IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROBERT AND BRENDA PERRY, Plaintiffs/Appellees/Counter-Appellants, vs. GRAND RIVER DAM AUTHORITY, Defendant/Appellant/Counter-Appellee.	)	Case No. 109714(consolidated with Nos. 109715 and 109716) District Ct. No. CJ-01-00381-"B"
DAVID and STACY PRYOR, Plaintiffs/Appellees/Counter-Appellants, vs. GRAND RIVER DAM AUTHORITY, Defendant/Appellant/Counter-Appellee.	)	District Ct. No. CJ-01-00381-"C"
JOHN and JANET SHAW, Plaintiffs/Appellees/Counter-Appellants, vs. GRAND RIVER DAM AUTHORITY, Defendant/Appellant/Counter-Appellee.	)	District Ct. No. CJ-01-00381-"A"

REPLY OF APPELLEES/COUNTER-APPELLANTS, ROBERT AND BRENDA PERRY, DAVID AND STACY PRYOR AND JOHN AND JANET SHAW, TO COMBINED ANSWER BRIEF OF APPELLANT/COUNTER-APPELLEE, GRAND RIVER DAM AUTHORITY

Appeal from the District Court of Ottawa County,
Case Nos. CJ-2001-00381-A, B, and C
The Honorable Robert E. Reavis, II

May 30, 2012

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I. INTRODUCTION

As this Court is well aware, this case parallels the progenitor case of *Dalrymple et al. v. Grand River Dam Authority*, which evolved into *McCool v. Grand River Dam Authority*, No. 97,020, (Court of Civ. App., June 15, 2004).[1] In that case (*Dalrymple*), over one hundred plaintiffs filed a class action against Grand River Dam Authority, alleging fourteen floods that occurred from 1993 through 1998 were caused by the existence and operation of Pensacola Dam. As GRDA now points out,[2] *Asbell* and *Dalrymple* involve the same series of unprecedented floods in the Miami, Oklahoma area.

In *Perry, Pryor* and *Shaw* (hereinafter "plaintiffs"), GRDA does not dispute the *Asbell* trial court's factual finding that the existence and operation of Pensacola Dam caused a substantial interference with plaintiffs' use and enjoyment of their private property, for which it bears responsibility. However previously, in *Dalrymple*, defendant GRDA disavowed any responsibility for the series of unnatural floods.[3] It took many years of litigation in *Dalrymple* before GRDA was found to be responsible for the increased repeated unprecedented flooding in the Miami area.

GRDA now concedes the proper remedy for a taking is to make the injured party whole,

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1 *See* R. 175-258, *McCool and Stoner* opinion mentioning the underlying *Dalrymple* litigation, which began as Ottawa District Court Case No. CJ-94-444.

2 "[T]hese three cases involve the same floods, the same time periods, and the same type of damages." Combined Reply and Answer Brief of Grand River Dam Authority, p. 4 (May 10, 2012).

3 *See* R. 175-258, 218, Ex. "B" to Plaintiffs' Response to Motion for Partial Summary Judgment, appellate opinion authored by the Honorable Ronald J. Stubblefield, *McCool v. Grand River Dam Authority*, [Court of Civ. App., June 15, 2004], (hereinafter, *McCool and Stoner* opinion).

but intimates the *Asbell* plaintiffs sat on their rights by waiting until 2001 to file suit. Significantly, while Dr. Forrest Holly's 1999 report found the existence and operation of Pensacola Dam caused an increase in flooding above 760' NGVD in the Neosho River at and upstream of Miami, *the cause and actual impact of the Dam as to flooding in particular locations in the river valley was not established until 2001.*[4] Further, under GRDA's interpretation of the statutes, in order to be made whole, all Oklahoma landowners, including the *Perrys, Pryors* and *Shaws*, must file a constitutional claim for a taking within 2 years. If not, any claim for loss of personal property in a constitutional takings action is foreclosed.

II. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT, IN A CONSTITUTIONAL PROCEEDING, GRDA WAS ENTITLED TO ASSERT THE AFFIRMATIVE DEFENSE OF THE 2-YEAR LIMITATION PERIOD FOR CIVIL ACTIONS UNDER 12 O.S. §95; RATHER, THE 15-YEAR STATUTE OF LIMITATIONS APPLIES IN AN INVERSE CONDEMNATION, WHICH IS A SPECIAL PROCEEDING.

GRDA has taken the position that plaintiffs are precluded from receiving just compensation for their personal property due to the affirmative defense of the 2-year limitation period for civil actions under 12 O. S. § 95. Further, it would define "private property" for which just compensation is required as *real* property only.

The issue presented is simple–in an inverse condemnation proceeding where a taking has been found due to flooding, can a governmental agency escape its responsibility to fully compensate landowners due to operation of the statute of limitations applicable to civil actions

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[4] In *Dalrymple,* Dr. Holly, as the court-appointed referee, heard evidence and issued multiple reports, authoring the final report in April 2001. *See* 2001 Referee Report of Dr. Holly, p. 1 and Letter from Ms. Aguilar to Mr. Bork dated May 28, 2010, attached as Exhibit "A" for the Court's convenience. *See also*, R. 276, 283-84, Plaintiffs' Motion in Limine filed May 12, 2010; R. 448, 464.

in tort? Respectfully, the *Perrys, Pryors*, and *Shaws* submit that, in an inverse condemnation proceeding where a taking is found, the 15-year statute of limitations period applies to all private property found to have been taken.

A. Standard of Review

When a defendant relies upon an affirmative defense as the basis for its motion for summary judgment, then the defendant bears the burden of proof and must prove each essential element of an affirmative defense in order to show, as a matter of law, plaintiff has no viable cause of action. *Akin v. Missouri Pacific Railroad Co.*, 1998 OK 102, ¶9, 977 P.2d 1040. "Constitutional and statutory provisions relating to eminent domain must be strictly construed in favor of the landowner and against the condemning party." *Material Services Corp. v. Rogers County Commissioners*, 2006 OK CIV APP 52, ¶ 19, 136 P.3d 1063, *citing Carter v. City of Oklahoma City*, 1993 OK 134, 862 P.2d 77, 80.

B. Plaintiffs Initiated Special Proceedings Under Oklahoma Constitution, Art. II, §24.

1. Special Statutory Proceeding, Not a Civil Action for Damages.

Each of the *Allman* plaintiffs, including the *Shaw, Pryor* and *Perry* plaintiffs, initiated an inverse condemnation action for compensation following a taking of their property pursuant to Article II, § 24. The Oklahoma Supreme Court has explained that, technically, a condemnation is not a civil action, but rather a special statutory proceeding:

> "Oklahoma's extant jurisprudence defines a condemnation proceeding--such as the one here in issue - a *special statutory proceeding* designed to determine in a single action the damages for property taken from private persons for public use. The right of eminent domain or public taking of private property is a fundamental attribute of the sovereign state that is circumscribed by the provisions of Okla. Const. Art. 2, § 24, which in essence provides that such takings can only be accomplished with just compensation. . . . A cause of action

> only arises when a wrong or breach of duty by the defendant occurs. It is what produces the necessity of action. When one complies with statutory procedure, no breach of duty happens.
>
> The presence of a civil wrong is a critical identifying characteristic of a 'cause of action' since 'causes of action' are brought to remedy civil wrongs which are threatened or committed. Oklahoma's extant jurisprudence specifically holds that a condemnation proceeding 'is a special proceeding and not a civil action. **Condemnation proceedings do not involve a tort and are not civil actions at law or suits in equity.**"

City of Tahlequah v. Lake Region Electric, Co-op, Inc., 2002 OK 2, ¶¶ 7-8, 47 P.3d 467 (involving municipal condemnation of rural electric system facilities). (emphasis added).

