IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

APPELLEES' COMBINED ANSWER BRIEF
AND BRIEF-IN-CHIEF ON COUNTER-APPEAL OF
APPELLEES ROBERT AND BRENDA PERRY, DAVID AND STACY PRYOR
AND JOHN AND JANET SHAW

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

April 9, 2012

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INDEX

INTRODUCTION **1**

Constitutional Authority:
Okla Constitution, Art. 2, §§ 23 & 24 2

Statutes:
12 O.S. 1981 § 95(3) 2

SUMMARY OF THE RECORD **3**

Cases:
McCool v. GRDA and *Stoner v. GRDA*, Court of Civil Appeals Case Nos. 97,020 and 97,021 [June 15, 2004].) 3, 5, 6

Stoner v. Grand River Dam Authority, District Court of Ottawa County, Case No. CJ 94-444-B, The Honorable Robert E. Reavis, ¶ 4, attached as Exhibit "C.") 3, 5,6

Constitutional Authority:
Article II, §24 of the Oklahoma Constitution 4, 8

Statutes:
82 O.S. § 862(h) and (l) 4

27 O.S. §12 4

12. O.S.§ 95(3) 8

ANSWER TO APPELLANT GRDA'S BRIEF IN CHIEF ARGUMENT AND AUTHORITIES **8**

STANDARD OF REVIEW **8-9**

Cases:
Gentry v. Cotton Elec. Coop., Inc., 2011 OK CIV APP 24, *citing Christian v. Gray*, 2003 OK 10, ¶ 41, 65 P.3d 591, 608 9

I. THE TRIAL COURT CORRECTLY DETERMINED GRDA'S REPEATED INUNDATION CONSTITUTED A SUBSTANTIAL TAKING" WHICH REQUIRED JUST COMPENSATION **9**

A. **The Constitution Requires Just Compensation to Make the Landowner Whole** 9

1. **Under Article II, § 24, Private Property Shall Not be Taken or Damaged for Public Use Without Just Compensation** 9

Cases:
Kelly v. Oklahoma Turnpike Auth., 1954 OK 112, ¶ 13, 269 P.2d 359 9

State ex rel. Dept. of Transp. v. Lamar Cent. Ourtdoor, Inc., 2007 OK CIV APP 105, ¶ 8, 170 P.3d 551 9

Constitutional Authority:
Article II, §24 of the Oklahoma Constitution 9

2. **Takings Clauses Place Conditions on Government's Exercise of Power over Fundamental Property Rights** 9

Cases:
Dow Chem. Co v. United States, 476 U.S. 227, 237-38, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986) 10

Skip Kirchdorfer, Inc. v. *United States*, 6 F.3d 1573, 1578 (Fed. Cir. 1993) 10

United States v. Carmack, 329 U.S. 230, 241-42, 67 S. Ct. 252, 91 L. Ed. 209 (1946) 10

Constitutional Authority:
Article II, §24 of the Oklahoma Constitution 9

3. **Claim of Consequential Damage to Adjacent Property Versus Constitutional Taking Claim** 10

Cases:
Material Service Corp. v. Rogers County Commissioners, 2006 OK CIV APP 52, ¶ 7, 136 P.3d 1063 10

Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992) 11

Constitutional Authority:
Article II, §24 of the Oklahoma Constitution 10

Statute:
27 O.S. §12 10

Other Authorities:
9 Thompson on Real Property § 80.05(b)(2), Third Thomas Edition (David A. Thomas, ed. LexisNexis, 2011) 11

4. Just Compensation to Make the Landowner Whole 11

Cases:
Kelly v. Oklahoma Turnpike Auth., 1954 OK 112, ¶ 13, 269 P.2d 359 11

State ex rel. Dept. of Transportation v. Little, 2004 OK 74, ¶¶ 21-22, 100 P.3d 707 13

Williams Natural Gas Co. v. Perkins, 1997 OK 72, ¶23 13

Carter v. City of Oklahoma City, 1993, OK 134, ¶¶19-20 13

City of Houston v. Texan Land & Cattle Co., 138 S.W. 3d 382, 388-89 (Tex. App. 2004) p.13, n.1

Constitutional Authority:

Article II, §24 of the Oklahoma Constitution 12

Statute:
27 O.S. § 16 12

27 O.S. § 12 12

82 O.S. § 862 . . . . p. 13, n.2

Other Authorities:
OUJI 25.2 12

B. The Trial Court Correctly Determined the Severe Series of Floods Resulted in a Taking, Requiring just Compensation **14**

1. If there is Physical Occupation/Invasion, Just Compensation is Required Even Though the Taking is for a Temporary Period of Time **14**

Cases:
Chicago, R.I. & P.R. Co. v. Prigmore, 1937 OK 275, 180 Okla. 124, 68 P.2d 90 16

Hendler v. United States, 952 F.2d 1364, 1376-77 (Fed. Cir. 1991) 14

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005), *citing*
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419 (1982) 14

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419 (1982) 16

Material Service Corp. v. Rogers County Commissioners, 2006 OK CIV APP 52,
¶ 7, 136 P.3d 1063 14

Skip Kirchdorfer, Inc. v. *United States*, 6 F.3d 1573, 1578 (Fed. Cir. 1993) 14, 15

United States v. 7.41 Acres of Land, 63 F. Supp. 43, 47(1947) 15

Other Authority:
27 Am. Jur. 2d Eminent Domain § 804 (2011) 14

2. It is Not Necessary that the Landowner be Deprived of the Entire Fee; a Taking May be Found Where there is Deprivation of Any Part of the Fee . . . .

Cases:
Dabek v. City of Norman, 1996 OK 126, ¶17, 946 P.2d 658 16

Morain v. City of Norman, 1993 OK 149, ¶10, 863 P.2d 1246 . . . . 16, 17

Williams Natural Gas Co. v. Perkins, 1997 OK 72,¶ 4, 952 P. 2d 483 16

C. THE TRIAL COURT CORRECTLY DETERMINED THE REPEATED FLOODING SUBSTANTIALLY INTERFERED WITH PLAINTIFFS' PROPERTY RIGHTS 17

Cases:
Dabek v. City of Norman, 1996 OK 126, ¶12, 946 P.2d 658 17

1. The Factfinder Found There was a Taking, Requiring Just Compensation 17

Cases:
Material Service Corp. v. Rogers County Commissioners, 2006 OK CIV APP 52,
¶ 7, 136 P.3d 1063 18

Williams v. State Dept. of Transp., 2000 OK CIV APP 19 18

2. Permanent or Recurrent Flooding may Constitute a Taking . . . 19

Cases:

Underwood v. State ex rel. Dept. of Transp., 1993 OK CIV APP 40, ¶33, 849 P.2d 1113 19

State ex rel. Dep't of Transp. v. Hoebel, 594 P.2d 1213, 1215 (Okla. 1979) 19

Morain v. City of Norman, 1993 OK 149, ¶9, 863 P.2d 1246 19

Williams v. State Dept. of Transp., 2000 OK CIV APP 19 ¶ 22 998 P2d 245 . . . . 19, 20

3. The Naturally-Occurring Flooding Component Only Relates to the Shaws; the Asserted Claims Are Solely for Dam-Caused Flooding 20

Other Authorities:

9 *Nichols on Eminent Domain* § G34.03[1], (3rd Ed.) 21

II. THE TRIAL COURT CORRECTLY DETERMINED THE NATURE, TIMING, AND EXTENT OF PLAINTIFFS' DAMAGES 22

A. Competent Evidence Supports the Trial Court's Findings of Fact 22

Cases:

