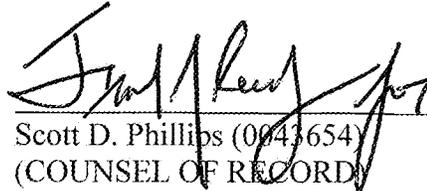




-Exhibit G: *ODNR v. Jerry W. Powell, et al.*, Mercer C.P. No. 12-CIV-206, *Judgment Entry – Decision on Motion to Exclude Evidence* (Mar. 12, 2014).

Respectfully submitted,



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COUNSEL FOR RESPONDENTS JAMES  
ZEHRINGER, DIRECTOR, OHIO  
DEPARTMENT OF NATURAL RESOURCES  
AND OHIO DEPARTMENT OF NATURAL  
RESOURCES

**PROOF OF SERVICE**

I hereby certify that a copy of Respondents' Notice of Additional Authorities to Be Relied Upon at Oral Argument was served by electronic and ordinary U.S. mail on April 23, 2014 on the counsel listed below:

Bruce L. Ingram (0018008)  
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---

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DEPARTMENT OF NATURAL RESOURCES  
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RESOURCES

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO EX REL JEAN A. KARR :  
REVOCABLE TRUST, et al.,

Case No. 13-CIV-084

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Relators

vs.

JAMES ZEHRINGER, DIRECTOR OHIO  
DEPARTMENT OF NATURAL  
RESOURCES, et al.,

*[Signature]*  
MERCER CO. CLERK OF COURTS  
OELUNJA, OHIO

JUDGMENT ENTRY - DECISION  
ON COMPLAINT FOR WRIT OF  
MANDAMUS

Respondents

---

This matter is before the court for decision on the complaint for writ of mandamus filed April 3, 2013, with memorandum in support. Respondents filed their answer to the complaint on June 5, 2013, and their memorandum in opposition on June 6, 2013. The court heard oral arguments on August 16, 2013, pursuant to notice of re-assignment filed July 29, 2013, at which relators appeared through their attorneys Thomas H. Fusonle and Joseph R. Miller, and respondents appeared through their chief legal officer of the Ohio Department of Natural Resources ("ODNR") Michael L. Williams, and respondents' attorneys Frank J. Reed, Jr. and Brian W. Fox.

Relators have requested a peremptory writ of mandamus compelling ODNR to make deposits in the amount of the State's appraisals in the appropriation proceedings against relators now pending in the Mercer County Court of Common Pleas, or in the alternative, a writ to show cause why ODNR should not be compelled to make deposits in the appropriation proceedings pursuant to Ohio Revised Code Chapter 163; their attorney fees incurred in this action; and such other and further relief as may be available either at law or in equity. The relators have attached affidavits of each of them identifying each as a defendant in an appropriation or condemnation action filed by ODNR in this court which involves property owned by each of them in Mercer County, Ohio, that ODNR has taken for a perpetual, permanent flowage easement by means of severe flooding caused by a spillway constructed by ODNR and verifying the facts relating to that lawsuit. Respondents'

defenses in their answer, among others, include that ODNR was and is not required to deposit the appraised value for relators' properties at the time of filing of its petition for appropriation in each condemnation proceeding.

The memoranda of the parties focus upon the three requirements that relators must establish for the court to issue the writ sought: that relators have a clear, legal right to relief sought; that there exists a clear, legal duty for respondents to take the action sought by relators; and there exists no ordinary or adequate remedy at law available to the relators for that relief. Respondents argue that there exists no clear, legal right nor a clear, legal duty and that, in fact, relators have adequate remedies at law. Respondents further claim that relators are barred from seeking relief through this action by the legal doctrines of "the law of the case" and *res judicata*, which relators not only dispute but also claim support their petition for the writ they seek.

A writ of mandamus is an order commanding a public officer or entity to perform an act that the law specifically imposes upon that officer or entity as a duty. (See R.C. § 2731.01.) As an extraordinary remedy, a writ of mandamus is only available where the court finds "that the relator has a clear, legal right to the relief prayed for, that the respondent is under a clear, legal duty to perform the requested act, and that relator has no plain and adequate remedy at law." *State ex rel Bd. Edn. of Middletown City School Dist. v. Butler Cty Budget Comm.*, 31 Ohio St. 3d 251, 510 N.E. 2d 383 (1987); R.C. § 2731.05. A court must exercise judicial discretion based upon all the facts and circumstances in the case before it in determining whether or not to order the writ be issued. *State ex rel Pressley v. Industrial Comm.* 11 Ohio St. 2d 141, 228 N.E. 2d 631 (1967).

Generally, the underlying facts that are relevant and material to the issues raised in this cause are not in dispute. Specifically, on December 4, 2012, respondent ODNR filed six appropriation petitions pursuant to the provisions of R.C. 163.01 *et seq.* in this court in

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which it alleged that the subject action was brought "pursuant to the Ohio Supreme Court's judgment entry dated December 1, 2011" and "in full compliance with the Ohio Supreme Court's mandamus order in *State ex rel. Doner v. Zody*, 130 Ohio St. 3d 446, 211-Ohio 6117." Factually, each petition alleges that the State is acquiring a permanent flowage easement depicted in a survey and a legal description attached to the complaint against each of the relators, setting forth what it believes to be a fair market value in a specific amount. These related case numbers are 12-CIV-207, 12-CIV-200, 12-CIV-201, 12-CIV-209, 12-CIV-206, and 12-CIV-208. In none of these cases did respondent ODNR file a notice of depositing nor did it deposit money equal to what it alleges to be the fair market value of the easement which deposit relators seek be mandated to be made by ODNR through the issuance of the writ herein sought.

In relators' first argument, they rely on the Ohio Supreme Court's decision in *Doner* wherein they claim the court determined that the State of Ohio has taken the subject properties for the permanent and perpetual flowage easement which was the basis for the writ issued in that case by which the respondents were ordered to initiate the subject eminent domain proceedings. Specifically, relators quote Justice Pfeifer's decision on behalf of the court that a deposit is required:

[A] deposit is made when the State is going to use the property as if it's theirs immediately ... [H]ere, there has been a legal determination that the State is using the property, that there has been a taking already ... that would put these cases squarely in the position — a deposit is required.

