennig, the Hines, Linda Linn, the Kricks, Marvin Kuhn, David Johnsman, Ruth M. Johnsman Irrevocable Trust, and Leroy J. Johnsman Irrevocable Trust never flooded prior to 1997. PE 13, Aff. C. Ellis ¶ 8; PE 26, Aff. E. Hines ¶ 8; PE 33, Aff. D. Johnsman ¶ 9; PE 40, Aff. T. Krick ¶ 10; PE 45, Aff. M. Kuhn ¶ 8; PE 46, Aff. L. Linn ¶ 7.

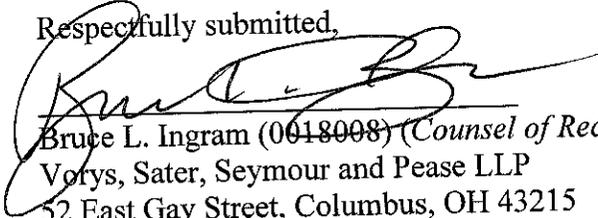
²⁸ Previously, ODNR denied that it ever caused any flooding. PE 104, Ans. to Req. to Admit 62.

²⁹ Even if ODNR's claimed prescriptive right somehow ripened on an undetermined date prior to 1997, ODNR fails to present clear and convincing evidence that any flooding prior to 1997 was continuous. Where such flooding occurs at "irregular intervals", no prescriptive right ripens. *Twinsberry Farm v. Consol. Rail, Corp.* (2010), 11 Ohio App.3d 182, 184. Relators' testimony establishes that any flooding prior to 1997 was sporadic at best. This is not continuous use.

flooded Relators' property to a much greater degree. A change in use can extinguish an easement. *Twinsberry*, 11 Ohio App.3d at 184. ODNR admits that it is now flooding additional acres, flooding those lands more frequently, and flooding those lands for longer periods of time. Resp'ts Br., 45-46; RE, Tab A, Ex. A, Apr. 2010 Modeling, Tech. Rep., at Table 2-5 on p. 2.8. This significantly increased flooding extinguishes any easement ODNR claims it acquired. *E.g.*, *Simmons v. Trumbull Co. Eng.* (Dec. 14, 2007), 2007-Ohio-6735, at ¶ 35. Of all the Relator testimony, ODNR cites to 6 phrases from Relator depositions as "anecdotal evidence" that flooding existed "to substantially the same degree now and during the prescriptive period." Resps.' Merit Br. at 4, 45. Not only did ODNR ignore the affidavits and depositions of the other Relators regarding the increased flooding since 1997, it provides misleading citations to the few Relator depositions it cites. All Relators testified that the flooding on their land has increased significantly since 1997: flooding more frequently, flooding more acres, for longer periods of time, and now during growing season. *See* Appendix B. Further, ODNR does not dispute that its new lake-management practices cause or exacerbate flooding that occurs during "high rainfalls." JE 79, Henson Dep. at 81-82 & Ex. L, RE, Tab A, Ex. B, at Tables 4 & 5. Accordingly, any purported prescriptive right terminated with the significantly increased flooding caused by ODNR's 500-foot spillway and new Lake management practices.

Wherefore, for the reasons above and those in Relators' Merit Brief, Relators respectfully request that this Court protect their inviolate property rights and grant them their requested writ.

Respectfully submitted,


Bruce L. Ingram (0018008) (Counsel of Record)
Votys, Sater, Seymour and Pease LLP
52 East Gay Street, Columbus, OH 43215
Tel.: (614) 464-6480 Fax: (614) 719-4775
Attorneys for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via hand delivery, this 9th day of November, 2010:

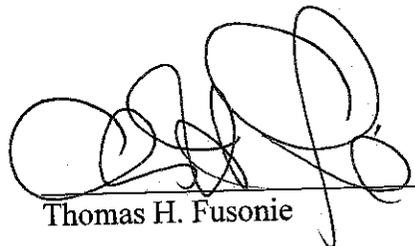
William J. Cole
Mindy Worly
Jennifer S.M. Croskey
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

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

Attorneys for Respondents

Larry R. Gearhardt
Chad A. Endsley
Ohio Farm Bureau Federation
280 North High Street, Floor 6
P.O. Box 182383
Columbus, Ohio 43215-2594

Attorneys for Amicus Curiae



Thomas H. Fusonie

IN THE SUPREME COURT OF OHIO

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

Relators,

v.

