

IN THE SUPREME COURT OF OHIO

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

Relators,

v.

JAMES ZEHRINGER, DIRECTOR,
OHIO DEPARTMENT OF
NATURAL RESOURCES, ET AL.,

Respondents.

Case No.: 2009-1292

RELATORS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO EVIDENCE

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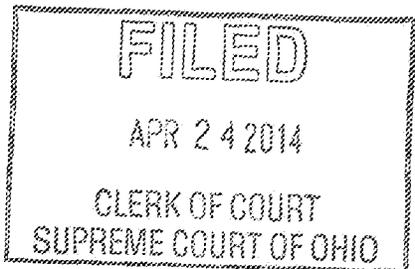
Attorneys for Relators

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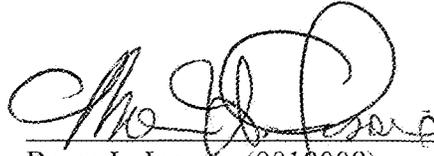
Relators respectfully submit this motion for leave to file a supplement to the evidence (supplement attached hereto as Exhibit 1) regarding Relators' pending Motion for an Order for Respondents to Show Cause Why They Should Not Be Held in Contempt and an Order Setting a Court-Supervised Mediation ("Show Cause Motion"). This previously unavailable evidence is a new petition filed by Respondent, the Ohio Department Of Natural Resources ("ODNR"), yesterday (April 23, 2014) and was not served on Relators' counsel until 4:18 PM that day.

ODNR filed this new petition to appropriate a flowage easement over property owned by William Ransbottom and the Jean A. Karr Revocable Trust. As set forth in the Show Cause Motion, ODNR originally filed a petition to appropriate an easement over this property on December 3, 2012, but dismissed that petition one week before trial, on December 4, 2013, after the trial court indicated that it intended to deny ODNR's motion to amend their petition. (Show Cause Motion, at 12 – 13.) Now, four months later, ODNR has filed this new petition based on a different methodology, survey, appraisal, and good faith offer.

Unlike the previously filed and dismissed petition, the new petition attempts to appropriate a flowage easement based on a 10-year flood event and not the 2003 flood. Unlike the previously filed and dismissed petition, ODNR now seeks to appropriate only the alleged "increase" in flooding caused by the 1997 spillway replacement. According to the survey attached to the new petition based on a 10-year flood event, ODNR believes that the new spillway caused zero additional acres of flooding and a "0.0 feet" increase in depth of flooding, that the "Maximum Flood Elevation" is the same under the old and new spillway, and the easement does not purport to take into account any increase in the frequency of flooding.

Because this new evidence is highly relevant to the pending Show Cause Motion and was not available to Relators until 4:18 PM yesterday, Relators request that this Court grant their Motion for Leave to File Supplement to Evidence.

Respectfully submitted,



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(Counsel of Record)

Joseph R. Miller (0068463)

Thomas H. Fusonie (0074201)

Martha Brewer Motley (0083788)

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Attorneys for Relators

CERTIFICATE OF SERVICE

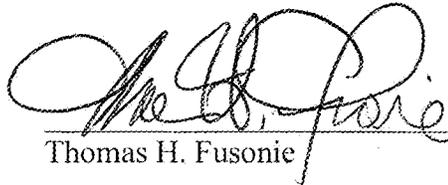
The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via U.S. Mail postage prepaid and e-mail, this 24th day of April, 2014:

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mblickensderfer@fbtlaw.com

Attorneys for Respondents



Thomas H. Fusonie

IN THE SUPREME COURT OF OHIO

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

Relators,

v.

JAMES ZEHRINGER, DIRECTOR,
OHIO DEPARTMENT OF
NATURAL RESOURCES, ET AL.,

Respondents.