Relators conclude that based upon the application of *res judicata*, the State is not only required to initiate the condemnation actions to compensate the relators for those takings, but also to make a deposit as Justice Pfeifer stated was required.

Relators used the *Doner* case as foundational to their argument that they have a

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clear, legal right to have the money deposited and that the respondents are under a clear, legal duty to make those deposits. They next cite the Ohio Constitution, Article I, Section 19, which in part states that "...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."

Secondly, relators argue that *Doner* is foundational to establish the clear, legal duty to make the deposit pursuant to R.C. 163.06 which they claim requires a deposit to be made before possession of the property appropriated is taken. Specifically, that statute requires that a deposit be made "thereupon" when the State is allowed to "take possession of and enter upon the property appropriated." Relators argue that ODNR has no right to maintain the appropriation actions against relators without first making the deposit of compensation, and it is therefore in violation of both the Ohio Constitution and R.C. Chapter 163 by continuing in possession of the perpetual easements without having deposited the compensation it deems is owed to the relators in the condemnation actions.

In addition, relators point to R.C. 163.59(F) which they claim explicitly prohibits ODNR from requiring an owner to relinquish possession of his or her property until such a deposit is made. That section states in pertinent part:

[n]o 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.

ODNR argues that for a number of reasons, the request for the writ must be denied. Specifically, ODNR claims that R.C. 163.06(A) and the Ohio Constitution do not impose a duty upon it to deposit the money at the time it filed the appropriation proceedings

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MERCER CO. CLERK OF COURTS  
CELINA, OHIO

against the relators; secondly, that relators have an adequate remedy at law; third, ODNR disagrees with the relators' interpretation of the case law supporting relators' position; and finally, it claims that relators are barred from bringing this action by legal doctrines of the "law of the case" and *res judicata*.

With regard to the first argument, ODNR focuses on the specific language of R.C. 163.06(A) which provides:

A public agency...that qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated.

Specifically, ODNR argues that the use of the word "may" rather than "must" or "shall" makes any deposit permissive rather than mandatory.

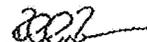
ODNR further argues that since it has *already taken* the relators' properties and the extent of the taking and amount due for the taking have not yet been determined, ODNR has no legal duty to deposit the monies at the time of ODNR's filing of the subject petitions. ODNR claims that none of the legal authorities cited by the relators establish any legal duty upon ODNR to deposit the money at the time of filing.

Secondly, ODNR argues that relators could have filed a counterclaim in the underlying condemnation proceedings seeking the declaratory relief sought by the petition filed herein. Somehow, they claim that that declaratory relief would be a legal remedy which relators have not pursued.

Next, ODNR points out that none of the legal authorities cited by the relators involve

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MERCER CO. CLERK OF COURTS  
CELINA, OHIO

factual situations where a public entity has already taken the property at issue, and because ODNR has already commenced the underlying appropriation actions to allow a jury to determine the amount that it owes the relators, the court should not exercise its discretion to order the writ.

Finally, ODNR claims that because the Supreme Court of Ohio did not provide relators with the relief they requested in a show cause motion in *Doner* when they argued that ODNR must "deposit at the date of filing of the appropriation proceeding ODNR's fair market value determination of just compensation to which relators are entitled," the doctrine of "the law of the case" should be honored by this court. That is, because the Ohio Supreme Court did not provide the very same relief requested by the relators in this action, they are now barred from bringing this petition by the doctrine of "the law of the case." In addition, ODNR claims that relators' claims are barred by *res judicata* since this action is secondary and subsequent to the *Doner* decision.

In its exercise of judicial discretion based upon all the facts and circumstances in this case, the court determines that the writ of mandamus shall be issued. Specifically, the court concludes that ODNR shall perform forthwith the act of depositing money equal to the value of the permanent and perpetual flowage easements of which it has taken possession in the matters it has initiated against the relators together with the damages, if any, to the residue of the individual relators' property as determined by ODNR, thereby securing its right of possession of the subject easement in each case, the use of which it now has as determined by the Supreme Court of Ohio consistent with its December 1, 2011, order in *State ex rel. Doner v. Zody*, 130 Ohio St. 3d 446, 211-Ohio-6117. In so deciding, the court has determined that the relators' right to require that the deposit be made is clear, and there is no valid reason that ODNR can give for not doing so.

The court specifically finds that relators have a clear and legal right to have said deposits made in money with the Clerk of this court in each of said matters that ODNR has

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CELINA, OHIO

a clear, legal duty to make said deposits; and that the relators have no plain and adequate remedy at law, said findings all being consistent with the decision of the Supreme Court of the State of Ohio in the *Doner* case authored by Justice Pfelfer. The facts are uncontroverted the ODNR has used the relators' properties without compensating them and without their permission or authorization which amounts to a *de facto* take of the properties to be valued in the condemnation cases now pending in this court.

In light of those pending matters, the court unilaterally grants to ODNR in the alternative that it comply with the writ hereby ordered to be issued by causing the deposits to be made on or before **Thursday, October 31, 2013**, or to appear before this court through its director on **Monday, November 4, 2013, at 1:30 p.m.**, to show cause why said deposits have not been made.

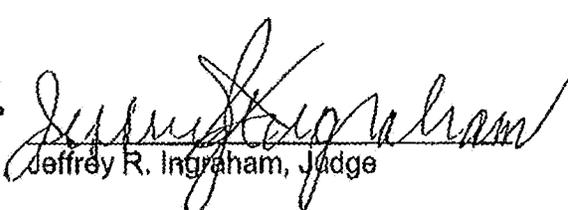
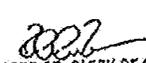
The court herein assigns this matter for an attorney conference for **Monday, November 4, 2013, at 1:30 p.m.**, at which time the court will assign the matter for further proceeding on the other relief requested by relators, including the amount of attorney fees incurred and for any other relief relators may seek.

