

IN THE SUPREME COURT OF OHIO

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

: Case No. 2009-1292

Relators,

v.

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

Respondents.

RESPONDENT'S MEMORANDUM IN RESPONSE TO RELATORS' MOTION FOR
LEAVE TO FILE SUPPLEMENT TO EVIDENCE

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APR 28 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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ZEHRINGER, DIRECTOR, OHIO
DEPARTMENT OF NATURAL
RESOURCES AND OHIO DEPARTMENT
OF NATURAL RESOURCES

As this Court is well aware, in *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, at ¶¶ 72, 77, 83, and 86, this Court found that the “relators have established that respondents, by their actions, effected a taking of at least some of their property.” Further, this Court ordered ODNR “to commence appropriation proceedings to determine the amount of their taking of the property,” and that “[t]he determination of the extent of the taking will be made by the court presiding over the appropriation proceeding.” ODNR continues to amend petitions in the trial court to properly comply with these directives. Recently, Relators have asked this Court for permission to supplement the evidence in the record with one of ODNR’s newly-filed petitions. In response, ODNR submits this *Memorandum in Response to Relators’ Motion for Leave to File Supplement to Evidence*.

For their response, ODNR states simply that it does not object to Relators’ *Motion* being granted, but do object to Relators’ mischaracterization of the evidence sought to be supplemented. Relators’ *Motion* misstates that the new petition filed in *ODNR v. David D. Karr, Trustee, et al.*, Mercer C.P. No 14-CIV-045 “attempts to appropriate a flowage easement based on a 10-year flood event *and not the 2003 flood*.” (Emphasis added). This is categorically untrue. Even a cursory review of the new petition plainly reveals that it contains two separate, alternative claims – one based on a 10-year flood event and the second based on the 2003 flood event. *Karr, Petition to Appropriate Flowage Easement and to Fix Compensation* (Apr. 23, 2014) (the “*Petition*”), ¶¶ 9-11 (Count I) and ¶ 12 (Count II).¹ Paragraph 12 of the *Petition* explicitly states “in the event [the trial 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*

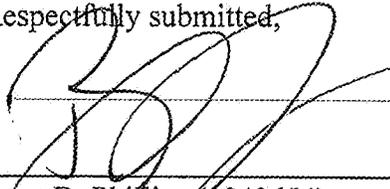
¹ Respondents attach hereto as “Exhibit 1” a color copy of its proposed flowage easements in *Karr*, which clearly depict the increase in flooding based on the 10-year flood event and the 2003 flood event.

appropriated in this case is that described in Exhibit B, attached hereto and fully incorporated by reference.” (Emphasis added). Clearly, the *Petition* offers compensation, in an alternative claim, on more than just a 10-year flood event increase in flooding.

Relators’ *Motion* also mischaracterizes the effect of the new *Petition*’s 10-year flood event claim, arguing that no additional flood damage occurred and, in turn, suggesting that no compensation would be owed to the *Karr* landowners. Again, this is categorically untrue. As an initial matter, the property that is the subject of the *Karr* petition is located nearly 10 miles from the spillway. Naturally, then, this Court should anticipate that the increase in flooding caused by the spillway reconstruction becomes more attenuated the farther removed the parcel is from the spillway. The hydrological evidence merely confirms what common sense would otherwise suggest. Moreover, as explicitly stated in the 10-year flood event-based easement attached to the *Petition* as Exhibit A, “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 28.013400.000 . . .*” It is this increase in duration for which ODNR is seeking to compensate the *Karr* landowners under Count I of the *Petition*.

In other words, ODNR agrees to the relevancy of the new *Petition* for purposes of the pending *Show Cause Motion*; however, ODNR requests that this Court review the entirety of the new *Petition*, and not simply Relators’ mischaracterized, self-serving summary thereof.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of Respondents' Memorandum in Response to Relators'

Motion for Leave to File Supplement to Evidence was served by electronic and ordinary U.S.

mail on April 28, 2014 on the counsel listed below:

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RESOURCES



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+15.65	853.4	853.4
Beaver	46+58.09	853.5	853.4
Beaver	49+59.48	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	281+51.70	855.7	855.7
Wabash	283+56.62	855.8	855.8
Wabash	288+68.62	855.9	855.9
Wabash	289+66.62	855.9	855.9
Wabash	292+66.62	856.0	856.0
Wabash	295+66.62	856.0	856.0
Wabash	298+66.62	856.1	856.1

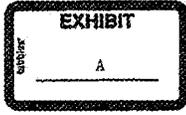
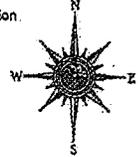
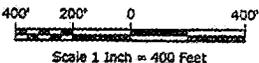
Acres in Light Blue: APN 28-013400.0000 - 139.8 Acres
APN 28-013500.0000 - 14.2 Acres
TOTAL ACRES - 154.0 Acres