Case No.: 2009-1292

AFFIDAVIT OF THOMAS H. FUSONIE

State of Ohio

ss:

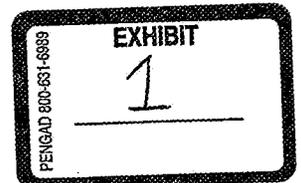
County of Franklin

I, Thomas H. Fusonie, being first duly cautioned and sworn, state that I have personal knowledge of the facts set forth herein, and hereby depose and state as follows:

1. I am a partner with the law firm Vorys, Sater, Seymour and Pease LLP and I am one of counsel for Relators in this matter.

2. I was one of the counsel of record for the Relators in the original mandamus action before the Ohio Supreme Court, captioned as *State ex rel. Doner v. Zody*, and the subsequent related contempt proceedings before this Court, captioned as *State ex rel. Doner v. Zehringer*.

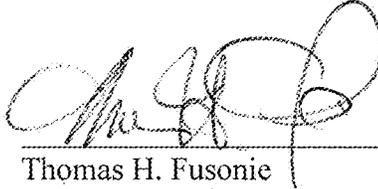
3. I am also a counsel of record for the *Doner* Relators in each appropriation proceeding instituted by ODNR in the Mercer County Court of Common Pleas as a result of the Writ issued by this Court.



4. On behalf of Relators William Ransbottom and the Jean A. Karr Revocable Trust, I received from ODNR a copy of a new good faith offer on December 23, 2013. This new good faith offer was based on a different appraisal than the one used to create the original good faith offer made to these Relators and, as a result, ODNR offered these Relators only 26% of the amount of the original good faith offer.

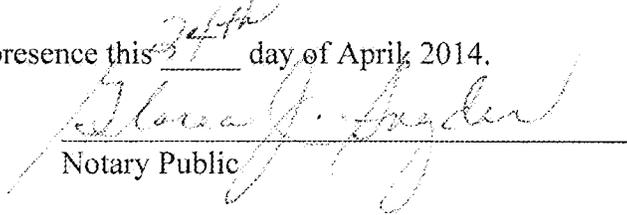
5. On April 23, 2014, at 4:18 PM, I received from ODNR's counsel a Petition to Appropriate Flowage Easement and to Fix Compensation over property owned by William Ransbottom and the Jean A. Karr Revocable Trust. A true and accurate copy of the Petition is attached hereto as Exhibit A.

Further, Affiant sayeth naught.



Thomas H. Fusonie

Sworn to and subscribed in my presence this 23rd day of April, 2014.



Notary Public



GLORIA J. SNYDER
Notary Public, State of Ohio
My Commission Expires
12-18-2018

Scott D. Phillips
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513.870.0999 (f)
sphillips@fbtlaw.com

VIA E-MAIL AND REGULAR U.S. MAIL

April 23, 2014

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Amy B. Ikerd, Esq.
Assistant Prosecutor
Mercer County Prosecuting Attorney's Office
119 N. Walnut Street
Celina, OH 45822

Re: State of Ohio Department of Natural Resources v. David D. Karr, et al.
The Common Pleas Court of Mercer County, Ohio; Case No.: 14-CIV-05

Ladies and Gentlemen:

Enclosed please find a filed-stamped copy of ODNR's *Petition To Appropriate Flowage Easement And To Fix Compensation* that was filed with the Court today in the above-referenced case.

If you have any questions, please feel free to call.

Very truly yours,

FROST BROWN TODD LLC

Scott D. Phillips/bjy
Scott D. Phillips

SDP/ks
Enclosure

cc: Brian W. Fox, Esq. (w/encl.) (via e-mail)
Frank J. Reed, Jr., Esq. (w/encl.) (via e-mail)
Matthew C. Blickensderfer, Esq. (w/encl.) (via e-mail)

IN THE COURT OF COMMON PLEAS
MERCER COUNTY, OHIO

STATE OF OHIO, DEPARTMENT OF
NATURAL RESOURCES
2045 Morse Road, Building D-3
Columbus, Ohio 43229

Plaintiff,

vs.