Calhoun v. City of Durant, 1998 OK CIV APP 152, ¶13, 970 P.2d at 613 22

Henthorn v. Okla. City, 1969 OK 76, ¶15, 453 P.2d 1013, 1016 22

Mattoon v. City of Norman, 1980 OK 137, ¶11, 617 P.2d 1347, 1349 22

Underwood v. State ex rel. Dept. of Transp., 1993 OK CIV APP 40, ¶33, 849 P.2d 1113 22

1. With Flooding, Affixing a Point in Time When the Taking Occurs is Fact-Dependant, and is Only Critical Where the Taking is Permanent 22

Cases:

Townsend v. State ex rel. State Highway Dep't, 117 N.M. 302, 304-05, 871 P.2d 958 (1994) 23

Other Authorities:

9 *Nichols on Eminent Domain* § G32.03[1] 23

9 *Nichols on Eminent Domain*, § G32.05 (Matthew Bender, 3d Edition) 24

2. The Trial Court Correctly Determined What Was Taken in the Perry, Shaw and Pryor Cases 24

Cases:

Carter v. Davis, 1929 OK LEXIS 17, 141 Okla. 172, 284 P.3 25

Oklahoma City-Ada-Atoka Ry. Co. v. Rooker, 1960 OK 189, 355 P.2d 552 25

Other Authorities:

9 *Nichols on Eminent Domain*, § G32.04 (Matthew Bender, 3d Edition) 24

9 *Nichols on Eminent Domain* § G32.03[1] 24

Nichols on Eminent Domain, Ch. 9, § G32.01 (Matthew Bender, 3d Edition). 24

III. THE 15-YEAR STATUTE OF LIMITATIONS PERIOD APPLIES WHERE THE SUBSTANCE OR GRAVAMEN OF PLAINTIFFS' CAUSE OF ACTION IS INVERSE CONDEMNATION 26

A. 12 O.S. § 95(3) 26

Cases:

City of Oklahoma City v. Daly, 1957 OK 209, 316 P.2d 129 28

Corbell v. State ex rel. Dept. of Transp., 1993 OK CIV APP 45, 856 P.2d 575 27

Dabek v. City of Norman, 1996 OK 126, ¶11, 946 P.2d 658 28

Moneypenney v. Dawson, 2006 OK 53, 141 P.3d 549 .... p. 23, n.6

National Discount Corp v. O'Mell, 194 F.2d 452 (6th Cir. 1952) 27, 28

New Amsterdam Cas. Co. v. Waller, 301 F. 2d 839, 844 (4th Cir. 1962) 27

Rummage v. State ex rel. Dept. of Transp., 1993 OK CIV APP 39, 849 P.2d 1109 .... 27, 28

Underwood v. State ex rel. Dept. of Transp., 1993 OK CIV APP 40, ¶33, 849 P.2d 1113 27

Constitutional Authority:

Article II, § 24 27

Statutes:
12 O.S § 95(2) 27, 28

12 O.S. § 95(3) 27

B. 12 O.S. §95(3) . . . .

Cases:
City of McAlester v. King, 1960 OK 178 29

City of Tulsa v. Mingo School Dist. No. 16, 1976 OK CIV APP 27, ¶38 29

Statute:
12 O. S. § 95(3) 29

Other Authority:
OUJI 3d (Rev. 2009) 5.4 29

IV. APPOINTMENT OF COMMISSIONERS IS NOT REQUIRED IN INVERSE CONDEMNATION PROCEEDINGS 30

Cases:
Carter v. City of Oklahoma City, 1993, OK 134, ¶¶11-12, 862 P.2d 77 30

Statutes:
27 O.S. § 12 30

66 O.S § 57 30

PROPOSITION OF COUNTER-APPELLANTS 31

I. THE TAKINGS CLAUSE OF THE OKLAHOMA CONSTITUTION DOES NOT RESTRICT THE TERM "PRIVATE PROPERTY" TO REAL PROPERTY; THUS, THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY THE 15-YEAR STATUTE OF LIMITATIONS TO ALL PROPERTY TAKEN AND, INSTEAD, APPLIED THE 2-YEAR LIMITATION PERIOD OF 12 O.S. §95 TO PLAINTIFFS' PERSONAL PROPERTY 31

Case:
Williams v. Natural Gas Co., 1997 OK 72, ¶23, n.23, 952 Pl2d 483 31

Constitutional Authority:
Article II, § 24 31

Statutes:
12 O.S. § 95 (3) 31

STANDARD OF REVIEW 31

Cases:
Deutsche Bank National Trust Co. v. Roberts, 2010 OK CIV APP 47, ¶9 31

Oklahoma Dept. of Securities ex rel. Faught v. Blair, 2010 OK 16, ¶54 31

Wathor v. Mutual Assur. Adm'rs, Inc., 2004 OK 2, ¶4 31

A. "PRIVATE PROPERTY" INCLUDES NOT ONLY REAL ESTATE, BUT ALSO EASEMENTS, PERSONAL PROPERTY, AND EVERY VALUABLE INTEREST WHICH CAN BE ENJOYED AND RECOGNIZED AS PROPERTY 31

Case:
Curtis v. WFEC R.R. Co., 2000 OK 26, ¶13, 1 P.3d 996 32

Drabek v. City of Norman, 1996 OK 126, ¶18, 946 P.2d 658 32

State ex rel. Dept. of Transportation v. Kelly, 2007 OK CIV APP 25, ¶8,156 P.3d 734 . . . 32

State ex rel. Dept. of Transportation v. Little, 2004 OK 74, ¶¶ 20
100 P.3d 707 32

Constitutional Authority:

Article II, § 24 32

Statutes:
12 O.S. § 93(4) 32

B. FUNDAMENTAL RULES OF STATUTORY INTERPRETATION . . 33

Cases:
Bechler v. Kay, 222 F.2d 216 (10th Cir. 1955) *cert. denied,* 350 U.S. 837, 76 S. Ct. 75, 100 L. Ed. 747 (1955) 35

Board of County Commissioners of Muskogee County v. Lowery, 2006 OK 31, ¶11, 136 P.3d 639 33

Carter v. City of Oklahoma City, 1993, OK 134, ¶¶12 33

F.D.I.C. v. Grant, 8 F. Supp. 2d 1275, 1299 (N.D. Okla. 1998) 36

Luckenbach Steamship Co. v. United States, 312 F.2d 545,548 (2d Cir. 1963) 35

Resolution Trust Corp. v. Greer, 1995 OK 126, ¶¶11, 12 911 P.2d 257, 261 (1995) 35

Wilson v. Webb, 2009 OK 56, ¶ 4, 212 P.3d 731 36

Constitutional Authority:

Article II, § 24 . . . . 33, 34, 35

Statutes:
12 O.S, § 95 36

12 O.S, § 95(3) 36

Other Authority:
26 A.L.R. 4th 68,71-73, 83-87 (1983) 33

51 Am. Jur. 2d Limitation of Actions § 92, p. 509 36

C. FEDERAL LAW DOES NOT DISTINGUISH BETWEEN REAL AND PERSONAL PROPERTY IN AN ACTION FOR INVERSE CONDEMNATION 37

Cases:
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 316, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 55 USLW 4781 (1987) 37

Hawkins v. La Grande, 315 Ore. 57, 68-69, 843 P.2d 400 (1992) 38

Pete v. United States, 215 Ct. Cl. 377, 569 F.2d 565, 568 (1978) 37

Pete, 215 Ct. Cl. at 379-80 37

Pete, 215 Ct. Cl. at 381 37

Sutfin v. State of California, 261 Cal. App.2d 50, 53, 67 Cal. Rptr. 665, 668 (Cal. Ct. App. 1968) 38

United States v. General Motors Corp., 323 U.S. 373, 384, 65 S. Ct. 357, 56 A.L.R. 390 (1945) 37

Statutory Authority:
12 O.S. § 95(3) 38, 39

INTRODUCTION

Defendant/Appellant Grand River Dam Authority ("GRDA") owns Pensacola Dam and Grand Lake and operates pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC"). When the project was constructed decades ago, intermittent flowage easements were obtained permitting GRDA to inundate land in the Miami area up to an elevation of 760 NGVD feet. All of the claims at issue involve the taking of private property higher than 760 NGVD feet.