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

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

RELATORS' REPLY BRIEF IN SUPPORT OF WRIT OF MANDAMUS

APPENDIX A

APPENDIX A: FLOODING BETWEEN JANUARY 2008 AND MARCH 2010

Owner	Parcel No.	Flooding ¹		
		2008	2009	2010 ²
Janet K. Doner; Wayne T. Doner;	28-011700.0000	X	X	X
David M. Doner; Karen S. Doner	28-012200.0000	X	X	X
Janet K. Doner; Wayne T. Doner	28-012300.0000	X	X	X
Wayne T. Doner	28-010500.0000	X	X	X
Janet K. Doner; Wayne T. Doner;	28-011300.0000	X	X	X
David M. Doner				
Richard L. Adams;	42-005800.0000	X	X	X
Nancy L. Adams	42-003700.0000	X	X	X
	26-043100.0000	X	X	
The Baucher Farms, Inc.	42-017300.0000	X		
Joyce A. Dwenger; Lawrence J. Dwenger	26-041200.0100	X	X	X
Stanley M. Ebbing;	26-041000.0000	X	X	
Vicki L. Ebbing	26-047200.0100		X	
Carman R. Ellis; Jill E. Ellis	26-049300.0100	X		
H. Edward Gilbert; Mary E. Gilbert	26-041200.0000	X		
David L. Granger, Trustee of the David L. Granger & Esther L. Granger Living Trust	42-004100.0000	X	X	
	26-041400.0000	X	X	X
Patricia L. Highley;	42-003500.0000	X	X	X
Robert E. Highley	42-004500.0000	X	X	X
Emily A. Hines; Jason E. Hines ³	26-049300.0200	X		
Daniel W. Johnsman	26-038300.0200	X	X	X
David A. Johnsman ⁴	26-029500.0100	X		
	26-048600.0000	X		X
David A. Johnsman, self and as Trustee of Ruth M. Johnsman Irrevocable Trust and as a Trustee of the Leroy J. Johnsman Irrevocable Trust and the Leroy J. Johnsman Irrevocable Trust ⁵	26-024700.0000	X		
	26-038300.0000	X		X
Jean A. Karr;	28-013500.0000	X	X	X
William Ransbottom	28-013400.0000	X	X	X
Andrea M. Knapke;	29-003600.0000	X	X	
Chad M. Knapke	29-003500.0000	X	X	

¹ Boxes with an "X" denote positive evidence of flooding presented in Relators' Presentation of Evidence and Joint Exhibits.

² For 2010, the chart is limited to flooding that had occurred by March 31, 2010.

³ In his affidavit, Mr. Hines stated that his property "flooded at least every other year, at times more than once a year." P.E. Tab 28.

⁴ In his affidavit, Mr. Johnsman stated that parcel 26-029500.0100 floods "annually." P.E. Tab 33.

⁵ In his affidavit, Mr. Johnsman stated that these properties "flood annually." P.E. Tab 33.

APPENDIX A: FLOODING BETWEEN JANUARY 2008 AND MARCH 2010

Owner	Parcel No.	Flooding ¹		
		2008	2009	2010 ²
Mark L. Knapke as Trustee of the Mark L. Knapke Revocable Living Trust	29-002400.0000	X	X	
Timothy A. Knapke	29-003700.0000	X	X	X
Thomas L. Krick; Candace L. Krick	27-012600.0000 27-013500.0000			
Darrell D. Kuhn	42-001200.0000	X	X	X
Marvin E. Kuhn	28-017400.0100	X	X	X
Estate of Marilyn M. Kuhn	42-000200.0000		X	X
Linda B. Linn; Lee A. Fenning	29-002200.0000	X		
David J. McDonough; Deborah A. McDonough	26-038100.0000	X		
David J. McNeilan	26-027300.0500 26-027400.0000		X X	
David J. McNeilan; Laura B. McNeilan	26-027500.0000		X	
Lois J. McNeilan	26-027200.0000		X	
Charles J. Meier	26-052600.0000 26-052700.0000	X X	X X	
Charles J. Meier ⁶ ; Mary K. Meier	26-052700.0100	X		
Jerome L. Meyer; Amy L. Meyer	42-001000.0000 42-019700.0000 42-019800.0000	X X X	X X X	X
William M. Muhlenkamp	29-003300.0000 29-004400.0000	X X		X X
Carolyn J. Pierstorff; Thomas D. Rasaweher; Timothy Rasaweher	42-001300.0000	X	X	X
Opal L. Post	29-004200.0000 28-011400.0000	X X	X X	X X
Jerry W. Powell, Betty L. Powell, Trustees of the Powell Living Trust dated December 22, 2005; Paul A. Agnello; Rhonda E. Powell	28-010400.0000 42-014000.0000	X X	X X	X
Jerry W. Powell, Betty L. Powell, Trustees of the Powell Living Trust dated December 22, 2005	28-010400.0000 42-014000.0000 42-024200.0000 42-016900.0000	X X X X	X X X X	
M. Leone Powell; Larry V. Pugsley	42-003800.0000 42-003400.0000	X	X	
Brenda S. Powell; Thomas L. Powell	28-010400.0100 42-014000.0100	X X	X X	X X
Carl. W. Rose; Lucile M. Rose	42-018500.0000	X	X	