DAVID D. KARR, TRUSTEE
5474 E. Hinsdale Circle
Denver, Colorado 80122

AND

WILLIAM J. RANSBOTTOM
410 Corona Avenue
Oakwood, Ohio 45419

AND

RANDY GRAPNER
Mercer County Auditor
101 N. Main Street, Room 105
Celina, Ohio 45822

AND

DAVID KAISER
Mercer County Treasurer
101 N. Main Street, Room 201
Celina, Ohio 45822

Defendants.

SERVE ALSO:

David D. Karr
4751 E. Costilla Avenue, Apt. 137
Centennial, Colorado 80122

Case No.: 14-CIV-045

Judge Jeffrey R. Ingraham

PETITION TO APPROPRIATE
FLOWAGE EASEMENT AND TO FIX
COMPENSATION

FILED

APR 23 2014


MERCER CO. CLERK OF COURTS
CELINA, OHIO

Pursuant to the Ohio Supreme Court's December 1, 2011 *Judgment Entry* issued in *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117 ("*Doner*"), Plaintiff State of Ohio, Department of Natural Resources ("ODNR"), brings this *Petition to Appropriate Flowage Easement and To Fix Compensation* (this "*Petition*"), and hereby alleges as follows:

1. ODNR is a public agency as defined in R.C. 163.01.
2. This *Petition* is brought by ODNR pursuant to its authority under R.C. 1501.01, R.C. 163.01, *et seq.*, and in full compliance with *Doner*.
3. Defendants are those persons or entities, based upon preliminary review of title or otherwise, who may possess legal interest(s) in property located in Mercer County, Ohio (as more particularly described as Mercer County Auditor's Parcel Nos. 28-013400.0000 and 28-013500.0000) over a portion of which the herein flowage easement is being acquired.
4. Defendants' loss of property is not a permanent, complete conversion of private property for public use, which would require an appropriation of a fee simple interest in Defendants' property.
5. Instead, any increase in flooding on Defendants' property that does occur creates only a temporary loss of Defendants' use of the property, which would justify an appropriation of a flowage easement interest in their property.
6. To date, ODNR has been unable to agree with Defendants on the terms for conveyance of a flowage easement.
7. In advance of filing this *Petition*, ODNR has complied with the requirements of R.C. 163.04.

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8. The purpose of this *Petition* is to acquire a flowage easement, free and clear of all liens, claims and encumbrances, and to fix compensation, in full compliance with the Ohio Supreme Court's December 1, 2011 *Judgment Entry* in *Doner*.

COUNT I

(10-Year Flood Event)

9. This Court recently determined in the related cases of *ODNR v. Nelda G. Thomas, et al.*, Mercer C.P. No. 12-CIV-208, *ODNR v. Jerry W. Powell, et al.*, Mercer C.P. No. 12-CIV-206, and *ODNR v. Timothy Knapke, et al.*, Mercer C.P. No. 12-CIV-209 that the post-appropriation extent of the take for valuation purposes is the 2003 flood line. See *Thomas, Judgment Entry on Motion for Leave to File Amended Complaint* (Jan. 17, 2014); *Powell, Judgment Entry on Motion for Leave to File Amended Complaint* (Feb. 12, 2014); *Knapke, Judgment Entry on Motion for Leave to File Amended Complaint* (Mar. 7, 2014).

10. ODNR respectfully disagrees with this Court's determination and asserts that the appropriate determination of the post-appropriation extent of the take for valuation purposes is the measure of a 10-year flood event.

11. In order to preserve this issue for appeal while allowing the case to proceed to trial as expeditiously as possible, ODNR proffers the 10-year flood event-based flowage easement to be appropriated in this case as that described in Exhibit A, attached hereto and fully incorporated by reference.

COUNT II
(2003 Flood Line)

12. Alternative to the above, in the event this Court dismisses Count I or otherwise determines in this case as it did in *Thomas, Powell, and Knapke* that the post-appropriation extent of the take for valuation purposes is the 2003 flood line, the 2003 flood line-based flowage easement to be appropriated in this case is that described in Exhibit B, attached hereto and fully incorporated by reference.