Specific provisions in GRDA's FERC license mandated that GRDA "shall acquire title in fee or the right to use in perpetuity all lands . . . necessary or appropriate for the construction, maintenance and operation of the project," and *"shall be liable for all damages occasioned to the property of others* by the construction, operation, or maintenance of the project works." Over the years, GRDA has periodically raised the "normal" levels of Grand Lake. This reduced the capacity of the lake to accommodate flood waters. GRDA could have instituted condemnation proceedings to obtain flowage easements, rights to usage or, if necessary, the entire fee of the private properties flooded, but that was not done. GRDA never acquired additional easements or property rights that were necessary and, as a result, flooding of private property occurred in October 1986, followed by a series of 14 floods on some properties between 1992 and 1995. Of those floods, this action primarily focuses on the four largest floods – October 1986, September 1993, April 1994 and June 1995.

GRDA did not provide any notice or warning to the residents of Miami of further impending floods due to the operation of the dam. In the predecessor litigation involving the same floods between 1992 and 1995, same neighborhoods and same defendant, Referee and expert hydrologist Dr. Forrest Holly (now employed by GRDA), was charged with the task of

studying the extent and duration of the flooding caused by Pensacola Dam and Grand Lake. Dr. Holly's report was specifically adopted in this case. The report of Dr. Holly substantiates the increased inundation of numerous properties, including Plaintiffs/Appellees' (hereinafter "Plaintiffs") homes. It confirms that all of the damages for these Plaintiffs from1993, 1994 and 1995 floods were solely due to the existence and operation of the Pensacola Dam. Floodwaters remained upon plaintiffs' property for weeks at a time, in some cases, causing substantial damage to real and personal property. Because of the repeated floods, Plaintiffs were ousted from their land, and could not enter or use their homes until the floodwaters had receded and repairs and restoration were complete, which took up to six months.

The trial court correctly determined the series of floods caused by the existence and operation of the Pensacola Dam constituted a sufficient interference with the Plaintiffs' use and enjoyment of their properties to result in a taking within the meaning of Okla Constitution, Art. II, §§ 23 & 24, requiring just compensation making the property owner whole. The trial court ruled the 15-year statute of limitations for a constitutional taking only applied to Plaintiffs' *real property,* but not Plaintiffs' *personal* property. The trial court erroneously applied the 2-year tort statute of limitations, 12 O.S. §95(3), to Plaintiffs' inverse condemnation claims for *personal property* taken in the series of floods, effectually ruling *personal property* is excluded from the definition of "private property" taken for which just compensation is due. However, when the impact of flooding results in a taking of a person's property, the Constitution requires just compensation for all private property taken, and the statute of limitations should be the same for all such property.

SUMMARY OF THE RECORD

1. In 2001, approximately 40 landowners filed this lawsuit, entitled *Asbell, et al. v. Grand River Dam Authority,* Ottawa District Court Case No. CJ-01-00381. Plaintiffs subsequently filed a First Amended Petition, which resulted in a revised case caption of *Allman, et al. v. Grand River Dam Authority* (hereinafter "*Allman*"). (R. 27-51, First Amended Petition.) Said landowners are seeking recovery pursuant to inverse condemnation for the repeated flooding that occurred on their property for the preceding fifteen (15) years, including October 1986, and multiple floods occurring from November1992 through July1995. *Id.*

2. The *Allman* inverse condemnation litigation follows the precursor class action lawsuit, *Dalrymple et al. v. Grand River Dam Authority* (hereinafter *Dalrymple*), Ottawa District Court Case No. CJ-94-444. In *Dalrymple*, over 100 owners of property along the Neosho River in Ottawa County (upstream of Pensacola Dam) sought damages or just compensation for the harm to their property by GRDA resulting from fourteen (14) floods that occurred from 1992 through 1995. (R. 175-258, 217, Ex. "B" to Plaintiffs' Response to Motion for Partial Summary Judgment, *McCool and Stoner v. GRDA,* [Court of Civ. App., June 15, 2004], (hereinafter, *McCool and Stoner* opinion.)

3. The claims of Jeffry and Carol McCool and Randy and Dena Stoner were severed from the *Dalrymple* class to allow damages to be established for real property and personal property and to allow appeals to determine legal issues. The Stoners' claimed a constitutional taking. [Hereinafter, precursor litigation will be referred to as "*Dalrymple*," unless unique to *Stoner* or *McCool* judgments.] (*See* R. 175-258, 217-18, *McCool and Stoner* opinion,; R. 175, 240-42, Resp. to MSJ, Ex. "C," *Stoner* trial court Judgment [October 17, 2001]) (hereinafter,

Stoner Judgment).

4. *Allman* involves the same operative facts and occurrences as the precursor *Dalrymple* case. The district court and the parties agree that the same floods at issue in *Dalrymple*, are at issue in *Allman*. Therefore, the Court's order adopting Dr. Holly's findings concerning the 1993-1995 floods is also the law of this case." (*See* R.87-119, 89, 91, GRDA's Motion for Partial Summary Judgment; (R. 488, 492, Resp. to Plaintiffs' Motion to Settle Journal Entry; R. 27-51, First Amended Petition.)

5. Robert and Brenda Perry, David and Stacy Pryor, and John and Janet Shaw are Plaintiffs in *Allman*. (*See* R. 27-51, First Amended Petition.) Plaintiffs seek the relief provided by Article II, §24 of the Oklahoma Constitution and 27 O.S. §12; just compensation for the significant interference with the use and enjoyment of their property. (*Id.*, R. 27, 35-37.)

6. Defendant Grand River Dam Authority (GRDA), is a governmental entity of the State of Oklahoma that owns and operates the Pensacola Dam, which impounds water from the Neosho River and the Spring River to form the reservoir known as Grand Lake O' the Cherokees [Grand Lake], for the purposes of flood control and electrical power generation. (*See* [Shaw] R. 607-08, ¶2; [Perry] R. 617-25, ¶2; [Pryor] R. 626-27, ¶2.)

7. As recognized by GRDA [Brief, p. 1], under 82 O.S. §862(h) and (l), it "has the power to condemn land, and can be sued for inverse condemnation or in tort." GRDA could have instituted condemnation proceedings to obtain an easement interest, fee title or other interest in Plaintiffs' private property. At the May 14, 2010 hearing in *Allman*, counsel for GRDA stated:

> "[Plaintiffs' counsel] says we could have taken this property, we could have exercised eminent domain. Well, duh, so what. We didn't. So that's why we can have inverse condemnation where the municipality or city or state doesn't

> bring . . . condemnation proceedings, the landowner can bring inverse condemnation."