There are two types of condemnation proceedings in Oklahoma, regular condemnation, where the landowner is compensated prior to the taking of his land, and inverse condemnation, where the landowner seeks condemnation damages for a taking. *See Allen v. Transok Pipe Line Co.*, 1976 OK 53, ¶ 9, 552 P.2d 375. Thus, the fact this is an inverse condemnation proceeding makes no difference.

2. *From an Early Date, Courts Have Declined to Apply the Limitations Period for Civil Actions to Condemnation Proceedings; City of Oklahoma City v. Wells, 1939 OK 62, 91 P.2d 1077.*

The Oklahoma Supreme Court has rejected the argument that statutes of limitation for civil actions apply in a special proceedings. In the case of *City of Oklahoma City v. Wells*, 1939 OK 62, 91 P.2d 1077, the landowner instituted an inverse condemnation proceeding to recover for the taking of a lot he had deeded to the railroad. The deed contained a provision that, in case of abandonment by the railroad, the land was to revert to grantors. *Wells*, 1939 OK 62 at ¶¶ 1-2. The railway abandoned the property, signing a quitclaim deed conveying it to the City of Oklahoma City. The City took possession, installed improvements, and used the land for a city park. Id. at ¶¶ 3-4. Grantors sought compensation from the City.

The City argued that plaintiffs in actuality alleged a civil action for recovery of damages, which was barred by operation of the statute of limitations under "section 101 of the chapter on Limitations of Action, O.S. 1931, and particularly by subdivisions (3) and (6)," which provide 2-year and 5-years, respectively, " for trespass upon realty, or one for injury to the rights of another not arising upon contract and not otherwise enumerated." *Wells*, 1939 OK 62 at ¶¶ 20-21. The City pointed out plaintiffs had referred to the proceeding as an "action," "cause of action," and "action in condemnation," etc. *Wells*, 1939 OK 62 at ¶¶ 7,19, 20. The *Wells* Court indicated it did not matter what the parties called it, it was the nature rather than the form which determines the applicability of the statute of limitations. *Id.* at ¶ 23. The *Wells* Court determined the landowners' claim was not barred by any statute of limitations, since the 15 years required [presumably for the City] to obtain title by prescription had not elapsed. *Id.* at ¶ 51.

Just as in *Wells*, in this case private plaintiffs seek compensation for a governmental entity's exercise of power which resulted in a taking of their property. In granting partial summary judgment, the trial court erroneously found GRDA was entitled to assert the 2-year statute of limitations under 12 O.S. §95(3) as an affirmative defense in cases where it is undisputed that a constitutional taking occurred. The trial court should have recognized that plaintiffs seek just compensation for a taking and the limitation periods for civil causes of action do not apply.

C. The Nature of Plaintiffs' Claim is Clearly Set Forth in the Amended Petition.

Here, the sole basis for plaintiffs' theory of recovery is the Oklahoma Constitution, Article II, § 24. *See First Amended Petition*, filed April 18, 2002, R. 27-51. Plaintiffs instituted a special proceeding to obtain recovery for the taking of their property, and a taking was found.

As a result of the taking, plaintiffs were deprived of both real and personal property. There is only one singular theory, but GRDA contends it is entitled to assert the affirmative defense of the 2-year statute of limitations as to one particular category of damages.

A court's determination as to which statute of limitations governs in a particular instance is dependent upon the theory or theories of liability plaintiff will press at trial. *See Resolution Trust Corp. v. Greer*, 1995 OK 126, ¶¶ 11-12, 911 P.2d 257. A court will "make a fair reading" of the allegations to decipher the nature of the plaintiff's claim(s). *See Ashton Grove, L.C. v. City of Norman*, 2009 U.S. Dist. LEXIS 64675, *7, n. 4 (W. Dist. Okla., 2009). The term "claim" is defined as:

> "a legal concept which has no separate existence in the natural order of things. It is what the makers of legal policy, the Legislature and the courts say it is. It exists to satisfy the needs of plaintiffs for a means of redress, of defendants for a conceptual context within which to defend an accusation, and of the courts for a framework within which to administer justice."