⁶ In his affidavit, Mr. Meier stated that these properties "have flooded almost every year and some years, they have flooded several times." P.E. Tab 54.

APPENDIX A: FLOODING BETWEEN JANUARY 2008 AND MARCH 2010

Owner	Parcel No.	Flooding		
		2008	2009	2010 ²
Dorothy K. Schroyer	42-005700.0000	X	X	X
Bonita S. Searight; Robert E. Searight ⁷	26-011900.0000	X		
	26-030700.0200	X		
	26-030700.0000	X		
	26-030700.0300	X		
Duane R. Sheets	28-010900.0000		X	
	28-012900.0000		X	
Linda J. Sheets; Rodney R. Sheets	28-011000.0000	X	X	X
Rodney R. Sheets	28-011100.0000	X	X	
Jeff A. Siefiring	26-044100.0100	X	X	
	26-044100.0200	X	X	
Mark A. Siefiring; Ronald J. Siefiring	42-020000.0000	X	X	
Mark A. Siefiring; Carol L. Siefiring	42-001000.0100	X	X	
Neil J. Siefiring; Mary K. Siefiring	26-041500.0000	X	X	X
Ronald J. Siefiring; Carol L. Siefiring	42-000100.0000	X	X	X
David J. Suhr; Rita K. Suhr	26-040900.0000	X	X	
	26-039200.0200	X	X	
Rita K. Suhr	26-039100.0500	X	X	
	26-004200.0101	X	X	
Carl A. Sutter; Judith A. Sutter	28-015300.0000	X	X	X
Gale A. Thomas; Nelda G. Thomas	28-013800.0000	X	X	
Marilyn L. Uhlenhake	26-042900.0100	X		
Jerry Weisman; Vicki L. Weisman	42-000300.0100	X	X	X
Charles F. Zumberge, Trustee of the Virginia L. Zumberge dated January 31, 1990 & Trustee of the John H. Zumberge Trust dated January 31, 1990 ⁸	26-022600.0000		X	
	26-051000.0000			
	26-052900.0000		X	
Jennifer M. Zumberge	26-042800.0000	X	X	
Z-Farms Inc. ⁹	26-051400.0000		X	
	26-049500.0000		X	

⁷ In his affidavit, Mr. Searight stated that these properties "have flooded approximately fifteen times or approximately once per year." P.E. Tab 74.

⁸ In his affidavit, Mr. Zumberge stated these properties flood "almost every year, and some years they have flooded several times." P.E. Tab 95.

⁹ In his affidavit, Mr. Zumberge stated these properties flood "almost every year, and some years they have flooded several times." P.E. Tab 97.

IN THE SUPREME COURT OF OHIO

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

Relators,

v.