(R. 587, p. 40. Transcript of Proceedings.)

8. In *Stoner,* damages were awarded for violation of Okla. Const., Art. 2, § 24. (*See* R. 240-42, Plaintiffs' Response to MSJ, Ex. "C," *Stoner* Judgment.) In affirming *McCool* and *Stoner*, the Court of Civil Appeals observed that "[t]he license and applicable federal and state statutes require GRDA to operate the dam at the federal government's direction," and "[t]he statutes also provide that GRDA shall be responsible for damages resulting from the dam's operation." (*See* R. 175-258, 217-18, *McCool and Stoner* opinion.)

9. In 2001, the trial court adopted Dr. Holly's report where he concluded: "The government and GRDA have only purchased easements to elevation 760. Therefore [T]he existence and operation of Pensacola Dam has caused a quantifiable increase in the magnitude and duration of flooding . . . ." Dr. Holly's report also included maps and charts showing the difference between natural flood levels versus dam-caused flooding. (*See* R. 175-258, 218, *McCool and Stoner* opinion.)

10. Dr. Holly identified actions of the State as the cause of inundation or additional inundation to Plaintiffs' properties. In addition, Dr. Holly opined the magnitude of the duration of inundation can depend on somewhat arbitrary dates chosen to designate the beginning and end of floods. (*See* R. 275-258, 218, Dr. Holly's report, p. 112.)

11. In *Stoner*, the trial court determined "repeated flooding of Plaintiffs' property from 1993 through 1998 for public use substantially interfered with the [Plaintiffs] use and enjoyment of their property, is likely to recur . . . and constituted a taking by Defendant . . . ."

(*See*, R. 175-258, 241, Plaintiffs' Response to MSJ, Ex. "C," *Stoner* Judgment).

12. In *Dalrymple*, in regard to GRDA's argument the Trial Court had impermissibly awarded Landowners a double recovery by awarding them both temporary and permanent damages to property, the Court of Civil Appeals held: "We are satisfied from our review of the record that the Trial Court awarded 'costs of repair damages' and damages for diminution in the value of the property after repairs. This is not a double recovery." (*See* . (*See* R. 175-258, 231, *McCool and Stoner* opinion.)

13. At the May 14, 2010 hearing, counsel for GRDA agreed Dr. Holly's report from *Dalrymple* is also binding in *Allman*. As to the factual findings and appellate court rulings from *Dalrymple*, counsel for GRDA stated, "obviously, 90 percent of that we're not going to dispute, because we've been down that road." (*See* R. 587, p. 53-54. Transcript of Proceedings.) GRDA's counsel represented that there would be no need for plaintiffs to present evidence to establish certain fundamental. *Id.* at p. 55.

14. In *Perry* and *Pryor*, GRDA was found liable for all damage done above an elevation of 760' NGVD. The floodwaters which ousted the Perrys and the Pryors from their residences in 1993, 1994 and 1995 were caused solely by Pensacola Dam. Floodwater would not have reached those properties but for the existence and operation of Pensacola Dam. (*See* R. 617-25, [Perry] FOF ¶¶ 6, 9, 12, COL ¶2; R. 626-33, [Pryor] FOF ¶¶ 6, 9, 12, COL ¶2.)

15. In *Allman*, Plaintiffs' expert hydrologist, Dr. Robert A. Mussetter, was the only expert witness who prepared maps and models of the 1986 flood. Dr. Mussetter's specific findings in regard to the 1986 flood were adopted after GRDA agreed to stipulate to Dr. Mussetter's opinions as to the1986 flood. Dr. Mussetter found 50% of the water on the Shaw's

property in 1986 was due to dam-caused flooding. In other words, instead of 2 feet of water in their house, the water was 4 feet deep in their house. (*See* R. 607-16, [Shaw] FOF ¶¶ 5, 6, 8.)

16. In *Shaw*, 50% (or 2 feet) of the (4 feet deep) floodwater in the Shaws' home in 1986 was caused by the existence and operation of Pensacola Dam. (*See* R. 607-16, [Shaw] FOF ¶¶5, 6.) However, in 1993, 1994 and 1995, the floodwater in the Shaws' home was caused solely by the existence and operation of the dam. (*See* R. 607-16, [Shaw] FOF ¶ 10, 13, 17.) GRDA is liable for all damage done above an elevation of 760' NGVD caused by flood waters resulting from the existence and operation of Pensacola Dam. (*See* R. 607-16, [Shaw] COL ¶2.)

17. In *Perry*, *Pryor* and *Shaw*, the trial court found takings had occurred by virtue of "Plaintiffs being deprived of the use and enjoyment of their property" because of flooding, caused by GRDA's repeated and unprecedented impoundment of water on Plaintiffs' properties. In addition, the trial court found the flooding constituted a sufficient interference with the Plaintiffs' use and enjoyment of their properties to result in a "taking" within the meaning of Okla Constitution, Art. 2, §§ 23 & 24. (R. 607-16 [Shaw] FOF ¶¶7, 11, 14, 24, COL ¶4; R. 617-25, [Perry] FOF ¶¶7, 10, 13, COL ¶3; R. 626-33, [Pryor] FOF ¶¶ 7, 10, 13, COL ¶4.)

18. The trial court found GRDA was responsible for payment of just compensation for the flood waters on Plaintiffs' private property it caused due to the existence and operation of the Pensacola Dam. (R. 607-16 [Shaw] FOF ¶¶ 11, 14, COL ¶¶ 1, 2; R. 617-25 [Perry] FOF ¶¶ 7, 9, 13, COL 1; R. 626-33 [Pryor] FOF ¶¶ 7, 10, 13, COL ¶ 2.)

19. GRDA has not paid any compensation to Plaintiffs to date. (R. 607-16 [Shaw] FOF ¶27; R. 617-25 [Perry] FOF ¶ 23; R. 626-33 [Pryor] FOF ¶23.)

20. The trial court held, pursuant to 12 O.S. §93 and common law, the 15-year inverse

condemnation limitations period applied to a taking of *real property*, but the 2-year statute of limitations under 12 O.S. §95(3) applied to Plaintiffs' inverse condemnation claims for taking of *personal property*. (R. 607-16 [Shaw] COL ¶¶ 7, 8,9; R. 617-25 [Perry] COL ¶¶ 6, 7, 8; R. 626-33 [Pryor] COL ¶¶ 7, 8, 9.)

21. Plaintiffs' homes were repeatedly inundated; they were deprived of physical control over and/or access to their property; and suffered extensive injury both to real and personal property. (R. 607-16 [Shaw] FOF ¶¶ 5,9, 12, 16-18; R. 617-25 [Perry] FOF ¶¶ 5, 8, 11, 14; R. 626-33 [Pryor] FOF ¶¶ 5, 8, 11, 14.)

22. The District Court has severed three cases, *Perry v. GRDA*; *Pryor v. GRDA*; and *Shaw v. GRDA*, for further litigation and appeal to prevent delay and decrease the potential for wasted expense and judicial resources. (R. 603-606.)

23. For the Court's convenience, Plaintiffs have prepared a chart summarizing the impact of the series of floods on the Perrys, Pryors and Shaws. (*See* R. 607-16 [Shaw] FOF ¶¶ 5,9, 12, 16-18; R. 617-25 [Perry] FOF ¶¶ 5, 8, 11, 14; R. 626-33 [Pryor] FOF ¶¶ 5, 8, 11, 14.) (See attached hereto as Exhibit "A").