The Clerk of this Court is directed to make personal service of this entry upon James Zehringer, Director of Ohio Department of Natural Resources, by the Mercer County Sheriff in accordance with R.C. 2731.08.

IT IS SO ORDERED.

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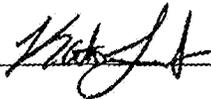
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JEFFREY R. INGRAHAM, JUDGE  
  
MERCER CO. CLERK OF COURTS  
OELINA, OHIO

**CERTIFICATE OF SERVICE**

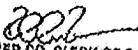
I hereby certify that a copy of the foregoing Judgment Entry was issued by regular U.S. mail to **Christopher L. Ingram, Esq., Bruce L. Ingram, Esq., Thomas H. Fusonle, Esq., Joseph R. Miller, Esq., and Martha C. Motley Brewer, Esq.,** (Attorneys for Relators), and **Scott D. Phillips, Esq., Brian W. Fox, Esq., and Frank J. Reed, Esq.,** (Attorneys for Respondents), at their respective addresses, on this ~~30~~ day of ~~September~~ <sup>October</sup>, 2013. A copy was also issued to the Mercer County Sheriff.

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**MERCER CO. CLERK OF COURTS  
CELINA, OHIO**

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO DEPARTMENT OF  
NATURAL RESOURCES

Case No. 12-CIV-207

Plaintiff

vs.

JUDGMENT ENTRY

DAVID D. KARR, et al.,

Defendants

Consistent with this court's entry issued simultaneously herewith in case no. 12-CIV-208, *State of Ohio Department of Natural Resources vs. Nelda G. Thomas, et al.*, the court hereby vacates the trial scheduled to commence in this matter on Wednesday, December 11, 2013, at 8:30 a.m., and schedules oral argument on the motion of plaintiff in this matter for leave to file an amended petition to appropriate flowage easement and fix compensation filed November 8, 2013, to which defendant Karr and Ransbottom filed their response on November 25, 2013, and plaintiff filed its reply on December 2, 2013, the same to be heard in both matters simultaneously on **Wednesday, December 11, 2013, at 9:00 a.m.**

IT IS SO ORDERED.  
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Jeffrey R. Ingraham, Judge

  
MERCER CO. CLERK OF COURTS  
CELINA, OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Judgment Entry was issued by regular U.S. mail to Frank J. Reed, Jr., Esq., Scott D. Phillips, Esq., and Brian W. Fox, Esq. (Attorneys for Plaintiff), Bruce L. Ingram, Esq., Thomas H. Fusonie, Esq., Joseph R. Miller, Esq., and Martha C. Motley Brewer, Esq. (Attorneys for Defendants Knapkes), and Amy B. Ikerd, Esq. (Attorney for Defendants Mercer Co. Auditor and Mercer Co. Treasurer), at their respective addresses, on this \_\_\_\_ day of December, 2013.

Exhibit B

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO DEPARTMENT OF  
NATURAL RESOURCES

Case No. 12-CIV-208

Plaintiff

vs.

NELDA G. THOMAS, et al.,

Defendants

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MERCER CO. CLERK OF COURTS  
CELINA, OHIO

**JUDGMENT ENTRY ON  
MOTION FOR LEAVE TO FILE  
AN AMENDED PETITION**

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This matter is before the court for decision on the motion for leave to file an amended petition by plaintiff State of Ohio, Department of Natural Resources (ODNR) filed October 11, 2013. Defendants Nelda G. Thomas and Gale A. Thomas (Thomas) filed their brief in opposition to the motion on October 31, 2013. On November 18, 2013, ODNR filed a motion to set oral argument which the court granted by entry filed December 3, 2013. Oral arguments were heard on December 11, 2013, pursuant thereto.

By its motion, ODNR seeks to incorporate a clear and accurate description of the property taken which appropriately accounts for the scientific effects of the redesigned spillway, that description being other than that set forth in its original petition of the boundaries of the floodwaters determined by a 2003 flood referenced by the Ohio Supreme Court when it determined that ODNR was liable for damage to Thomas' caused by the intermittent but inevitably recurring flooding of their property that resulted from the construction of a new western spillway on Grand Lake St. Marys in 1997. See *State ex rel. Doner v Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117 ("*Doner*"). Thomas claim that rather than seeking to amend its petition to "cure a defect or informality" in its original petition, ODNR is seeking to be relieved from what the Supreme Court of Ohio found to be its obligations under the law with regard to the flowage easement it had taken on and over the subject property. For the reasons stated herein, the court finds said motion to be not well-taken and without good cause.

Specifically, based upon the evidence submitted through the sworn testimony of George F. McMahon by affidavit and the exhibits attached thereto and the sworn testimony of Thomas H. Fusonie by affidavit to which are attached ten exhibits, the court concludes that to grant ODNR's motion and permit it to file an amended petition would be in conflict with the *Doner* decision issued by the Supreme Court of Ohio on December 1, 2011, as well as its subsequent contempt order decided December 5, 2012, in *State ex rel. Doner v. Zehringer*, 134 Ohio St. 3d 326, 2012 Ohio 5637.

As this court understands that Writ issued in *Doner*, this court is required to:

1. determine the amount of ODNR's taking or the extent of the take for each of the Relators in the *Doner* matter, including Thomases, whose properties have suffered continuing, persistent, frequent, and inevitable severe flooding since the construction in 1997 of the spillway on the western end of Grand Lake St. Marys; and
2. convene a jury to assess the value of the flood easement taken, that being based upon the value of the Relators' properties, in this case the Thomases' property, before the 1997 take and its lesser value after the take.

Consistent with that order, this court has required that metes and bounds descriptions be made of the subject flowage easements which have been taken by ODNR over the Relators' properties, specifically including the Thomases' property. In *Doner*, the Supreme Court found that the evidence established by clear and convincing evidence that construction of a new spillway on the western end of Grand Lake St. Marys and its lack of lake level management was causing one-hundred-year flooding events every ten years on Relators' properties, an example of which was the 2003 flood, the boundaries of which are described in the metes and bounds description attached to ODNR's original petition in this cause. On the issue of the value of the take, the court has attempted to provide a neutral forum for juries to assess the value of that take based upon the testimony offered by the property owners and expert appraisers for each party.

