

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

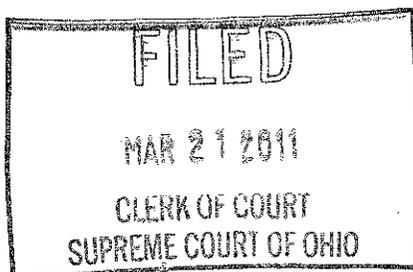
**MEMORANDUM OF RESPONDENTS IN OPPOSITION TO
RELATORS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO
PRESENTATION OF EVIDENCE**

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I. INTRODUCTION

Several Relators claim they have had recent heavy flooding on their lands in 2011 which they blame—as they have blamed all flooding west of the Grand Lake St. Marys spillway since 1997—on Respondents. Now, more than nine months after this Court's deadline for submitting evidence has expired, Relators seek leave to saddle an already voluminous evidentiary record with more lay affidavit, photographic, and video material.

Relators' motion should be denied for at least four reasons. First, Relators' entire case is barred by the statute of limitations, and their proposed submissions cannot overcome that bar under a continuous-violation theory. Second, Relators' lay submissions are untimely and cumulative. Relators admit the purpose of their proposed submissions is to merely update their prior submissions. The voluminous evidentiary record, with many photographs and videotapes of flooding, does not need to be updated at this stage of the litigation. The Court has an ample record to evaluate whether Relators have proven their case.

Third, Relators' lay evidence is not sufficient to show causation. Their proposed submissions are not relied upon by any expert, nor do they include any technical or scientific explanation of how they help support any expert opinions. Fourth, the affidavits and photographs are not only unreliable, but the photographs are also accompanied by prejudicial, self-serving written statements by the lead Relator. Similarly, the aerial photographer's affidavit includes statements beyond simply authenticating his aerial photos.

If Relators' motion is granted, then the case should be re-opened, and Respondents and their experts should be given sufficient time to evaluate (by conducting discovery of the affiants and Relators whose properties are purportedly depicted) Relators' evidence and to submit their response to the Court.

II. ARGUMENT

A. **The proposed submissions are irrelevant because Relators' case is barred by the statute of limitations.**

Relators' motion for leave should be denied because Relators' entire case is barred by the four-year statute of limitations in R.C. 2305.09(E). See Respondents' Merit Br. at 12-21. Relators allege that flooding on their properties in 2011 is the result of Respondents' 1997 modification of the Grand Lake St. Marys western spillway and subsequent annual lake-level management "decisions." However, such an allegation cannot avoid the statute of limitations bar under a continuous-violation theory. See *State ex rel. Nickoli v. Erie MetroParks*, 124 Ohio St. 3d 449, 2010-Ohio-606, ¶¶ 35-36, reconsideration denied, 124 Ohio St. 3d 1417, 2010-Ohio-1893. Any evidence of flooding in 2011 is not relevant to whether Relators' suit is timely.

Relators note that the 2011 flooding was the worst some Relators had ever experienced. Their unsupported lay opinion is irrelevant, and is only further evidence establishing that they knew or should have known that any impacts the new spillway may have had would have been shortly after 1997, but no later than 2003, a year cited by virtually every Relator and well more than four years before the filing of their suit.

B. **The proposed submissions are untimely and cumulative.**

Relators' submissions come nine months after this Court's June 1, 2010 deadline for presenting and filing evidence, and more than a year after the mutually-agreed upon

March 1, 2010 deadline for exchanging evidence. In an effort to minimize the significance of these deadlines, Relators argue the Court should not pick an “arbitrary” date for submitting evidence and not ignore flooding that occurs after a “supposed deadline.” Relators’ Motion at 4. The Court’s June 1, 2010 deadline was neither arbitrary nor supposed and Relators should not be allowed to continually and indefinitely add to the evidentiary record whenever someone west of the spillway claims to have additional flooding.