ANSWER TO APPELLANT GRDA'S BRIEF IN CHIEF
ARGUMENT AND AUTHORITIES

STANDARD OF REVIEW

On appellate review, issues of law are reviewed de novo, but adjudications of fact are reviewed with deference to the trial court.

> "[A]ppellate courts are courts of limited jurisdiction. Okla Const. art. 7, § 4. The standard of review prescribes an appellate court's scope of review, and therefore limits its power. Ronald R. Hofer, *Standards of Review–Looking Beyond the Labels*, 74 Marq. L. Rev. 231, 232 (1991). The standard of review

> allocates judicial decision making between trial and appellate courts by defining the deference the appellate court must give to decisions of the trial court. 'An issue of law decided by a trial court is reviewed by this Court *de novo*. On the other hand, an adjudication of a fact by a lower tribunal is reviewed by different [deferential] standards according to the type of controversy and type of adjudication made.'"

Gentry v. Cotton Elec. Coop., Inc., 2011 OK CIV APP 24, *citing Christian v. Gray*, 2003 OK 10, ¶ 41, 65 P.3d 591, 608.

I. THE TRIAL COURT CORRECTLY DETERMINED GRDA'S REPEATED INUNDATION CONSTITUTED A SUBSTANTIAL INTERFERENCE WITH PLAINTIFFS' PROPERTY RIGHTS, CONSTITUTING A "TAKING" WHICH REQUIRED JUST COMPENSATION.

A. Constitution Requires Just Compensation to Make the Landowner Whole.

1. *Under Article II, § 24, Private Property Shall Not be Taken or Damaged for Public Use Without Just Compensation.*

"The Oklahoma Constitution provides in Article II, Section 24 that 'private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken." *State ex rel. Dept. of Transp. v. Lamar Cent. Outdoor, Inc.*, 2007 OK CIV APP 105, ¶ 8, 170 P.3d 551. Article II, § 24 of the Oklahoma Constitution, like the Fifth Amendment, recognizes a preexisting sovereign power to take private property for public use.

> "[I]t is settled law that the constitutional provisions are not a grant of power, but are limitations placed upon exercise of a power recognized as a necessary attribute of sovereignty."

Kelly v. Oklahoma Turnpike Auth., 1954 OK 112, ¶ 13, 269 P.2d 359.

2. *Takings Clauses Place Conditions on Government's Exercise of Power over Fundamental Property Rights*

Both the Fifth Amendment and Article II, § 24 of the Oklahoma Constitution place

conditions or obligations on the sovereign's exercise of power over private property. The state is not prohibited from obtaining property; but two conditions must be met. Private property shall only be taken (1) for public use; and (2) with just compensation. *See United States v. Carmack*, 329 U.S. 230, 241-42, 67 S. Ct. 252, 91 L. Ed. 209 (1946) (Takings clauses impose the condition or obligation to pay just compensation when it takes another's property for public use); *see also Skip Kirchdorfer, Inc.* v. *United States*, 6 F.3d 1573, 1578 (Fed. Cir. 1993) (recognizing property rights as fundamental; "Government is instituted no less for protection of the property than of the persons of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government.") Further, in cases involving physical appropriation by the government, maximum protection should be accorded when it comes to the home of a citizen. *Cf. Dow Chem. Co. v. United States*, 476 U.S. 227, 237-38, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986)(explaining commercial property does not enjoy same sanctity accorded an individual's home due to intimate activities associated with family privacy and the home and its curtilage).

3. Claim of Consequential Damage to Adjacent Property Versus Constitutional Taking Claim

Plaintiffs' inverse condemnation cause of action is a constitutional claim pursuant to Article II, § 24 of the Oklahoma Constitution and 27 O.S. § 12. Inverse condemnation is not governed by the Governmental Tort Claims Act, but is a special statutory proceeding for the purpose of ascertaining the compensation to be paid for appropriated property. *See Material Service Corp. v. Rogers County Commissioners*, 2006 OK CIV APP 52, ¶ 7, 136 P.3d 1063.

In its Brief, GRDA muddies the waters by failing to recognize the distinction between

a constitutional taking where there is actual physical occupation by the government; tort claims; and a constitutional claim for damage to property located adjacent to a site of government activity. GRDA's arguments improperly intermingle the concepts. They are not the same thing.

> "If a government action that allegedly resulted in a taking was negligent, it must usually be challenged in a tort action of trespass or nuisance. Thus, an abutting landowner whose property was damaged by a nearby taking but not actually taken may sue for damages, if the bar of sovereign immunity as applied in tort actions can be overcome, but some cases have found injury resulting from negligent acts of government to be takings rather than ordinary tort actions."

9 Thompson on Real Property § 80.05(b)(2), (Thomas, 3d Ed. LexisNexis, 2011).

> "Generally, the government compensates property owners before appropriating property, either by paying a mutually agreed price or by paying the value as determined in a statutory condemnation proceeding. If, however, the government appropriates property without paying adequate compensation, the owner may recover the resulting damages in an 'inverse condemnation' suit. An inverse condemnation may occur when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development."

Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992) (citations omitted).

4. Just Compensation to Make the Landowner Whole.

The courts have consistently interpreted the constitutional guarantee of just compensation expansively in order to restore injured plaintiffs to their previous position, making them whole. **"The underlying principle of the law of eminent domain is that the owner must receive full and equivalent compensation for the loss sustained."** *Kelly v. Oklahoma Turnpike Auth.*, 1954 OK 112, ¶27, 269 P.2d 359, 365 (emphasis added).

The constitutional guarantee of "just compensation" requires an award reimbursing plaintiff "for his reasonable costs, disbursements and expenses, including reasonable attorney,

appraisal and engineering fees, actually incurred because of such proceeding," so injured private property owners will be made whole for the taking or damaging of their property by the State. Article 2, §24; 27 O.S. §16; 27 O.S. §12. Just compensation is defined as the payment to the landowner for the taking of his property of "an amount of money that **will make the landowner whole**." OUJI 25.2 (emphasis added). The Supreme Court has stated:

> "This court should never be unmindful that a landowner is entitled to be **compensated fully** when the latter's property is taken by the government in the exercise of the eminent domain power. The mandate of both the state and federal constitutions strongly supports full indemnification by just compensation. The command requires that the **condemnee be placed as fully as possible in the same position** as they occupied before the government's taking."

State of Oklahoma ex rel. Dept. of Transp. v. Little, 2004 OK 74, ¶ 23, 100 P.3d 707 (emphasis added).

It is also essential to keep in mind the difference of eminent domain where intentions are declared and inverse condemnation in cases like this where the landowner is left to guess at what might occur in the future. The burden of erroneous but reasonable assumptions must fall on the government, not the landowner. Plaintiffs brought this action to obtain just compensation when GRDA failed to act. Pursuant to 82 O.S. §862, GRDA could have instituted condemnation proceedings to obtain an easement interest, fee title or other interest in Plaintiffs' private property. But as counsel for GRDA observed, it chose not to institute condemnation proceedings:

> "[W]e could have exercised eminent domain. Well, duh, so what. We didn't. So that's why we can have inverse condemnation where the municipality or city or state doesn't bring . . . condemnation proceedings, the landowner can bring inverse condemnation."

(R. 587, p. 40.)