WHEREFORE, ODNR prays this Court will:

- A. Enter a judgment on Count I or, in the alternative Count II, ordering the conveyance of a perpetual flowage easement in the subject property to ODNR;
- B. Cause a jury to be impaneled to make inquiry into and assess compensation to be paid for the appropriation of the permanent flowage easement; and
- C. Grant ODNR all such other relief to which it may be entitled.

Respectfully submitted,

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OF COUNSEL:

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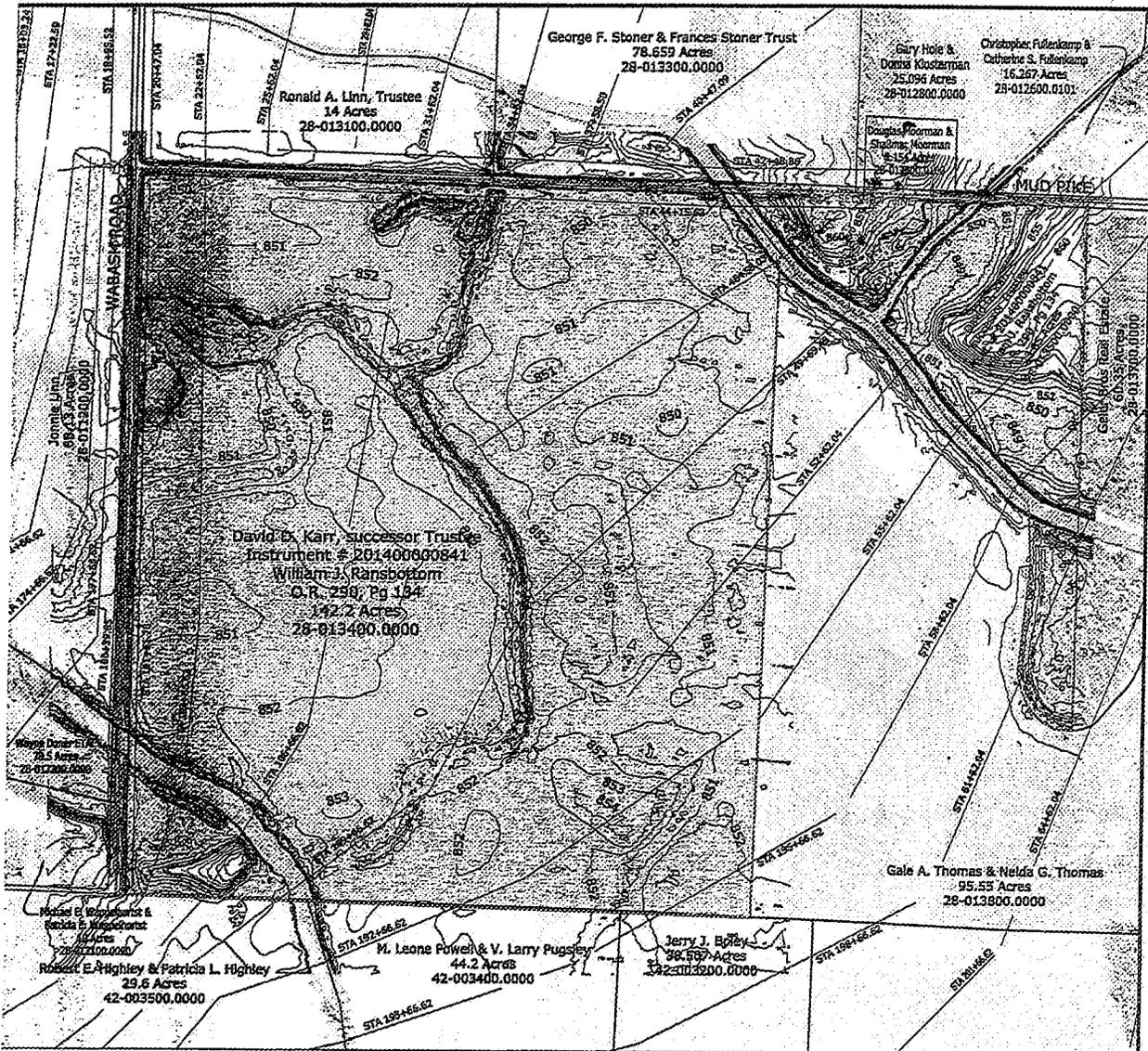
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(614) 464-1737 (facsimile)