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

Exhibit 1

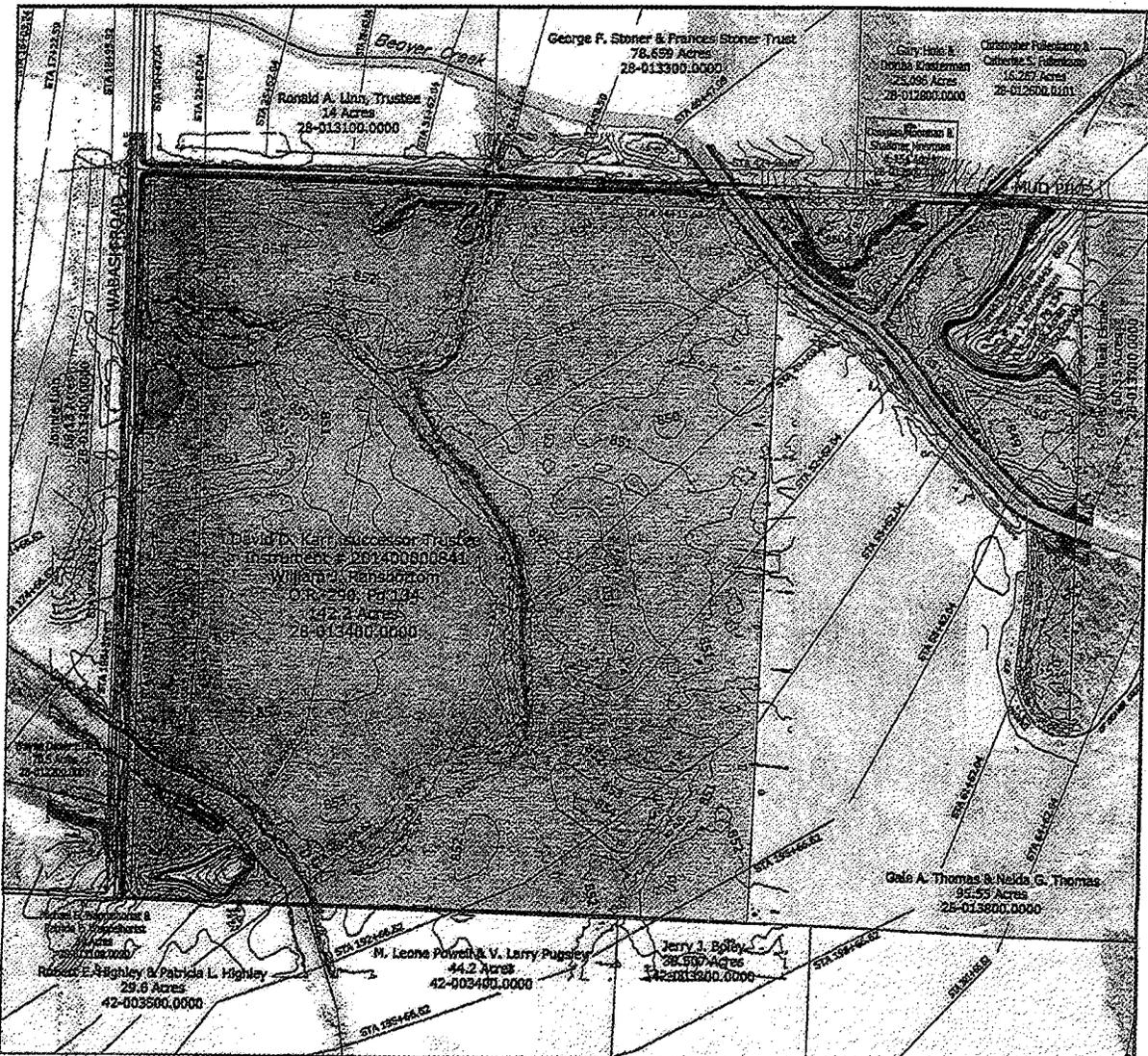


Office of Real Estate
 Ohio Department of Natural Resources
 2945 Morse Road, Bldg. 52
 Columbus, OH 43229

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

PROJECT NUMBER: Dupper Case Easements
 DRAWING NUMBER: Kerr-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	HIC-RAS Station	Maximum Flood Elevation (feet)	
		Old Spillway	New Spillway
Station 20+47.04 Wabash Road			
Beaver	20+47.04	853.4	854.0
Beaver	23+62.04	853.5	853.5
Beaver	25+62.04	853.5	854.3
Beaver	28+62.04	853.6	854.3
Beaver	31+62.04	853.6	854.4
Beaver	34+62.04	853.7	854.4
Beaver	37+58.50	853.7	854.5
Beaver	40+47.09	853.8	854.5
Beaver	43+46.85	853.8	854.6
42+34.889 Mud Pile			
Beaver	44+15.83	854.2	855.2
Beaver	46+58.03	854.2	855.3
Beaver	49+69.48	854.3	855.3
Beaver	53+62.04	854.3	855.3
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+81.70	855.5	855.4
Wabash	183+66.62	855.6	855.5
Wabash	186+66.62	855.7	855.6
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	855.9	855.9

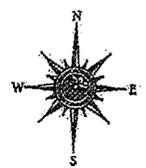
Acreeage in Dark Blue: APN 28-013400.0000 - 0.3 Acres
APN 28-013500.0000 - 1.0 Acres
TOTAL ACRES - 1.3 Acres

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.

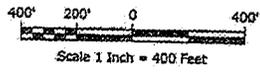
Acreeage in Light Blue: APN 28-013400.0000 - 139.8 Acres
APN 28-013500.0000 - 15.1 Acres
TOTAL ACRES - 154.9 Acres

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 GIS digital orthorectification 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



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 2045 Morse Road, Bldg. E2
 Columbus, OH 43229

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

PROJECT NUMBER: Donor Case Easements
 DRAWING NUMBER: Kerr-Remediation
 DATE: 04/25/2014
 DRAWN BY: RLS
 REVISED BY: N/A
 DATE REVISED: N/A

DAVID KARR, TRUSTEE & WILLIAM RANSBOTTOM
 Flowage Easement Exhibit