The idea of compensatory damages is to make the injured party whole. In *Little*, the Court observed that property owners were entitled to a recovery for the expense of moving stored personal property, regardless of whether the taking was characterized as a total taking or a partial taking. 2004 OK 74, at ¶¶ 21-22. The Court expressly allowed plaintiff's claim for moving expenses in a flood case in order to make the plaintiff whole. *Id.* Moreover, prejudgment interest is an element of "just compensation" to which citizens of this State are entitled under Article II, §24, to make them whole for the time value of money from taking to payment. *Williams Natural Gas Co. v. Perkins*, 1997 OK 72, ¶23; *Carter v. City of Oklahoma City*, 1993 OK 134, ¶¶19-20.[1] When all is said and done, an award of any amount less than what is necessary to make Plaintiffs whole and to restore them to their former positions unjustly relieves GRDA of its constitutional obligations.

Plaintiffs seek just compensation for the takings they have endured.[2] Plaintiffs do not ask to be placed in a better position; only to be made whole again. To be made whole, the cost of their reasonable repairs must be allowed. GRDA bears a constitutional responsibility to assure

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Other states with similar constitutional provisions are in accord. *See e.g., City of Houston v. Texan Land & Cattle Co.*, 138 S.W. 3d 382, 388-89 (Tex. App. 2004) ("The purpose of prejudgment interest is to compensate a party for the lost use of money due as damages during the lapse of time between accrual of the claim and the date of judgment ... In other words, prejudgment interest is one component in making the plaintiff whole. ") (emphasis added).

2

There is no question that, pursuant to 82 Okla. Stat. §862, GRDA could have instituted condemnation proceedings to obtain easements or fee title of Plaintiffs' property. In fact, GRDA's own license issued by the federal government specifically requires GRDA to purchase all necessary easements. To date, however, GRDA has chosen not to institute condemnation proceedings as to these plaintiffs, and continues to deny its obligation of just compensation.

just compensation for its taking of Plaintiffs' property, and it should not be allowed to evade the duty to make Plaintiffs whole.

B. The Trial Court Correctly Determined the Severe Series of Floods Resulted in a Taking, Requiring Just Compensation.

1. If there is Physical Occupation/Invasion, Just Compensation is Required Even Though the Taking is for a Temporary Period of Time.

As GRDA recognizes, "[w]hen the government physically invades a landowner's property, a taking occurs at once, and nothing the government can do or say after that point will change that fact." [Brief, p. 16, *citing* 27 Am. Jur. 2d *Eminent Domain* §804(2011).] "A taking may be found where land is physically taken and occupied, where government action substantially interferes with the use and enjoyment of property, or where government overtly exercises dominion and control over property." *Material Service Corp. v. Rogers County Board of Commissioners*, 2012 OK CIV APP 17 at ¶5. Physical invasion or occupation of property, even for a limited term or temporary period of time, is considered a *per se* taking. [3] *See, e.g., Hendler v. United States*, 952 F.2d 1364, 1376-77 (Fed. Cir. 1991). The United States Supreme Court has stated that "where government requires an owner to suffer a permanent physical invasion of her property–however minor–it must provide just compensation." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005), *citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419 (1982) (tracing the evolution of takings jurisprudence).

In *Skip Kirchdorfer, Inc.*, the Federal Circuit Court of Appeals stated:

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[3] GRDA concedes an overt act by the government resulting in an assertion of dominion and control over property can be an actual or *de facto* "taking." (Brief, p. 11.)

"When the Government authorizes a permanent physical occupation, the Supreme Court has recognized a per se taking. [Citation omitted.] Thus, permanent physical occupation causes a taking regardless of the economic impact on the owner or the magnitude of public interests. *Id.*

A 'permanent' physical occupation **does not** necessarily mean a taking **unlimited in duration**. *Hendler v. United States*, 952 A 'permanent' taking can have a limited term. *Id.* In *Hendler*, this court concluded that the distinction between 'permanent' and 'temporary' takings refers to the nature of the intrusion, not its temporal duration. *Id.* at 1377. A 'permanent' physical occupation, as distinguished from a mere temporary trespass, involves a substantial physical interference with property rights. *See id.*

. . .

The [joint venture] did not continuously occupy the warehouse. Nevertheless, a permanent physical occupation need **not be continuous and uninterrupted**. [Citation omitted.] An intermittent intrusion still causes a taking. *See Kaiser Aetna*, 444 U.S. at 180, 100 S. Ct. at 393 (holding that a compensable taking exists where the Government physically invades an easement in property, allowing third parties to have intermittent access to claimant's property interests)."

Skip Kirchdorfer, Inc. v. *United States*, 6 F.3d 1573, (Fed. Cir. 1993) (emphasis added).

When circumstances are such that, as here, landowners are denied the use of their property, even if it is for a limited term, it constitutes a taking that requires just compensation. Courts have likened the occupancy of premises by the government for a temporary period of time to "the equivalent of rent." *United States v. 7.41 Acres of Land*, 63 F. Supp. 43, 47(1947).

In many instances, the State's physical occupation of private property for a temporary period of time can disrupt the landowner's use of his or her real property. For instance, if the State covers private property with gravel, or parks huge highway construction equipment on the entrance to private property, the property owner loses the use of the surface of the land taken or is prevented from accessing the entire property for a period of time. If the physical occupation is for a temporary period of time but the interference is substantial, such as when the landowner

is unable to obtain access to his property, a " balancing process" has been used to determine if there has been substantial enough interference with the property owner's rights as to constitute a taking. *See Loretto*, 458 U.S. at 440.

Owners whose property has been taken for a temporary period of time must be compensated. *See* 4 Nichols on Eminent Domain §12E.01 (3rd Ed.) Under Article II, §24, if the state restricts the means of ingress and egress for a temporary period of time, a recovery is authorized under Article II, §24, even where there is no physical invasion of the property. *See Chicago, R.I. & P.R. Co. v. Prigmore*, 1937 OK 275, ¶¶1, 4, 68 P.2d 90 (allowing recovery of depreciation in rental value).

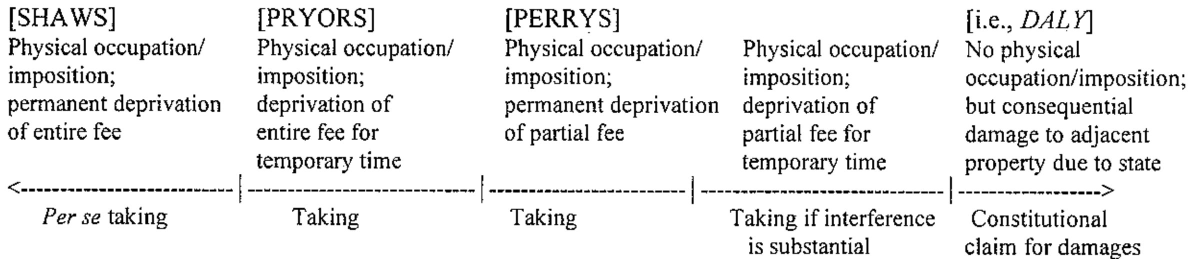
2. It is Not Necessary that the Landowner be Deprived of the Entire Fee; a Taking is Found Where there is Deprivation of Any Part of the Fee.

The Oklahoma Supreme Court has recognized that, even when the physical imposition is partial and does not involve the entire fee, a taking can occur. *See Williams Natural Gas Co. v. Perkins*, 1997 OK 72, ¶ 4, 952 P.2d 483 (Art. II, §24 must be read to apply to partial takings as well as fee). In fact, the Court has expressly stated the remedy afforded by condemnation proceedings is exclusive where <u>any part</u> of an owner's land has been taken and occupied for public use without having been purchased or condemned. *Drabek v. City of Norman*, 1996 OK 126, ¶17, 946 P.2d 658. GRDA's arguments to the contrary must fail.