Miller v. Miller, 1998 OK 24, ¶ 23, 956 P.2d 887 (looking to plaintiff's Petition for theories of recovery).

The nature of plaintiffs' condemnation proceeding is not in dispute. In inverse condemnation proceedings, there is no justification for subjecting certain categories of damages differently, especially where GRDA does not dispute the factual findings of the trial court. (*See* Brief in Chief of Appellant Grand River Dam Authority, p. 11.)

Here, the trier of fact determined in *Perry, Pryor* and *Shaw* that the flooding in each instance was "so severe as to substantially interfere with the landowners' use and enjoyment of their property and their homes." (*See* [Shaw] R. 607-08, ¶24; [Perry] R. 617-25, ¶20; [Pryor] R. 626-27, ¶ 15.) The question of whether a "taking" has occurred is a factual determination, and

GRDA does not challenge any of the trier of fact's factual determinations. Since the undisputed facts establish the flooding caused by Pensacola Dam was so severe as to constitute a substantial interference with plaintiffs' use and enjoyment of their property, plaintiffs are entitled to just compensation. Further, personal property taken by flooding must be viewed as an element of the total value of the landowner's award of just compensation.

D. The 15-Year Time Period Applies to Property Taken by the Government.

GRDA relies heavily upon the *Drabek v. City of Norman* opinion as support for the proposition that the15-year limitation period for condemnation proceedings applies only to real property and the 2-year limitations period in 12 O.S. § 95(3) should be applicable to constitutional proceedings for taking or damaging of personal property (to go along with a 3-year limitation for constitutional damages to real property, and a -year limitation for tort damage under the Oklahoma Governmental Tort Claims Act). However, *Drabek* does not support GRDA's arguments.

1. Drabek v. City of Norman, 1996 OK 126, 946 P.2d 658.

Drabek v. City of Norman, 1996 OK 126, 946 P.2d 658, is not a case involving flooding. However, one of the issues the Oklahoma Supreme Court was called upon to decide whether the trial court erred in granting summary judgment to the City of Norman based upon the City's argument that the suit was merely one for damages and, if so, whether one of the limitation periods under 12 O.S. § 95 (2) (3) or (9) applied to bar Drabek's claim. *Id.* at ¶¶ 1-3, 15.

In *Drabek*, the City of Norman constructed a water main in 1981 on property that had once been a right-of-way. The City took an easement from the Board of Regents who, as it turned out, did not actually own the property. *Drabek*,1996 OK 126, at ¶ 2. Mr. Drabek

purchased the property in 1983 from the rightful landowner. After obtaining a quit claim deed from the Board of Regents, Drabek filed an inverse condemnation action alleging the City's actions constituted an unauthorized taking for which he was entitled to recover not less than $3.50 per sq. ft. in compensation. *Id.* at ¶ 2. The City of Norman argued the statute of limitations had run because Drabek's suit was merely one for damages, and Drabek could not bring suit because he did not actually own the property in 1981. *Id.* at ¶ 3. The trial court granted the City's motion summary judgment, but the Court of Civil Appeals reversed. The Oklahoma Supreme Court granted *certiorari* to resolve the issue of the appropriate statute of limitations to be applied in inverse condemnation actions. *Id.*

The *Drabek* Court discussed the early history of Oklahoma case law establishing the fifteen-year limitation period for an inverse condemnation proceeding, beginning with *Oklahoma City v. Wells,* 1939 OK 62, 91 P.2d 1077 (1939), where it was recognized that condemnation proceedings do not involve a tort, and are not strictly speaking civil actions or suits in equity, but rather special proceedings. *Drabek,*1996 OK 126, at ¶¶ 5-8. Next, the *Drabek* Court mentioned *Allen v. Transok Pipe Line Co.*, 1976 OK 53, 552 P.2d 375, 379, where two kinds of condemnation proceedings were identified–regular condemnation and reverse condemnation. *Id.* at ¶9.