- 4 -

State of Ohio v. David D. Karr, Case No.: ()

*Petition To Appropriate Flowage
Easement And To Fox
Compensation*



From April 2014 Summary Report from ARCADIS U.S., Inc

River	HEC-RAS Station	Maximum Flood Elevation (feet) NAVD 88	
		Old Spillway	New Spillway
Station 20+47.04 Wabash Road			
Beaver	20+47.04	852.9	852.9
Beaver	22+62.04	852.9	853.0
Beaver	25+62.04	853.0	853.0
Beaver	28+62.04	853.0	853.0
Beaver	31+62.04	853.0	853.0
Beaver	34+62.04	853.1	853.1
Beaver	37+58.50	853.1	853.1
Beaver	40+47.09	853.1	853.1
Beaver	42+46.86	853.2	853.2
43+34.889 Mud Pike			
Beaver	44+15.63	853.4	853.4
Beaver	46+58.03	853.5	853.4
Beaver	49+69.48	853.5	853.5
Beaver	52+62.04	853.5	853.5
Beaver	55+62.04	853.5	853.5
Beaver	58+62.04	853.5	853.5
Beaver	61+62.04	853.6	853.5
180+84.60 Wabash Rd			
Wabash	181+51.70	855.7	855.7
Wabash	183+66.62	855.8	855.8
Wabash	186+66.62	855.9	855.9
Wabash	189+66.62	855.9	855.9
Wabash	192+66.62	856.0	856.0
Wabash	195+66.62	856.0	856.0
Wabash	198+66.62	856.1	856.1

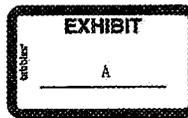
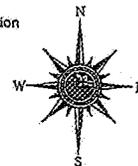
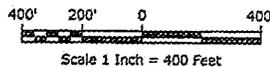
Acreage in Light Blue: APN 28-013400.0000 - 139.8 Acres
APN 28-013500.0000 - 14.2 Acres
TOTAL ACRES - 154.0 Acres

Easement for the intermittent, but inevitably recurring, increase in depth and duration of flooding. As determined in the April 2014 Summary Report by ARCADIS U.S., Inc., this land flooded during a 10-year flood when the pre-1997 spillway was in place, but floods for a longer duration (approximately 1.03 days longer on Parcel 28-013400.0000 and approximately 1.06 days longer on parcel 28-013500.0000) and to an increased maximum depth (0.0 feet deeper on average) during a 10-year flood with the post-1997 spillway in place.

This exhibit is a description of the use which requires the appropriation pursuant to Section 163.05(G) of the Ohio Revised Code.

Note: Cross Sections and Stations shown hereon are from the April 2014 Summary Report by ARCADIS U.S., Inc.

Aerial Photography shown hereon is provided by the Ohio Geographically Referenced Information Program. The OSIP digital orthoimagery was collected during the months of March and April 2012.