Case law is replete with examples of constitutional taking of private property as the result of government-caused flooding. "Where flooding is 'severe enough so as to effectively destroy **or impair the land's usefulness**,' such flooding may constitute a 'taking' under §24." *Morain*

v. City of Norman, 1993 OK 149, ¶10, 863 P.2d 1246 (emphasis added), *citing State ex rel. Dep't of Transp. v. Hoebel*, 1979 OK 63, 594 P.2d 1213, 1215.

As an aid to the Court, an illustration is provided on takings by physical occupation/ invasion:



(Reduced in Size to fit required page width; larger version is attached hereto, as Exhibit "B").

C. The Trial Court Correctly Determined the Repeated Flooding Substantially Interfered with Plaintiffs' Property Rights.

Oklahoma case law clearly holds that "if flooding is serious enough to constitute substantial interference with the use and enjoyment of property, it may constitute a taking," and, further, that "whether such a taking is present is a question for the trier of fact." *Drabek*, 1996 OK 126, ¶12, *citing State ex rel. Dept. of Transportation v. Hoebel*, 1979 OK 63, 594 P.2d 1213. GRDA does not dispute that the existence and operation of Pensacola Dam caused an increase in the magnitude and duration of the1993, 1994 and 1995 floods, which in turn caused the floodwaters to cover the properties of these landowners in these cases. It is also true that, for the 1986 flood, as determined by the only study of such event, the Dam caused an additional 2 feet of floodwater in the Shaws' home and increased the duration of the flooding, as well.

1. The Factfinder Found There was a Taking, Requiring Just Compensation.

Here, the facts (including Dr. Holly's report) establish GRDA's assertion of dominion and control over Plaintiff's private property. Referee Dr. Holly, a hydrologist, was charged in

Dalrymple with the responsibility of determining what portion of the 14 floods in Miami was due to natural causes, and what portion was due to Pensacola Dam.

Oklahoma courts have consistently held that the question of whether a taking constitutes substantial interference with the use and enjoyment of property is for the trier of fact to resolve. *Material Service Corp. v. Rogers County Commissioners*, 2006 OK CIV APP 52, ¶ 9, 136 P.3d 1063. The Court in *Williams v. State Dept. of Transp.*, 2000 OK CIV APP 19, specifically stated, "the determination of a taking must be make by the trier of fact and is not susceptible to summary disposition in inverse condemnation actions." *Id.* at ¶ 36. Here, the trial court found the impact and severity of the series of floods caused by the dam substantially interfered with Plaintiffs' use and enjoyment of their property.

There is no question each of the Plaintiffs were ousted from their homes by GRDA's repeated inundation of their properties. The facts show Plaintiffs were out of their homes for months at a time until cleanup and repairs were completed. Their belongings were ruined and their properties damaged by the waste-filled flood waters. They lost family photographs, furniture, and keepsakes. Receipts from prior flood repairs and other important papers were ruined. This was unreasonable interference with Plaintiffs' use and enjoyment of their real and personal property.

GRDA tries to argue this could not possibly constitute a taking in the case of the Perrys and Pryors since, after several months of clean up and repair, they were eventually able to return to their homes. GRDA attempts to avoid its obligation of just compensation by arguing for a legal ruling that, since "after every flood, the Perrys and Pryors returned to their homes and continued to live there," the inference the court should draw is that "intermittent flooding . . . is not such a

substantial interference that it amounts to a taking." [p. 13.] This is an untenable assertion contrary to established law, which is incapable of being defended or justified.[4]

2. *Permanent or Recurrent Flooding may Constitute a Taking.*

The law is clear that intermittent flooding may constitute a sufficient interference as to impair a landowner's property rights, requiring just compensation. *See e.g., Underwood v. State ex rel. Dept. of Transp.*, 1993 OK CIV APP 40, ¶33, 849 P.2d 1113. In *State ex rel. Dept. of Transportation v. Hoebel,* 1979 OK 63, 594 P.2d 1213, the Court held flooding may constitute a taking, reasoning: "[I]t makes little sense to rule that a taking is present when a citizen's land is covered with steel and cement; yet, not present when the land is covered with water." *Id.* at ¶7.

Moreover, by arguing the extensive series of floods did not impair the Shaws', Perrys' or Pryors' properties to the extent there was a taking, GRDA essentially challenges the trial court's factual findings, which GRDA specifically has said it is not doing, on pages 9 and 11 of its brief. In *Morain v. City of Norman,*[5] 1993 OK 149, 863 P.2d 1246, the Court observed:

> "In Oklahoma, we have held that the test of whether there can be recovery in inverse condemnation is whether there is a sufficient interference with the landowner's use and enjoyment to constitute a taking. The question of substantial interference is one that the trier of facts must decide . . . ."

Morain, 1993 OK 149 at ¶9, (Emphasis added.)

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One cannot help but wonder if the Director of GRDA was out of his home for 6 months if he would consider it a substantial interference with his use and enjoyment. In his case, it is likely he would not have to complete repairs himself; many who were flooded could only afford to perform repairs themselves in the evenings and on the weekends, after their regular work. Substantial interference? Yes.

5

Morain does not provide, as GRDA asserts, a case that is factually comparable because, unlike this case, in *Morain*, the City had not committed any overt acts of dominion or control.

> "It is generally conceded that there is a legal right to the use and enjoyment of one's property free from unreasonable interference. The ultimate question is whether there is a sufficient interference with the landowner's use and enjoyment to constitute a taking by a sovereign . . . [and] [t]he question of substantial interference is one that the trier of facts must decide.

Williams v. State ex rel. Dept. of Trans., 2000 OK CIV APP 19, ¶22, 998 P.2d 1245.

GRDA essentially asks this Court to rule the government may impound water on private property without notice, deny landowners access to their own private property, and oust them from their homes for months at a time with no liability unless GRDA obtains impairment of title or fee. Under this proposed scenario, unless the physical invasion/occupation is permanent, the government would have no duty to pay just compensation. GRDA's argument is transparent. Its goal is to: (1) evade its obligation to pay compensation for repeatedly inundating Plaintiffs' properties, or (2) if payment for a taking must be made, to acquire either fee title or an easement interest. Such a result would reap tremendous injustice upon landowners.

3. *The Naturally-Occurring Flooding Component Only Relates to the Shaws; the Asserted Claims Are Solely for Dam-Caused Flooding.*

As indicated by the Findings of Fact and Conclusions of Law, the 1993, 1994 and 1995 floods in *Perry, Pryor* and *Shaw* involve only Dam-caused flooding. Any arguments focusing on natural floods are wholly irrelevant to the Pryors and Perrys because the Pryors' and Perrys' properties would not have suffered *any* flooding but for the Dam. As for the 1986 flood and the Shaws, the trial court found:

> "On each occasion that the . . . Pensacola Dam caused or increased the flooding of [the Shaws'] property, the flooding was so severe that it substantially interfered with the Plaintiffs' use and enjoyment of their property and their home by forcing them out of their home for a period of weeks or months."

(R. 607, *Shaw* Findings of Fact ¶24.)

> "As the 1995 flood began on June 2, 1995, and it was the last flood in the series which constituted a taking of the Plaintiffs' property by the GRDA, the taking date is found to be June 2, 1995 . . . ."

(R. 607, *Shaw* Conclusion of Law ¶ 13.)