In addressing the "apparent conflict" regarding the appropriate statute of limitations in inverse condemnation actions, the *Drabek* Court observed the Court of Civil Appeals previously concluded that the 15-year prescriptive period applied where there has been a taking, citing *Rummage v. State ex rel. Dept. of Transportation*, 1993 OK CIV APP 39, 849 P.2d 1109, and *Underwood v. State ex rel. Dept. of Transportation*, 1993 OK CIV APP 40, 849 P.2d 1113. *Id.*

at ¶10.

> "In those cases the Court of Civil Appeals held that if the trier of fact determines that there has been a taking, even if it is the unintended and consequential result of a public improvement, the action is one properly in inverse condemnation and the applicable limitation period is fifteen years. To hold otherwise would . . . allow the taking entity to effectively gain title, or some property interest, short of the prescriptive period."

Drabek, 1996 OK 126 at ¶ 10.

In *Drabek*, the Court concluded there was no conflict between its decision in *City of Oklahoma City v. Daly*, 1957 OK 209, 316 P.2d 129, and the decisions of the Court of Civil Appeals in regard to the appropriate statute of limitations to be applied. *Drabek*, 1996 OK 126 at ¶ 11. It explained that, in *Daly*, the 3-year limitation period at 12 O.S. § 95(2) was applicable because there was not a taking and the action involved "only consequential damage to adjacent private buildings" due to the city's construction activities on another property. *See id.* at ¶ 11. It further noted that the question of whether "injuries resulting from activities off the subject property" constitute a taking is a question of fact the trier of fact must decide. *Id.* at ¶ 12. If the facts show the governmental action is serious enough to constitute substantial interference with the use and enjoyment of property, it may constitute a taking. *Id.*

The *Drabek* opinion does not comment on any distinction between personal and/or real property. That issue was not before the Court. Instead, it held inverse condemnation was the proper remedy for the landowner to pursue under the circumstances presented and, therefore, Mr. Drabek's lawsuit had been properly filed within the 15-year limitation period.

2. The *Drabek* Opinion Approves of the Holding in *Rummage v. State ex rel. Dept. of Transp.*, 1993 OK CIV APP 39, 849 P.2d 1109.

In *Rummage v. State ex rel. Dept. of Transp.*, 1993 OK CIV APP 39, 849 P.2d 1109, the

Court of Civil Appeals considered a case very similar to the instant action. There, a culvert was replaced as part of a road improvement project which allegedly resulted in almost continual flooding to landowners' property. *Rummage,* 1993 OK CIV APP 39, ¶ 2. The landowners filed petitions alleging the continual flooding so substantially interfered with their use and enjoyment of their property as to constitute a taking by the Department of Transportation without just compensation, and indicating they were bringing special proceedings under Article II, § 24 of the Oklahoma Constitution. *Id* at ¶¶ 2-3.

The Department filed a summary judgment motion, contending landowners' actions were barred by the running of the statutes of limitations. The Department argued, just as GRDA argues here, that the action was actually one for consequential tort damage to property, and the applicable statute of limitations period was three years as established in *City of Oklahoma City v. Daly*, 1957 OK 209, 316 P.2d 129, pursuant to 12 O.S. § 95. *Id* at ¶¶ 5-6. The Court of Civil Appeals found the trial court erred procedurally in granting summary judgment because, as a matter of law, that landowners' actions were <u>not</u> barred by a two year or three year statute of limitations. *Rummage*,1993 OK CIV APP 39, ¶ 20.

Significantly, the Court observed that the fact question of a taking was most critical. *Rummage*,1993 OK CIV APP 39, ¶ 24. The Court stated: "If the trier of fact determines there is a taking, even if the taking is the consequential result of a public improvement, the action is one properly in inverse condemnation and the applicable limitation period is fifteen years." *Id.* at ¶ 27. It further observed: "The trial court may not decide whether this action is barred by the statute of limitation until the issue of taking is resolved by the trier of facts . . . ." *Id.* at ¶ 29.

E. 12 O.S. § 95(3) Applies in Civil Actions Involving Breach of Duty; It Does Not Apply to Special Proceedings Pursuant to the Constitution, Particularly Where a "Taking" Has Been Found.