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

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

RELATORS' REPLY BRIEF IN SUPPORT OF WRIT OF MANDAMUS

APPENDIX B

APPENDIX B: CLARIFICATION OF RESPONDENTS' MISCHARACTERIZED DEPOSITION CITES¹

Deposition	Page	Quote
Richard L. Adams, JE 2	31	<p>"Q. What do you think has caused the flooding on your properties [since 1997]?</p> <p>A. Well you really want to get me started, don't you. I've been out there [on my property] since 1972... You get flooded every now and then [before 1997], it wasn't too hateful. . . [if] they go back to doing [lake level management], it [the flooding] wouldn't be near so hateful out my way."</p>
Janet K. Doner, JE 6	25-27	<p>Q. And is that because the ground is too soft [that you can no longer access portions of your property]?</p> <p>A. The Riverbeds never dry out any more since 1997. We can't plant anything in 'em. We used to be able to plan 'em and go right, you know, go right east and west [across the properties], but now, we can't.</p> <p>***</p> <p>Q. And just so I understand your testimony is that you used to be able to farm the river bed area, but you've not been able to do that since what time?</p> <p>A. Since 1997, since they put the spillway in.</p> <p>Q. . . . At no time since 1997, you've not been able to farm that river bed area?</p> <p>A. It's usually setting full of water and it doesn't dry out in time to get the crops planted.</p> <p>Q. And prior to 1997, the river beds were dry?</p> <p>A. If it flooded they would dry out and we was able to get through then.</p> <p>Q. So prior to 1997, you were familiar with some flooding in the river beds?</p> <p>A. Yeah. We had some flooding but it wasn't near as much as it was since 1997. It's been more frequent and more persistent and then we're flooded a lot more [since 1997]."</p>

¹ This Appendix refutes the contention made by Respondents that, "As evidence by Relators' anecdotal evidence of flooding and the Stantec reports and modeling, flooding existed to substantially the same degree before the spillway was modified," and including blatantly false and intentionally misleading deposition cites. ODNR Merit Brief at 4.

APPENDIX B: CLARIFICATION OF RESPONDENTS' MISCHARACTERIZED DEPOSITION CITES¹

<p>William Muhlenkamp, JE 31</p>	<p>12</p>	<p>“Q. . . . In your long experience farming, how many times have you seen these two parcels we’re talking about flood? A. . . . they always did flood years ago, but since they put that new spillway in, they just flood about twice as much. See, that 40 acres, the reason I bought that 40 acres there is [prior to 1997] I always see it just flood just on the corner, you know, so much five or seven acres or something like that. Then [since 1997] we were having big floods. Now [since 1997], the 30 acres of it floods. . . . Q. And then what about the other parcel? How much difference have you noticed? A. . . . it floods a lot worse now. Q. So your experience has been that both those parcels flooded in the past, but that’s been worse since the spillway has changed? A. ‘Bout five, ten times [worse since 1997]’”</p>
<p>C. Rose, JE 44</p>	<p>17-19 (see errata sheet).</p>	<p>“Q. How often did the property flood [prior to 1997]? A. Well, it would flood, partially, almost every year. It would vary though, from year-to-year. *** Q. So before 1997, before changes were made to the spillway, can you talk to me a little bit about what parts of your property would flood? A. Well, it would be the same parts that flooded afterward, but [the flooding before 1997] was not near as deep and never stayed near as long. . . . It would probably be on 10-15 acres, something like that [as opposed to 30-31 acres post-1997, see deposition at page 23, 24, 26, 28.]” “Q. So since 1997, how often has flooding occurred? A. Well, almost every year.”</p>
	<p>21-22</p>	

¹ This Appendix refutes the contention made by Respondents that, “As evidence by Relators’ anecdotal evidence of flooding and the Stantec reports and modeling, flooding existed to substantially the same degree before the spillway was modified,” and including blatantly false and intentionally misleading deposition cites. ODNr Merit Brief at 4.

IN THE SUPREME COURT OF OHIO

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

Relators,

v.

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

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

RELATORS' REPLY BRIEF IN SUPPORT OF WRIT OF MANDAMUS

APPENDIX C

1 of 1 DOCUMENT

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH FILE 54 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Go to the Ohio Code Archive Directory

Oh. Const. Art. I, § 19 (2010)

§ 19. Inviolability of private property

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

2 of 2 DOCUMENTS

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group
All rights reserved.

*** ARCHIVE DATA ***

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

TITLE 1. STATE GOVERNMENT
CHAPTER 163. APPROPRIATION OF PROPERTY
DISPLACED PERSONS

ORC Ann. 163.59 (2010)

§ 163.59. Land acquisition policies

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many state and federally assisted programs, and to promote public confidence in public land acquisition practices, heads of acquiring agencies shall do or ensure the acquisition satisfies all of the following:

(A) The head of an acquiring agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(B) In order for an acquiring agency to acquire real property, the acquisition shall be for a defined public purpose that is to be achieved in a defined and reasonable period of time. An acquisition of real property that complies with *section 5501.31 of the Revised Code* satisfies the defined public purpose requirement of this division.