BY: *Robert L. Sneller* 4/22/14
 Robert L. Sneller, P.S. Date
 Professional Surveyor No. 6738

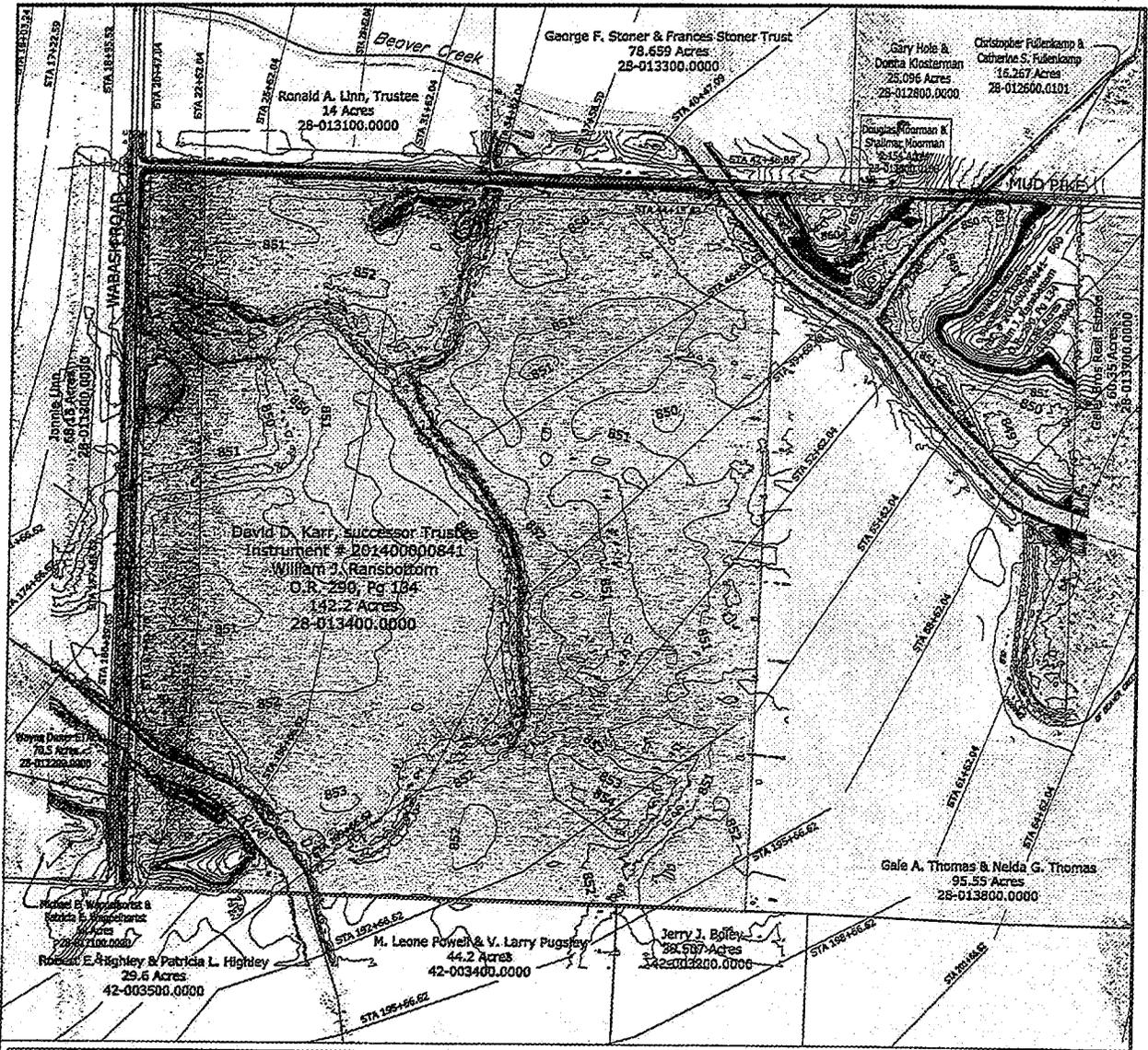


Office of Real Estate
 Ohio Department of Natural Resources
 2045 Morse Road, Bldg. E-2
 Columbus, OH 43220

Sec. 34, Twp 5 S, Range 1 E
 Liberty Township
 Mercer County, Ohio

PROJECT NUMBER: Doner Case Easements
 DRAWING NUMBER: Karr-Ransbottom
 DATE: 04/15/2014
 DRAWN BY: BJS
 REVISED BY: N/A
 DATE REVISED: N/A

DAVID KARR, TRUSTEE & WILLIAM RANSBOTTOM
 Flowage Easement Exhibit



From March 2014 Summary Report from ARCADIS U.S., Inc.