It is undisputed that the *Asbell* plaintiffs do not state a civil cause of action in their Amended Petition, but rather seek recovery pursuant to Art. II, § 24. GRDA argues the limitations period for a civil action for trespass, conversion, replevin, negligence or fraud should apply to a portion of the property loss plaintiffs sought to recover as a result of the taking. GRDA tries to balance its affirmative defense arguments upon the same slender reed other governmental entities have used unsuccessfully, statute of limitations for civil actions, 12 O.S. §95. Asserting the legal defense of the statute of limitations for tort claims as an affirmative defense seems particularly egregious where there is an undisputed factual finding of substantial interference with plaintiffs' use and enjoyment of their property, *i.e.*, a constitutional taking.

GRDA maintains 12 O.S. § 95(3) is the applicable statute of limitations for *personal* property in a constitutional cause of action for a taking. The statute, 12 O.S. §95, expressly states it sets forth the periods of limitation to bring "[c]ivil actions other than for the recovery of real property." The plain language of 12 O.S. § 95(3) indicates it does not apply to inverse condemnation, which is a special constitutional proceeding, not a civil action. Moreover, case law reflects that the statute applies to civil actions such as trespass, conversion, replevin, negligence and fraud, rather than a constitutional taking.

For example, in *Wilson v. Webb*, 2009 OK 56, ¶ 4, 212 P.3d 731, the Court specifically cited §95(3) and determined "the petition was filed beyond the two year statute of limitations *for conversion claims* found at 12 O.S. Supp. 2008 §95(3)." (Emphasis added.) In *Moneypenney v. Dawson*, 2006 OK 53, 141 P.3d 549, the Court determined the affirmative defense of the two

year statute of limitations under §95(3) applied in a tort action between neighbors. There was no government actor, nor was there an allegation of a constitutional taking. Further, the Oklahoma Supreme Court expressly stated in *Drabek v. City of Norman*: "Subsection 95(3) provides for a two-year statute of limitations on an action for trespass upon real property." *Drabek*, 1996 OK 126, ¶ 15, 946 P.2d 658. *See also, Ranier v. Stuart and Freida*, 1994 OK CIV APP 155, ¶4, 887 P.2d 339 (determination of limitations period for legal malpractice based on underlying cause of action for tort, which is governed by the 2-year statute of limitations in §95[3]); *Kimberly v. DeWitt*, 1980 OK CIV APP 2, ¶11, 606 P.2d 612 (finding survival action for pain and suffering of decedent barred by 1-year statute of limitations because the cause of action arose from assault and battery). These cases illustrate that 12 O.S. § 95(3) applies only in civil actions, not in special proceedings.

Under GRDA's argument, flooded landowners would be foreclosed from bringing a constitutional claim for any taking of personal property, and would be required to file a civil action within two years in order to obtain recovery. Further if, as GRDA maintains, the 15-year statute of limitations is for *real* property only, inverse condemnation actions for the taking of intangible property interests would be excluded under the 15-year statute of limitations.

According to this Court's own opinions, that is not the case. Inverse condemnation suits can involve intangible property interests. For example, in *Material Services Corp. v. Rogers County Commissioners*, 2006 OK CIV APP 52, 136 P.3d 1063, the Court of Civil Appeals affirmed the jury's verdict awarding compensation to Material Services Corporation for the temporary taking of MSC's lease to mine limestone on property within the County. *Id.* at ¶ 2. The County was held liable for a temporary regulatory taking of MSC's leasehold mining

interest. *See Material Services Corp.*, 2006 OK CIV APP 52 (inverse condemnation) (discussed in further detail below.)

F. "Private Property" Includes Not Only Real Estate, but Also Easements, Personal Property, and Every Valuable Interest Which Can Be Enjoyed and Recognized as Property.

