

IN THE SUPREME COURT OF OHIO

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

Relators,

v.

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

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

RELATORS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO STRIKE APPENDICES A AND B FROM RELATORS' REPLY BRIEF

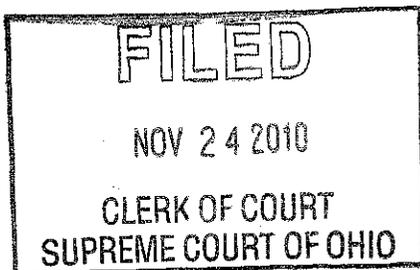
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MEMORANDUM IN SUPPORT

No matter how the evidence is presented to this Court, one thing is clear: Respondents have caused and continue to cause recurring flooding of Relators' lands that interferes with Relators' use and enjoyment of their land. Repeatedly, Relators have tried to make parsing through that evidence easier for this Court by preparing charts that index the evidence. And repeatedly, Respondents have screamed foul, without articulating a compelling reason why. In fact, Respondents do not even challenge the accuracy of the appendices. Respondents' latest motion to strike should be denied.

As Relators did in the Appendix attached to Relators' Amended Merit Brief, Relators included charts in an Appendix attached to Relators' Reply. These charts, like the ones previously accepted by this Court, catalogue and index the voluminous and comprehensive evidence in this matter (i.e., 11 Relators' Presentation of Evidence volumes plus 18 Joint Exhibit volumes of depositions) for the Court's convenience. Respondents oppose these charts because they do just what they were designed to do: assist this Court in reviewing the evidence and its relation to each Relator. It is in ODNR's best interest to impede this Court from efficiently and expeditiously reviewing the overwhelming evidence establishing that Relators are all entitled to their requested writ. All of the information charted and indexed in the Appendix comes from the evidence submitted in this action. But without these charts, this Court's work reviewing this evidence becomes much more tedious and time consuming. Respondents desire such result in hopes this Court will miss something or better yet, give up all together.

Respondents argue that Relators' charts are argumentative and not included within the types of documents that this Court's rules permit to be attached as an appendix. (Respondents' Br. at 2-3.) This is a particularly curious argument considering Respondents attached as

appendices to their Merit Brief the following: 1) a chart, not included in the presentation of evidence, presumably prepared by its “expert” Stantec and purporting to show the number of acres impacted by the Spillway for a 10-year rain event; 2) a map, not included in the presentation of evidence, presumably prepared by Stantec and purporting to show the impact of the Spillway on flooding for a 10-year rain event; 3) an oversized map presumably prepared by Stantec and purporting to show the impact of the Spillway on flooding for a 15-year rain event; 4) a chart summarizing rainfall data. (Respondents’ Appendices A-D, attached to Respondents’ Merit Br.) None of the documents Respondents attached to their brief are listed in Supreme Court Rule 6.2(B)(5), yet somehow Respondents’ appendices are acceptable. Indeed, Respondents were even so bold¹ as to attach to Respondents’ Merit Brief actual evidence which was not previously included in the Presentation of Evidence. Worse yet, Respondents’ Appendix D is a “summary” of rainfall data. (Respondents’ Appendices A-D, attached to Respondents’ Merit Br.) Presumably Respondents’ Appendices C and D, like Relators’ Appendices A and B, were attached for the Court’s convenience. Yet, somehow Respondents’ appendices were appropriate, but Relators’ are not. Apparently, Respondents are permitted to play by one set of rules while Relators must play by another.

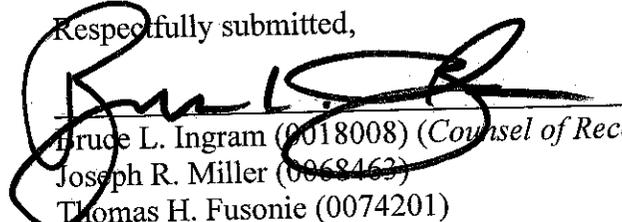
Along those same lines, when it benefited Respondents, Respondents acknowledged that these type of summary charts were compiled for the Court’s convenience and conceded that the summaries “. . . [we]re perhaps appropriate for Relators’ legal brief” (ODNR’s Motion to Strike Submissions of Evidence, at 12.) Now that Relators actually attached the charts to Relators’ legal briefing, Respondents’ take a different position.

¹ Respondents neither sought nor obtained leave to supplement Respondents’ Presentation of Evidence prior to attaching Appendices A-C to Respondents’ Merit Brief.

Respondents' Motion is nothing more than a thinly veiled effort to make the last argument. Indeed, there is no other reason for including footnote 2² in their motion; that footnote has no relation whatsoever to the appendices. The Supreme Court's Rules of Practice do not give Respondents a Surreply. S. Ct. Prac. R. 6.2-6.4, 10.8. This Motion should not give Respondents the opportunity to do what the rules otherwise do not allow.

The interests of justice is best served by allowing this Court the convenience of reviewing Relators' Appendices as a guide to Relators' evidence. For the reasons set forth above, Relators respectfully request that this Court deny Respondents' Motion to Strike Appendices A and B from Relators' Reply Brief.

Respectfully submitted,



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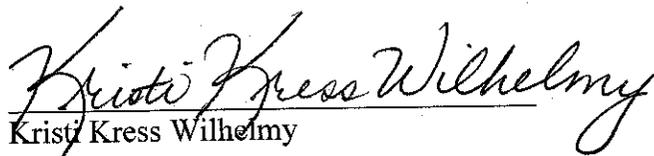
² Respondents again want to play by a different set of rules. Under their rules, both an affidavit of their "expert" provided to Relators four days before the Presentation of Evidence deadline (and months after the supposed March 1, 2010 expert deadline) and their unauthenticated evidence not produced at all, but attached to their Merit Brief are acceptable "evidence" for this Court to consider. Yet, this Court should ignore the affidavit of Relators' expert, James Moir, responding to the May 26, 2010 affidavit of Respondents' expert. Again, Respondents' sole goal is obfuscating the reality, as shown by Relators' evidence, that Respondents' new spillway and lake management decisions cause severe and frequent flooding of Relators' land and refuse to honor their duty and compensate the Relators for taking a flowage easement across their land.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via hand delivery, this 24th day of November, 2010:

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