In fact, twice upon Relators’ request the Master Commissioner has extended the evidence-filing deadline. See Entries of Jan. 13, 2010 (one-month extension) and March 23, 2010 (two-month extension). In the latter entry, the Master Commissioner advised the parties that no further extensions for submitting evidence will be allowed except upon a showing of “extraordinary circumstances.” There is nothing extraordinary about Relators’ latest proposed submissions. They are merely evidence that, when there is a heavy rain in Mercer County, some of it falls on their properties. At some point this Court must close the period for submitting evidence.

Moreover, the proposed submissions are admittedly cumulative to an already voluminous evidentiary record. Relators admit their proposed submissions “*merely update*[] Relators’ prior submissions regarding the severity, extent, frequency, and duration of flooding on their property” (Emphasis added.) Relators’ Motion at 4. Relators filed 13 volumes of their own (mostly lay) evidence, including numerous videotapes and photographs of their properties, along with 18 volumes they jointly filed with Respondents. In addition, Respondents also filed one large volume of evidence. Such a large evidentiary record does not need to be updated at this stage of the litigation.

The Court has an ample record to evaluate whether Relators have proven their case by clear and convincing evidence, assuming it is not time-barred.

C. The proposed submissions are insufficient to show causation.

Relators argue that *any* evidence of flooding after the 1997 spillway modification is relevant to establish a taking. Besides eviscerating the evidentiary deadline, Relators' argument is irrelevant because their proposed lay submissions do not, as a matter of law, show that Respondents' actions resulted in the increased flooding on their properties in 2011. See Respondents' Merit Br. at 29-30 (citing cases for the proposition that determining causation in flooding cases is complex and requires expert testimony). This failing further belies the lack of probative value and the cumulative nature of the proposed submissions.

The proposed submissions include many photographs taken by Relators Wayne and Janet Doner of various Relator properties. The photographs show flooding immediately after a period of snow and rain that impacted large portions of the State. There is no competent expert analysis to substantiate the self-serving assumptions by the affiants and the statements of counsel that surely this flooding is attributable to ODNR's spillway.

D. The written statements accompanying the photographs are unreliable and unfairly prejudicial.

Most of the submitted photographs have various statements or assertions labeled next to them. While Mr. Doner affirms that it is his handwriting, his affidavit does not assert that his written statements are truthful. The statements are not verified under oath, cannot be cross-examined, and therefore are not reliable as evidence. Some of the photographs (including those in Relators' Exhibit G) do not even depict Realtor

properties—a clearly prejudicial tactic. For example, one photograph in Exhibit G has the words “SR 49 car went around closed sign[,] curent (sic) swept car off road[,] driver almost drownd (sic.)”

The affidavit of the aerial photographer goes beyond authenticating his aerial photos. Remarkably, he claims that the photographs accurately depict the water flowing from ODNR’s spillway. However, there is no foundation to explain how he is able to offer this opinion on hydrology.

E. If Relators’ motion for leave is granted, the case must be re-opened to give Respondents a meaningful opportunity to respond.

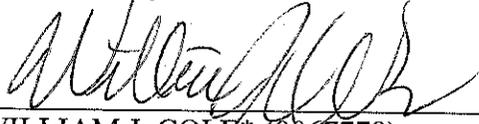
If Relators are permitted to supplement their evidence, the Respondents must have a meaningful opportunity to evaluate the evidence, including conducting depositions of those whose properties are depicted. Respondents must have an opportunity for their experts to evaluate and potentially rebut the lay opinions and speculation that is added into the evidentiary record. To allow the submission of such evidence at this stage of the litigation and not permit Respondents a meaningful opportunity to challenge and submit any desired rebuttal evidence would be highly prejudicial.

III. CONCLUSION

For the foregoing reasons, Relators’ motion for leave to supplement their evidence should be denied, and their proposed submissions should not be admitted into evidence or considered by the Court.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic and regular mail on March 21, 2011, to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, Kristi Kress Wilhelmy, and Martha C. Brewer, Vorys, Sater, Seymour & Pease, P.O. Box 1008, Columbus, OH 43216.


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