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This court finds that the procedure it has adopted in the number of cases that have been decided since the *Doner* decision has been consistent with and in compliance with the Supreme Court's decisions, including the writ issued December 1, 2011. In *Doner*, the Supreme Court referenced R.C. 163.05 as guidance to this court that its responsibility to determine the extent of the take is to describe in sufficient detail the property interest taken by its "nature, extent, and effect." ODNR has not sought to alter this procedure, including the use of a metes and bounds description of the 2003 flood boundary for each of the subject easements values of which juries have assessed in eminent domain proceedings commenced in this court as a result of the mandamus order issued by it in *Doner*.

What ODNR now seeks, in effect, is for this court to vacate a portion of the flowage easement as determined by the 2003 flood level boundary referenced by the Supreme Court to be a one-hundred-year flood level which it found to have been recurring as frequently as annually and generally not less often than every ten years. Furthermore, ODNR would have this court limit the take to something other than a permanent and perpetual easement to one that is instead temporary. What the Supreme Court has determined that ODNR has taken without properly compensating the various relator property owners are permanent flowage or flood easements on those properties of the relators, that is the right to flood those portions of the relators' properties that are subject to perpetual, persistent, frequent, and inevitable severe flooding, the boundary of which is evidenced by the 2003 flood level. In this case, it is this right taken by ODNR encumbering the Thomases' property that has decreased the property's value. How often ODNR makes use of the permanent flowage easement may be within ODNR's control if it exercises more effective lake level management; however, it does not reduce the extent of the take, nor has it reduced or limited the right that the Ohio Supreme Court has determined that ODNR has taken over the Thomases' property. If ODNR desires to reduce the size of the easement in this case below the 2003 flood level that the Supreme Court referenced in determining that ODNR had taken a flowage easement over the Thomases' property, it may have to seek relief in another forum other than this court which has determined the "nature, extent, and effect" of the flowage easement to be the 2003 flood boundary based

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MERCER CO., CLERK OF COURTS  
CELINA, OHIO

upon the *Doner* decision which, until now, has been accepted as appropriate by ODNR.

If the court were to grant ODNR's motion to permit it to amend the description of the flowage easement it has taken to be something less than the boundary of the 2003 flood, this court would be allowing ODNR to violate the Supreme Court's contempt order in the *Doner* matter issued December 5, 2012, wherein ODNR was ordered "to complete all appraisals on Relators' parcels for the 2003-flood-level cases within ninety (90) days and to file all appropriation cases for these parcels within one hundred twenty (120) days. For the remaining twenty (20) parcels that respondents claim they have not yet surveyed because they involve flooding above the 2003 flood level, respondents are ordered to institute declaratory-judgment actions in the Mercer County Common Pleas Court within thirty (30) days to determine the legal rights of the parties for those parcels." This Supreme Court order appears to affirm this court's position in describing the "nature, extent, and effect" of the take by use of a metes and bounds description of the boundary of the 2003 flood to sufficiently identify for the jury impaneled to assess the value of that take and for the appraisers who testify with regard to their opinions of the value of the take to do so with specificity.

In summary, the court concludes that ODNR is bound by the orders of the Supreme Court in *Doner*, including the contempt order; that ODNR is collaterally estopped from altering the description of the easement in an amended petition from that which it has represented to the Supreme Court it has used to comply with its contempt order in *Doner*; that it is bound by the determination by the Ohio Supreme Court that the flowage easement to be valued in this case is from flooding that is frequent, severe, and persistent and is therefore sufficient to constitute a take under law as determined by the Supreme Court in *Doner*; and finally, nothing in Chapter 163 of the Ohio Revised Code authorizes an amendment of the description of the easement taken under these circumstances.

Based upon the foregoing, ODNR's motion for leave to file an amended petition to appropriate flowage easement and to fix compensation filed October 11, 2013, is hereby denied. This matter shall proceed to trial before a jury beginning March 26, 2014, pursuant

**FILED**

**JAN 17 2014**

  
MERCER COUNTY CLERK OF COURTS

Judgment Entry on Motion for Leave to File an Amended Petition

to this court's scheduling entry filed simultaneously herewith.

This matter shall come on for a status report by telephone on **Friday, January 24, 2014, at 2:00 p.m.**, to be initiated by plaintiff's counsel pursuant to Notice of Assignment filed January 3, 2014.

IT IS SO ORDERED.

**FILED**

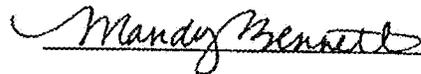
**JAN 17 2014**

  
MERCER CO. CLERK OF COURTS  
CELINA, OHIO

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Judgment Entry was issued by regular U.S. mail to **Scott D. Phillips, Esq., Frank J. Reed, Esq., Brian W. Fox, Esq.** (Attorneys for Plaintiff), **Bruce L. Ingram, Esq., Thomas H. Fusonie, Esq., Joseph R. Miller, Esq., and Martha C. Motley Brewer, Esq.** (Attorneys for Defendants Thomas), and **Amy B. Ikerd, Esq.** (Attorney for Defendants Mercer County Auditor and Mercer County Treasurer), at their respective addresses, on this 17<sup>th</sup> day of January, 2014.

XC: COURT

  
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IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO DEPARTMENT OF  
NATURAL RESOURCES

Plaintiff

vs.

JERRY W. POWELL, et al.,

Defendants

Case No. 12-CIV-206

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MERCER COUNTY CLERK OF COURT  
CELINA, OHIO

JUDGMENT ENTRY ON  
MOTION FOR LEAVE TO FILE  
AN AMENDED PETITION

This matter is before the court for decision on the motion for leave to file an amended petition by plaintiff State of Ohio, Department of Natural Resources (ODNR) filed January 15, 2014. Defendants Jerry W. Powell and Betty L. Powell (Powells) filed their brief in opposition to the motion on January 27, 2014.