"Private property" includes "every valuable interest which can be enjoyed and recognized as property. The *Material Services Corp. v. Rogers County Commissioners*, 2006 OK CIV APP 52, 136 P.3d 1063, opinion disposes of GRDA's argument to the contrary.

In *Material Services Corp.* , MSC entered a lease to mine limestone on property and applied for a permit from the Department of Mines. *Id.* at ¶¶ 1-2. MSC brought an inverse condemnation proceeding alleging the county tried to prevent any mining by first attempting to annex the property, then by informing the Department of Mines that mining on the property was restricted by zoning. *Id.* at ¶¶ 1-2. The jury entered a verdict in favor of MSC finding the county liable for ***temporarily taking*** plaintiff MSC's lease to mine limestone.

The County contended, based on *Oklahoma City v. Daly*, 1957 OK 209, 316 P.2d 129, that the 3 year limitations period in 12 O.S. § 95(2) provided it an affirmative defense barring MSC's inverse condemnation claim. *Id.* at ¶6. The Court of Civil Appeals characterized *Daly* as a case involving "consequential damages to a neighboring building caused by vibrations of machinery used in installing a sewer." *Id.* at ¶6, n. 1. The Court found the County failed to raise the limitations issue in its motion to dismiss, effectively waiving it; furthermore, "the limitations period was 15 years because the jury ultimately found a taking had occurred." *Material Services Corp.*, 2006 OK CIV APP 52, at ¶7.

G. The Net Effect of Applying 12 O.S. § 95(3) is to Collapse the 15-Year Limitations Period to 2 Years.

Plaintiffs suffered losses to both their real and personal property adn were out of their homes for months. To hold that plaintiffs cannot recover just compensation for personal property because the 2-year statute of limitations applies to personalty, while allowing their constitutional claims for real property to proceed under a 15 year statute of limitations, is not a construction of Article II, §24 that favors the landowners.

Under this interpretation, a landowner wishing to be made whole from a taking of his real property, in a situation where both real and personal property are damaged must sue within 2 years. Since a landowner may bring only one action for claims arising from the same flood event this will, in effect, collapse the 15 year statute of limitations period to a 2-year period where any personal property has been taken.[5]

A property owner cannot bring an inverse condemnation action for personal property and then bring another inverse condemnation action for the same flood event 13 years later, so a landowner wishing to be made whole following a taking of his real property in a situation where personal property is also substantially impacted must bring suit within 2 years. In cases of recurrent flooding, the cause of the flooding is often difficult to establish, and the 2-year tort statute of limitations could well expire before an injured party is able to establish the cause of the taking.

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[5] To illustrate the practical effect of the District Court's ruling, for example, a landowner would have 15 years to bring a constitutional claim for the taking of her kitchen cabinets, but only 2 years for the taking of the refrigerator standing next to those cabinets. Similarly, if a landowner's garage is destroyed by flooding for public use, she has 15 years to bring suit for the taking of the garage but only 2 years to bring suit for the taking of her car.

III. CONCLUSION

The undisputed facts establish that the flooding sufficiently interfered with plaintiffs' use and enjoyment of their property, and Article II, §24 of the Oklahoma Constitution requires in such instances that the landowner be fully compensated for damages. *See Williams v. Natural Gas Co.*, 1997 OK 72, ¶23, n.23, 952 P. 2d 483. There is an old adage to the effect that men and nations behave wisely once they have exhausted all other alternatives. The particular alternative chosen by the trial court should not be allowed to stand, as it will result in prejudice not only to these plaintiffs but also to other landowners facing the same situation.

The idea of awarding damages in a condemnation proceeding is to make the injured party whole. To achieve that end, this Court should hold the 15-year statutory limitation period for special proceedings applies to *all* private property taken in the floods, including plaintiffs' personalty. Plaintiffs request this Court to affirm the underlying judgments in all respects, except for the trial court's application of 12 O.S. § 95(3) to Plaintiffs' personal property.

This Court should reverse and direct the trial court that ruling on remand to apply the 15-year statute of limitations to all of Plaintiffs' private property, and with directions on remand that just compensation must be awarded for the taking of Plaintiffs' personal property consistent with the amounts already established by the trial court.