(C) Real property to be acquired shall be appraised before the initiation of negotiations, and the owner or the owner's designated representative shall be given a reasonable opportunity to accompany the appraiser during the appraiser's inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value. If the appraisal values the property to be acquired at more than ten thousand dollars, the head of the acquiring agency concerned shall make every reasonable effort to provide a copy of the appraisal to the owner. As used in this section, "appraisal" means a written statement independently and impartially prepared by a qualified appraiser, or a written statement prepared by an employee of the acquiring agency who is a qualified appraiser, setting forth an opinion of defined value of an adequately described property as of a specified date, supported by the presentation and analysis of relevant market information.

(D) Before the initiation of negotiations for real property, the head of the acquiring agency concerned shall establish an amount that the head of the acquiring agency believes to be just compensation for the property and shall make a prompt offer to acquire the property for no less than the full amount so established. In no event shall that amount be less than the agency's approved appraisal of the fair market value of the property. Any decrease or increase

in the fair market value of real property prior to the date of valuation caused by the public improvement for which the property is acquired, or by the likelihood that the property would be acquired for that improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

The head of the acquiring agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount that the head of the acquiring agency established as just compensation. Where appropriate, the just compensation for real property acquired and for damages to remaining real property shall be separately stated.

The owner shall be given a reasonable opportunity to consider the offer of the acquiring agency for the real property, to present material that the owner believes is relevant to determining the fair market value of the property, and to suggest modification in the proposed terms and conditions of the acquisition. The acquiring agency shall consider the owner's presentation and suggestions.

(E) If information presented by the owner or a material change in the character or condition of the real property indicates the need for new appraisal information, or if a period of more than two years has elapsed since the time of the appraisal of the property, the head of the acquiring agency concerned shall have the appraisal updated or obtain a new appraisal. If updated appraisal information or a new appraisal indicates that a change in the acquisition offer is warranted, the head of the acquiring agency shall promptly reestablish the amount of the just compensation for the property and offer that amount to the owner in writing.

(F) No owner shall be required to surrender possession of real property before the acquiring agency concerned pays the agreed purchase price, or deposits with the court for the benefit of the owner an amount not less than the agency's approved appraisal of the fair market value of the property, or the amount of the award of compensation in the condemnation proceeding for the property.

(G) The construction or development of a public improvement shall be so scheduled that no person lawfully occupying real property shall be required to move from a dwelling, or to move the person's business or farm operation, without at least ninety days' written notice from the head of the acquiring agency concerned of the date by which the move is required.

(H) If the head of an acquiring agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(I) In no event shall the head of an acquiring agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the real property.

(J) When any interest in real property is acquired by exercise of the power of eminent domain, the head of the acquiring agency concerned shall institute the formal condemnation proceedings. No head of an acquiring agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of the owner's real property.

(K) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the acquiring agency concerned shall offer to acquire that remnant. For the purposes of this division, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the agency concerned has determined has little or no value or utility to the owner.

An acquisition of real property may continue while an acquiring agency carries out the requirements of divisions (A) to (K) of this section.

This section applies only when the acquisition of real property may result in an exercise of the power of eminent domain.

4 of 14 DOCUMENTS

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** ARCHIVE DATA ***

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS
REAL ESTATE

ORC Ann. 2305.04 (2010)

§ 2305.04. Recovery of real estate

An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause of action accrued, but if a person entitled to bring the action is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person, after the expiration of twenty-one years from the time the cause of action accrues, may bring the action within ten years after the disability is removed.

22 of 55 DOCUMENTS

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** ARCHIVE DATA ***

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS
TORTS

ORC Ann. 2305.09 (2010)

§ 2305.09. Four-year limitation for certain actions; five-year limitation for identity fraud

Except as provided for in division (C) of this section, an action for any of the following causes shall be brought within four years after the cause thereof accrued:

- (A) For trespassing upon real property;
- (B) For the recovery of personal property, or for taking or detaining it;
- (C) For relief on the ground of fraud, except when the cause of action is a violation of *section 2913.49 of the Revised Code*, in which case the action shall be brought within five years after the cause thereof accrued;
- (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in *sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code*;
- (E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.