By its motion, ODNR seeks to incorporate a clear and accurate description of the property taken which appropriately accounts for the scientific effects of the redesigned spillway, that description being other than that set forth in its original petition of the boundaries of the floodwaters determined by a 2003 flood referenced by the Ohio Supreme Court when it determined that ODNR was liable for damage to Powells caused by the intermittent but inevitably recurring flooding of their property that resulted from the construction of a new western spillway on Grand Lake St. Marys in 1997. See *State ex rel. Doner v Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117 ("*Doner*"). Powells claim that rather than seeking to amend its petition to "cure a defect or informality" in its original petition, ODNR is seeking to have this court reverse the decision of the Ohio Supreme Court which found ODNR's obligations under the law to compensate the relator property owners, including plaintiffs, for the flowage easement it had taken on and over the subject property and to contradict the court's contempt order filed December 5, 2012, and allow ODNR to contravene its Second Notice of Compliance with that contempt order filed April 12, 2013. For the reasons stated herein, the court finds said motion to be not well-taken and without good cause.

Specifically, based upon the evidence submitted through the sworn testimony of George F. McMahon by affidavit and the exhibits attached thereto and the sworn testimony of Thomas H. Fusonie by affidavit to which are attached thirteen exhibits, the court concludes that to grant ODNR's motion and permit it to file an amended petition would be in conflict with the *Doner* decision issued by the Supreme Court of Ohio on December 1, 2011, as well as its subsequent contempt order decided December 5, 2012, in *State ex rel. Doner v. Zehringer*, 134 Ohio St. 3d 326, 2012 Ohio 5637.

As this court understands that Writ issued in *Doner*, this court is required to:

1. determine the amount of ODNR's taking or the extent of the take for each of the Relators in the *Doner* matter, including Powells, whose properties have suffered continuing, persistent, frequent, and inevitable severe flooding since the construction in 1997 of the spillway on the western end of Grand Lake St. Marys; and
2. convene a jury to assess the value of the flood easement taken, that being based upon the value of the Relators' properties, in this case the Powells' property, before the 1997 take and its lesser value after the take.

Consistent with that order, this court has required that metes and bounds descriptions be made of the subject flowage easements which have been taken by ODNR over the Relators' properties, specifically including the Powells' property. In *Doner*, the Supreme Court found that the evidence established by clear and convincing evidence that construction of a new spillway on the western end of Grand Lake St. Marys and its lack of lake level management was causing one-hundred-year flooding events every ten years on Relators' properties, an example of which was the 2003 flood, the boundaries of which are described in the metes and bounds description attached to ODNR's original petition in this cause. On the issue of the value of the take, the court has attempted to provide a neutral forum for juries to assess the value of that take based upon the testimony offered by the

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GELINA, OHIO

property owners and expert appraisers for each party.

This court finds that the procedure it has adopted in the number of cases that have been decided since the *Doner* decision has been consistent with and in compliance with the Supreme Court's decisions, including the writ issued December 1, 2011. In *Doner*, the Supreme Court referenced R.C. 163.05 as guidance to this court that its responsibility to determine the extent of the take is to describe in sufficient detail the property interest taken by its "nature, extent, and effect." ODNR has not sought to alter this procedure in *ODNR v. Thomas*, this court's case number 12-CIV-208 and now in this case, of using of a metes and bounds description of the 2003 flood boundary for each of the subject easements values of which juries have assessed in eminent domain proceedings commenced in this court as a result of the mandamus order issued by it in *Doner* until recently.

What ODNR now seeks, in effect, is for this court to vacate a portion of the flowage easement as determined by the 2003 flood level boundary referenced by the Supreme Court to be a one-hundred-year flood level which it found to have been recurring as frequently as annually and generally not less often than every ten years. Furthermore, ODNR would have this court limit the take to something other than a permanent and perpetual easement to one that is instead temporary. What the Supreme Court has determined that ODNR has taken without properly compensating the various relator property owners are permanent flowage or flood easements on those properties of the relators, that is the right to flood those portions of the relators' properties that are subject to perpetual, persistent, frequent, and inevitable severe flooding, the boundary of which is evidenced by the 2003 flood level. In this case, it is this right taken by ODNR encumbering the Powells' property that has decreased the property's value. How often ODNR makes use of the permanent flowage easement may be within ODNR's control if it exercises more effective lake level management; however, it does not reduce the extent of the take, nor has it reduced or limited the right that the Ohio Supreme Court has determined that ODNR has taken over the Powells' property. If ODNR desires to reduce the size of the easement in this case below the 2003 flood level that the Supreme Court referenced in determining that ODNR had taken a flowage easement over the Powells' property, it may have to seek

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CELINA, OHIO

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relief in another forum other than this court which has determined the "nature, extent, and effect" of the flowage easement to be the 2003 flood boundary based upon the *Doner* decision which, until now, has been accepted as appropriate by ODNR.

If the court were to grant ODNR's motion to permit it to amend the description of the flowage easement it has taken to be something less than the boundary of the 2003 flood, this court would be allowing ODNR to violate the Supreme Court's contempt order in the *Doner* matter issued December 5, 2012, wherein ODNR was ordered "to complete all appraisals on Relators' parcels for the 2003-flood-level cases within ninety (90) days and to file all appropriation cases for these parcels within one hundred twenty (120) days. For the remaining twenty (20) parcels that respondents claim they have not yet surveyed because they involve flooding above the 2003 flood level, respondents are ordered to institute declaratory-judgment actions in the Mercer County Common Pleas Court within thirty (30) days to determine the legal rights of the parties for those parcels." This Supreme Court order appears to affirm this court's position in describing the "nature, extent, and effect" of the take by use of a metes and bounds description of the boundary of the 2003 flood to sufficiently identify for the jury impaneled to assess the value of that take and for the appraisers who testify with regard to their opinions of the value of the take to do so with specificity.

In summary, the court concludes as it did in *Thomas* that ODNR is bound by the orders of the Supreme Court in *Doner*, including the contempt order; that ODNR is collaterally estopped from altering the description of the easement in an amended petition from that which it has represented to the Supreme Court it has used to comply with its contempt order in *Doner*; that it is bound by the determination by the Ohio Supreme Court that the flowage easement to be valued in this case is from flooding that is frequent, severe, and persistent and is therefore sufficient to constitute a take under law as determined by the Supreme Court in *Doner*; and finally, nothing in Chapter 163 of the Ohio Revised Code authorizes an amendment of the description of the easement taken under these circumstances.