Respectfully submitted,

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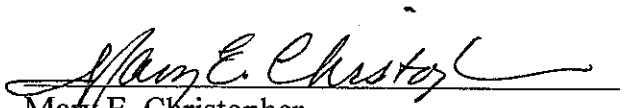

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EXHIBIT "A"

019643

FLOOD LEVEL AND DURATION DETERMINATION NEOSHO RIVER BELOW COMMERCE GAGE

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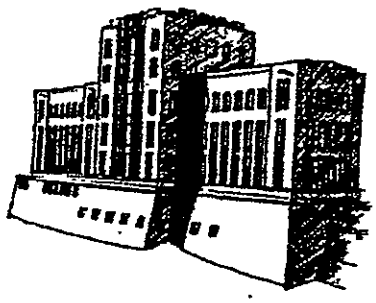

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I. Introduction and Background

In an earlier report to the Court dated 15 February 1999 the Referee, based on review of evidence, testimony presented in the trial, and his own analyses, agreed with the Plaintiff's claim that the existence and operation of Pensacola Dam caused an increase in the duration and magnitude of above-easement flooding in the vicinity of Miami Oklahoma for all but one of the fourteen floods that were the subject of the litigation. This determination was in response to a specific charge to determine whether or not the Pensacola Dam and its operation had an effect on flooding.

In the subsequent phase of the litigation, the Plaintiffs and Defense need to be able to quantify the magnitude and duration of the flooding, with and without the dam, on the specific properties that are represented by the Plaintiffs. This determination requires a level of detail in computer-based flood simulations, and a spatial and temporal resolution of the simulation results, that in turn require a computer modeling and analysis effort that goes beyond what was necessary for the first phase of the litigation.

Accordingly, the Plaintiffs and Defense approached the Referee asking for this additional effort. This report summarizes the computer-based simulations and results, and provides the results for use by the parties to the litigation.

II. River Basin Model Construction

The river basin model used for this determination is based on the fully dynamic unsteady flow equations in the river channel, and on non-inertial unsteady flow on the flood plains in areas of strong channel sinuosity, in particular upstream of the City of Miami. The C1/C2 software, written by the referee in the late 70's and in continuous industrial use by him and others since then, solves the de St. Venant equations for unsteady flow on a grid of cross sections in the river that correspond closely to the same sections used by the Plaintiffs and the Defense for their HEC-2 steady flow modelling; and by the Referee in his post-trial unsteady flow analysis. The C1/C2 software was developed in close collaboration with Dr. Alexandre Preissmann, and uses the same

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MAY 28, 2010

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Re: *Allman, Asbell, et. al. vs. Grand River Dam Authority*
Ottawa County District Court Case No. CJ 01-381

Dear Larry:

The following is GRDA's response and objections to Plaintiffs' Proposed Stipulated Previous Findings of Fact and Conclusions of Law Applicable in the *Asbell* Case:

1. **GRDA built and operates the project known as the Pensacola Dam (Reavis Order, November 5, 1999, §19, p. 9).**

2. **The operation of Pensacola Dam caused increased average lake elevations in approximately 1982 and again in approximately 1992. (Reavis Order, November 5, 1999, §20, p.9)**

   OBJECTION – Irrelevant. The findings in Dr. Holly's Report are the only relevant documents concerning lake elevations.

3. **On May 14, 2010, the Court adopted the report of Referee Holly consisting of his initial document on February 15, 1999, his modification on March 29, 1999 and his ultimate report of April, 2001. (Reavis Order, November 5, 1999, §22, p. 9)**

4. **GRDA does not share the immunity of the United States Army Corps of Engineers. (Reavis Order, ¶1, p. 10; *McCool v. GRDA*, Opinion, June 15, 2004, p. 14)**

   OBJECTION – Irrelevant and Plaintiffs cannot rely on unreported decisions in other lawsuits to which they were not parties and which concern legal theories not being litigated in this case.