River	HEC-RAS Station	Maximum Flood Elevation (feet) NAVD 88	
		Old Spillway	New Spillway
Station 20+47.04 Wabash Road			
Beaver	20+47.04	853.4	854.0
Beaver	22+62.04	853.5	853.5
Beaver	25+62.04	853.5	854.3
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Beaver	37+59.50	853.7	854.5
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Beaver	42+46.86	853.8	854.6
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Beaver	55+62.04	854.3	855.3
Beaver	58+62.04	854.3	855.3
Beaver	61+62.04	854.3	855.3
180+84.60 Wabash Rd			
Wabash	181+51.70	855.5	855.4
Wabash	183+66.62	855.6	855.5
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Wabash	189+66.62	855.7	855.7
Wabash	192+66.62	855.7	855.7
Wabash	195+66.62	855.8	855.8
Wabash	198+66.62	855.8	855.9

Acreeage in Dark Blue: APN 28-013400.0000 - 0.3 Acres
APN 28-013500.0000 - 1.0 Acres
TOTAL ACRES - 1.3 Acres

Flowage Easement for the increase in area flooded during the 2003 flood.
 As determined in the March 2014 Summary Report by ARCADIS U.S., Inc., this land would not have flooded during the 2003 flood if the old (pre-1997) spillway had been in place, but did flood during the 2003 flood with the new (post-1997) spillway in place.

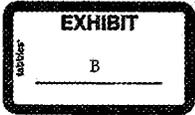
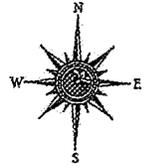
Acreeage in Light Blue: APN 28-013400.0000 - 139.8 Acres
APN 28-013500.0000 - 15.1 Acres
TOTAL ACRES - 154.9 Acres

Easement for the increase in depth and duration of flooding during the 2003 flood.
 As determined in the March 2014 Summary Report by ARCADIS U.S., Inc., this land would have flooded during the 2003 flood even if the old (pre-1997) spillway had been in place, but it flooded for a longer duration (approximately 2.71 days longer on Parcel #28-013400.0000 and approximately 2.32 days longer on Parcel #28-013500.0000) and to an increased maximum depth (0.6 feet deeper on average on Parcel #28-013400.0000 and on and 1.0 feet deeper on average on Parcel #28-013500.0000) during the 2003 flood with the new (post-1997) spillway in place.

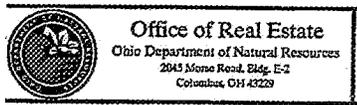
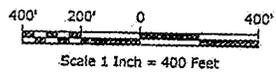
This exhibit is an alternative description of the use which the Mercer County Court of Common Pleas has determined requires the appropriation pursuant to Section 163.05(G) of the Ohio Revised Code.

Note: Cross Sections and Stations shown hereon are from the March 2014 Summary Report by ARCADIS U.S., Inc.

Aerial Photography shown hereon is provided by the Ohio Geographically Referenced Information Program. The OSIP digital orthoimagery was collected during the months of March and April 2012.



BY: *Robert L. Sneller* 5/22/14
 Robert L. Sneller, P.S. Date
 Professional Surveyor No. 6738



Sec. 34, Twp 5 S, Range 1 E
 Liberty Township
 Mercer County, Ohio

PROJECT NUMBER: Doner Case Easements
 DRAWING NUMBER: Karr-Ransbottom
 DATE: 04/15/2014
 DRAWN BY: BJS
 REVISED BY: N/A
 DATE REVISED: N/A

DAVID KARR, TRUSTEE & WILLIAM RANSBOTTOM
 Flowage Easement Exhibit