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CELINA, OHIO

Judgment Entry on Motion for Leave to File an Amended Petition

Based upon the foregoing, ODNR's motion for leave to file an amended petition to appropriate flowage easement and to fix compensation filed January 15, 2014, is hereby denied.

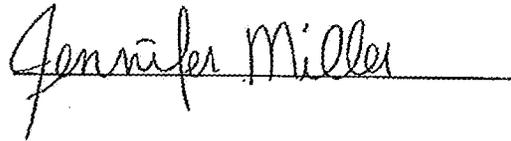
IT IS SO ORDERED.

  
Jeffrey R. Ingram, Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Judgment Entry was issued by regular U.S. mail to **Scott D. Phillips, Esq., Frank J. Reed, Esq., Brian W. Fox, Esq.** (Attorneys for Plaintiff), **Bruce L. Ingram, Esq., Thomas H. Fusonle, Esq., Joseph R. Miller, Esq., and Martha C. Motley Brewer, Esq.** (Attorneys for Defendants Thomas), and **Amy B. Ikerd, Esq.** (Attorney for Defendants Mercer County Auditor and Mercer County Treasurer), at their respective addresses, on this 12<sup>th</sup> day of February, 2014.

XC: Tara Pacorek

  
Jennifer Miller

XC: COURT

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MERCER COUNTY CLERK OF COURTS  
CELINA, OHIO

# Court of Appeals of Ohio

## Third Appellate District

### JUDGES

JOHN R. WILLAMOWSKI,  
PRESIDING JUDGE

RICHARD M. ROGERS,  
ADMINISTRATIVE JUDGE

STEPHEN R. SHAW

VERNON L. PRESTON

204 NORTH MAIN STREET  
LIMA, OHIO 45801-4462

PHONE (419) 223-1861

FAX (419) 224-3828

WWW.THIRD.COURTS.STATE.OH.US

### COUNTIES IN DISTRICT

ALLEN	MARION
AUGLAIZE	MERCER
CRAWFORD	PAULDING
DEFIANCE	PUTNAM
HANCOCK	SENECA
HARDIN	SHELBY
HENRY	UNION
LOGAN	VAN WERT

WYANDOT

GREGORY B. MILLER,  
COURT ADMINISTRATOR

February 13, 2014

SUSAN M. PRUETER,  
ADMINISTRATIVE COUNSEL

Mr. Scott D. Phillips, Esq.  
Frost Brown Todd, LLC  
9277 Centre Pointe Drive - Suite 300  
West Chester, OH 45069

Re: **CASE NO. 10-13-18**  
**STATE OF OHIO EX. REL JEAN A. KARR REVOCABLE TRUST, ET AL.,**  
**RELATORS-APPELLEES, v. JAMES ZEHRINGER, ET AL.,**  
**RESPONDENTS-APPELLANTS.**

To all Parties:

You are hereby notified that the above referenced case is assigned for oral argument or to be submitted without oral argument, on the following date:

**Tuesday, March 18, 2014 at 10:00 A.M.**  
**Third District Court of Appeals**  
**204 North Main Street, Lima, Ohio 45801**

The panel of Judges hearing this matter will be posted on the Court's web site at least fourteen days prior to the date of argument. Sup.R. 36.1.

Local Rule 13 - all requests for oral argument must be received in writing at the office of the Third District Court of Appeals, 204 North Main Street, Lima, Ohio 45801, by March 7, 2014. Failure to timely notify the Court in writing of a party's intent to present oral argument shall constitute a waiver of oral argument.

Very truly yours,

  
Gregory B. Miller  
Court Administrator

Notices sent to: Clerk of Courts  
Scott D. Phillips  
Thomas H. Fusonie

Exhibit E

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO DEPARTMENT OF  
NATURAL RESOURCES

Case No. 12-CIV-209

Plaintiff

vs.

TIMOTHY A. KNAPKE, et al.,

Defendants

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9:21  
MAR 07 2014

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281

JUDGMENT ENTRY ON  
MOTION FOR LEAVE TO FILE  
AN AMENDED PETITION

MERCER CO. CLERK OF COURTS  
CELINA, OHIO

This matter is before the court for decision on the motion for leave to file an amended petition by plaintiff State of Ohio, Department of Natural Resources (ODNR) filed December 11, 2013. Defendants Timothy A. Knapke and Ashleigh L. Knapke (Knapkes) filed their brief in opposition to the motion on December 20, 2013.

By its motion, ODNR seeks to incorporate a clear and accurate description of the property taken which appropriately accounts for the scientific effects of the redesigned spillway, that description being other than that set forth in its original petition of the boundaries of the floodwaters determined by a 2003 flood referenced by the Ohio Supreme Court when it determined that ODNR was liable for damage to Knapkes caused by the intermittent but inevitably recurring flooding of their property that resulted from the construction of a new western spillway on Grand Lake St. Marys in 1997. See *State ex rel. Doner v Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117 ("*Doner*"). Knapkes claim that rather than seeking to amend its petition to "cure a defect or informality" in its original petition, ODNR is seeking to have this court reverse the decision of the Ohio Supreme Court which found ODNR's obligations under the law to compensate the relator property owners, including plaintiffs, for the flowage easement it had taken on and over the subject property and to contradict the court's contempt order filed December 5, 2012, and allow ODNR to contravene its Second Notice of Compliance with that contempt order filed April 12, 2013. For the reasons stated herein, the court finds said motion to be not well-taken and without good cause.

Specifically, based upon the evidence submitted through the sworn testimony of George F. McMahon by affidavit and the exhibit attached thereto with appendix and the sworn testimony of Thomas H. Fusonie by affidavit to which are attached twelve exhibits, the court concludes that to grant ODNR's motion and permit it to file an amended petition would be in conflict with the *Doner* decision issued by the Supreme Court of Ohio on December 1, 2011, as well as its subsequent contempt order decided December 5, 2012, in *State ex rel. Doner v. Zehringer*, 134 Ohio St. 3d 326, 2012-Ohio-5637.

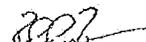
As this court understands that Writ issued in *Doner*, this court is required to:

1. determine the amount of ODNR's taking or the extent of the take for each of the Relators in the *Doner* matter, including Knapkes, whose properties have suffered continuing, persistent, frequent, and inevitable severe flooding since the construction in 1997 of the spillway on the western end of Grand Lake St. Marys; and
2. convene a jury to assess the value of the flood easement taken, that being based upon the value of the Relators' properties, in this case the Knapkes' property, before the 1997 take and its lesser value after the take.

Consistent with that order, this court has required that metes and bounds descriptions be made of the subject flowage easements which have been taken by ODNR over the relators' properties, specifically including the Knapkes' property. In *Doner*, the Supreme Court found that the evidence established by clear and convincing evidence that construction of a new spillway on the western end of Grand Lake St. Marys and its lack of lake level management was causing one-hundred-year flooding events every ten years on Relators' properties, an example of which was the 2003 flood, the boundaries of which are described in the metes and bounds description attached to ODNR's original petition in this cause. On the issue of the value of the take, the court has attempted to provide a neutral forum for juries to assess the value of that take based upon the testimony offered by the

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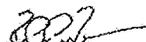
  
MERCER CO. CLERK OF COURTS  
CELINA, OHIO

property owners and expert appraisers for each party.

This court finds that the procedure it has adopted in the number of cases that have been decided since the *Doner* decision has been consistent with and in compliance with the Supreme Court's decisions, including the writ issued December 1, 2011. In *Doner*, the Supreme Court referenced R.C. 163.05 as guidance to this court that its responsibility to determine the extent of the take is to describe in sufficient detail the property interest taken by its "nature, extent, and effect." The court has previously issued decisions on motions by ODNR to alter this procedure in *ODNR v. Thomas*, this court's case number 12-CIV-208, and in *ODNR v. Powell*, this court's case number 12-CIV-206. In this case, ODNR again seeks to avoid the use of a metes and bounds description of the 2003 flood boundary for the flowage easement it has taken on Knapkes' approximately 124 acres of farm ground, the value of which flowage easement a jury will assess in these eminent domain proceedings in this case.

What ODNR now seeks, in effect, is for this court to vacate a portion of the flowage easement as determined by the 2003 flood level boundary referenced by the Supreme Court to be a one-hundred-year flood level which it found to have been recurring as frequently as annually and generally not less often than every ten years. Furthermore, ODNR would have this court limit the take to something other than a permanent and perpetual easement to one that is instead temporary. What the Supreme Court has determined that ODNR has taken without properly compensating the various relator property owners are permanent flowage or flood easements on those properties of the relators, that is the right to flood those portions of the relators' properties that are subject to perpetual, persistent, frequent, and inevitable severe flooding, the boundary of which is evidenced by the 2003 flood level. In this case, it is this right taken by ODNR encumbering the Knapkes' property that has decreased the property's value. How often ODNR makes use of the permanent flowage easement may be within ODNR's control if it exercises more effective lake level management; however, it does not reduce the extent of the take, nor has it reduced or limited the right that the Ohio Supreme Court has determined that ODNR has taken over the Knapkes' property. If ODNR desires to reduce the size of the easement

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CELINA, OHIO

in this case below the 2003 flood level that the Supreme Court referenced in determining that ODNR had taken a flowage easement over the Knapkes' property, it may have to seek relief in another forum other than this court which has determined the "nature, extent, and effect" of the flowage easement to be the 2003 flood boundary based upon the *Doner* decision which, until now, has been accepted as appropriate by ODNR.

If the court were to grant ODNR's motion to permit it to amend the description of the flowage easement it has taken to be something less than the boundary of the 2003 flood, this court would be allowing ODNR to violate the Supreme Court's contempt order in the *Doner* matter issued December 5, 2012, wherein ODNR was ordered "to complete all appraisals on Relators' parcels for the 2003-flood-level cases within ninety (90) days and to file all appropriation cases for these parcels within one hundred twenty (120) days. For the remaining twenty (20) parcels that respondents claim they have not yet surveyed because they involve flooding above the 2003 flood level, respondents are ordered to institute declaratory-judgment actions in the Mercer County Common Pleas Court within thirty (30) days to determine the legal rights of the parties for those parcels." This Supreme Court order appears to affirm this court's position in describing the "nature, extent, and effect" of the take by use of a metes and bounds description of the boundary of the 2003 flood to sufficiently identify for the jury impaneled to assess the value of that take and for the appraisers who testify with regard to their opinions of the value of the take to do so with specificity.

In summary, the court concludes as it did in *Thomas* and in *Powell* that ODNR is bound by the orders of the Supreme Court in *Doner*, including the contempt order; that ODNR is collaterally estopped from altering the description of the easement in an amended petition from that which it has represented to the Supreme Court it has used to comply with its contempt order in *Doner*; that it is bound by the determination by the Ohio Supreme Court that the flowage easement to be valued in this case is from flooding that is frequent, severe, and persistent and is therefore sufficient to constitute a take under law as determined by the Supreme Court in *Doner*; and finally, nothing in Chapter 163 of the Ohio Revised Code authorizes an amendment of the description of the easement taken under

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CELINA, OHIO

Judgment Entry on Motion for Leave to File an Amended Petition

these circumstances.

Based upon the foregoing, ODNR's motion for leave to file an amended petition to appropriate flowage easement and to fix compensation filed December 11, 2013, is hereby denied.

IT IS SO ORDERED.

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285

*Jeffrey R. Ingram*  
Jeffrey R. Ingram, Judge

*[Signature]*  
MERCER CO. CLERK OF COURTS  
GELINA, OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Judgment Entry was issued by regular U.S. mail to **Scott D. Phillips, Esq., Frank J. Reed, Esq., Brian W. Fox, Esq.** (Attorneys for Plaintiff), **Bruce L. Ingram, Esq., Thomas H. Fusonie, Esq., Joseph R. Miller, Esq., and Martha C. Motley Brewer, Esq.** (Attorneys for Defendants Thomas), and **Amy B. Ikerd, Esq.** (Attorney for Defendants Mercer County Auditor and Mercer County Treasurer), at their respective addresses, on this 7<sup>th</sup> day of March, 2014.

XC: COURT -  
XC: Angelita Bridges  
XC: Carolyn Payne  
XC: Tara Paciorek

*Darlene Scott*

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO DEPARTMENT OF  
NATURAL RESOURCES

Case No. 12-CIV-206

Plaintiff

vs.

JERRY W. POWELL, et al.,

Defendants

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MAR 12 2014

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MERCER CO. CLERK OF COURTS  
CELINA, OHIO

JUDGMENT ENTRY - DECISION ON  
MOTION TO EXCLUDE EVIDENCE

This matter is before the court for decision on motion of defendants Jerry W. Powell and Betty L. Powell, Trustees of the Powell Living Trust; and Paul A. Agnello and Rhonda E. Powell, Trustees of the Agnello Trust (Powells) to exclude George McMahon, Bryan Smith, and Lance Brown as witnesses and to exclude related testimony and documents filed February 10, 2014. The State of Ohio Department of Natural Resources (ODNR) filed their memorandum in opposition to Powells' motion to exclude evidence on February 25, 2014. Powells filed their reply on March 7, 2014.

Powells have filed their motion pursuant to Evid.R. 402, 403, 602, 701, and 801, as well in reliance on the court's inherent authority, claiming that this evidence that ODNR intends to present at trial and to which it objects is contrary to prior determinations of the Supreme Court of Ohio, prior rulings of this court in this matter and others, and prior judicial admissions of ODNR. ODNR claims that the evidence it intends to present at trial and that Powells seek to exclude is relevant and material to the value of the easement it has taken and which a jury yet-to-be convened in this case must assess by determining the difference between the pre- and post-appropriation fair market values of Powells' property; is consistent with this court's decision denying ODNR's motion for leave to file an amended petition that it must appropriate the easement on Powells' property to the extent of the 2003 flood elevation level; and finally, because ODNR's opinion as to the value of the flowage easement does not constitute a judicial admission. In their reply, Powells claim that by this evidence, ODNR is identifying and valuing a new and different taking that contradicts the Supreme Court of Ohio's decision and writ issued in *State ex rel. Doner v Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117 (*Doner*); that contradicts this court's prior jury instructions in other eminent domain proceedings already heard by this court for other cases initiated by ODNR pursuant to the writ issued in *Doner*; and that will result in inconsistent and unfair verdicts among the various *Doner* relators.

## Judgment Entry-Decision on Motion to Exclude Evidence

The evidence Powells seek to exclude includes the testimony of Bryan Smith, a State of Ohio registered professional surveyor; the testimony of George McMahon, a hydrologist; and the testimony of Lance Brown, a professional appraiser. Powells also seek to exclude any related testimony and documents concerning the testimony of these three witnesses.

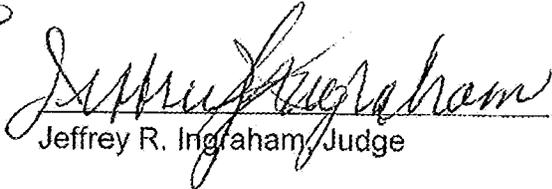
Although Powells' arguments may have some merit, the representations of ODNR as to the substance of and purpose of the testimony of these three witnesses establish that the court should at least consider any proposed testimony and evidence that ODNR may offer from these three witnesses to determine whether what Powells seek to exclude is relevant and material to the value of the take which is what the impaneled jury will be instructed to assess. ODNR claims and Powells do not deny that Powells have not conducted discovery depositions of these three proposed witnesses, and therefore, what Powells anticipate may be the testimony of each of these three witnesses may be different from what they now believe it to be, and some or all of the testimony of each of the witnesses may be subject to exclusion at the appropriate time. However, without being able to review the proposed testimony of any of the three witnesses Powells seek to exclude beyond their affidavits, the court is unable to determine that the testimony sought to be excluded is not relevant and material to the issue of the valuation of the take consistent with *Doner* and this court's prior orders in this case and those of other *Doner* relators.

Based upon the foregoing, the court finds that Powells' motion to exclude the testimony of George McMahon, Bryan Smith, and Lance Brown as witnesses and to exclude related testimony and documents at trial is presently without good cause, and it is therefore hereby denied.

This matter shall come before the court for a status report by telephone on **Thursday, March 13, 2014, at 3:30 p.m.**, concurrently with the telephone conference scheduled in related matter *ODNR v Thomas*, Case No. 12-CIV-208, during which it shall be the intention of the court to determine how the parties intend to proceed so that this matter may be rescheduled for trial since, with the filing of the motion to exclude by Powells on February 10, 2014, nine days prior to when the jury trial was scheduled to commence on February 19, 2014, the court necessarily vacated the trial. The court desires to re-establish an appropriate trial date or otherwise assign the matter for further proceedings as counsel may deem appropriate, including additional discovery.

IT IS SO ORDERED MAR 12 2014

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MERCER CO. CLERK OF COURTS  
CELINA, OHIO

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Jeffrey R. Ingraham, Judge

Judgment Entry-Decision on Motion to Exclude Evidence

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Judgment Entry was issued by regular U.S. mail to **Scott D. Phillips, Esq., Frank J. Reed, Esq., Brian W. Fox, Esq.** (Attorneys for Plaintiff), **Bruce L. Ingram, Esq., Thomas H. Fusonie, Esq., Joseph R. Miller, Esq., and Martha C. Brewer Motley, Esq.** (Attorneys for Defendants Thomas), and **Amy B. Ikerd, Esq.** (Attorney for Defendants Mercer County Auditor and Mercer County Treasurer), at their respective addresses, on this 13<sup>th</sup> day of March, 2014.

*XC: Tara Paciorek*

**XC: COURT**

ck

*Joseph R. Miller*

**FILED**

**MAR 12 2014**

*[Signature]*  
**MERCER CO. CLERK OF COURTS  
CELINA, OHIO**