The facts establish the Dam was the cause of 2 feet more floodwater in the Shaws' home in 1986, resulting in a total of 4 feet of floodwater. The higher water level caused greater damage to the Shaws and ousted the Shaws from their home for a longer period of time. Sheetrock and electric wiring which would not have been submerged had to be replaced. The trial court's award to the Shaws takes into account both Dam-caused and natural flooding, and reduces the Shaws' recovery by 50%. GRDA cannot reasonably take the position that every **natural** flood of significance equals a taking.

In addition, it should be noted that GRDA appears to adopt inconsistent positions as to the 1986 flood and the 1993, 1994 and 1995 floods. On one hand, GRDA argues "the Shaws' property was taken by natural flooding in 1986"; but, on the other hand, GRDA argues the 1993, 1994 and 1995 floods could not have resulted in a taking of the Perrys' and Pryors' property rights, because there was not sufficient interference. [Brief, pp. 14-15.] A "taking" is a term of art which, by definition, refers only to government action. Therefore, **natural** flooding cannot result in a "taking."

In an action for inverse condemnation, "[i]f the court determines that a taking has occurred, the defendant will be liable for damages. The nature of damages depends on (1) the nature and extent of the taking and (2) whether the taking is permanent or temporary." 9 *Nichols on Eminent Domain* §G34.03[1], (3rd Ed.). Once a taking is found, the issue of natural versus dam-caused flooding is relevant only to damages. The situation the Shaws faced in 1986 is

consistent with the circumstances the Pryors faced in 1994, which also represents a taking. The Shaws' home was taken from them in its entirety for approximately 2 months, a temporary period of time, until repairs were completed.

GRDA cannot seriously argue that it should not be held liable for inundating a citizen's home with several more feet of floodwater so long as it can show a natural flood component on any portion of the property. The trial court applied the correct test, substantial interference, and found GRDA's repeated inundation of the Shaw's home resulted in a taking, requiring just compensation. GRDA's arguments to the contrary lack merit.

II. THE TRIAL COURT CORRECTLY DETERMINED THE NATURE, TIMING, AND EXTENT OF PLAINTIFFS' DAMAGES.

A. Competent Evidence Supports the Trial Court's Findings of Fact

Oklahoma courts have consistently held that the question of whether a taking constitutes substantial interference with the use and enjoyment of property is for the trier of fact to resolve. *See Mattoon v. City of Norman*, 1980 OK 137, ¶11, 617 P.2d 1347, 1349; *Henthorn v. Okla. City*, 1969 OK 76, ¶15, 453 P.2d 1013, 1016; *Calhoun v. City of Durant*, 1998 OK CIV APP 152, ¶13, 970 P.2d at 613; *Underwood v. State ex rel. Dept. of Transp.*, 1993 OK CIV APP 40, ¶17, 849 P.2d 1113, 1116.

1. With Flooding, Affixing a Point in Time When the Taking Occurs is Fact-Dependant, and is Only Critical Where the Taking is Permanent.

In flood cases, the beginning and end dates of the taking are fact-specific. In affixing a point in time when each taking occurred, the trial court must consider the individual circumstances of the landowners, *i.e.*, when the flooding became so substantial that they were ousted from and/or could not exercise their rights over their property. Learned treatises indicate

affixing the date of taking is not as critical in inverse condemnation actions, or where the taking is for a temporary time period. The date of taking generally becomes important where there is a permanent taking (here, only *Shaw*).

> "The date of taking may be important in an inverse condemnation action. The date of taking is imperative when the taking is permanent. In permanent takings, the court computes the damages for the injury in the same fashion as it does in a regular condemnation action. In such cases, the date of taking is important to the calculation of damages because property appreciates and depreciates in value over time."

9 Nichols on Eminent Domain §G34.03[1], (3rd Ed.).

Plaintiffs' properties are at different elevations and, thus, the length of time the floodwater effects each property will vary accordingly. In inverse condemnation, there is scant comparison to a condemnation where a date of taking can easily be determined. The determination of the point in time when a taking occurs will vary depending on the circumstances presented. *See e.g., Townsend v. State ex rel. State Highway Dep't*, 117 N.M. 302, 304-05, 871 P.2d 958 (1994) ("A 'taking' occurred each time the State removed some portion of the sand or gravel . . . ."). Had GRDA instituted condemnation proceedings, there would have been a very different result.

The trial court determined the date of the taking for the Shaws' property was the first day of the 1995 flood because the Shaws never re-occupied the property after that date. By contrast, the Pryors and Perrys did <u>not</u> voluntarily abandon or relinquish title to their properties.

> "Just as a condemnor should only take and easement rather than a fee interest if the former will suffice, the condemnor should not take a permanent easement if a temporary easement will accomplish its purpose. Similarly, it has been held that a landowner has no right to insist that a temporary taking be deemed a permanent taking."

9 *Nichols on Eminent Domain*, §G32.05 (Matthew Bender, 3d Edition). The trial court considered the circumstances and entered judgment accordingly.

2. *The Trial Court Correctly Determined What Was Taken in the Perry, Shaw and Pryor Cases.*

In considering what was taken, the trial court must consider what interest is sufficient to satisfy the purpose of the taking. "As a general principle, the condemnor is allowed to take property only to the extent required. Thus, if an easement will be sufficient to meet the condemnor's needs, it cannot take a fee interest." 9 *Nichols on Eminent Domain* §G32.04 (Matthew Bender, 3d Edition). A close reading of GRDA's Brief reveals GRDA seeks a ruling that it will not be held responsible for the destruction or diminution of value it has caused by flooding private property, *unless* there is a complete and permanent taking of the fee title or GRDA obtains a flowage easement. GRDA argued below it automatically acquires a *quid pro quo* interest (impairment of title) in the real property whenever a taking is found. There is no support for this argument.

An easement is a right to enter on and use the land of another for some special purpose consistent with the landowner's general property interest. An easement is a limited property interest which may be taken through condemnation. 9 *Nichols on Eminent Domain* §G32.03[1]. A certain or set period of duration is not an essential element of an easement. An easement interest in land may be permanent, indefinite, or exist for a term of years. *9 Nichols on Eminent Domain*, §G32.01 (Matthew Bender, 3d Edition). Since a physical taking of a property interest may be for an indefinite term or exist for a term of years, at which time the property is returned

to the owner, it makes little sense to say there is a *quid pro quo* or that GRDA automatically acquires a property interest in the event a taking is found by the trier of fact.

In addition, when considering the easement in *Perry,* one critical point is that GRDA has not yet paid for the easement. There is no shield until payment has been made. Because GRDA did not pay for the 1994 easement, GRDA cannot use the easement to protect it from the Perrys' subsequent 1995 claims for recovery. In a case like this, an award consisting only of prejudgment interest when payment is eventually does not make the landowner whole.

In *Carter v. Davis*, 1929 OK LEXIS 17, 141 Okla. 172, 284 P.3, the Court stated:

> "Where the interest to be taken is not expressly stated, the condemnor is presumed to take no greater interest than an easement where an easement is sufficient to satisfy the purpose of the taking; but where an easement is not sufficient, the right to take is measured by the need to take. . . . The condemnor may be authorized to take a fee, but the authority to do so must be expressly given or necessarily implied from the language used in the statute; and an absolute and unconditional price must be paid for the property. Under some statutes the condemnor is only authorized to take a qualified or terminable fee, and the title reverts to the landowner in case of abandonment."

This was not an instance where GRDA took action to warn, for example, the Shaws that there would be continued flooding of their property, or where GRDA brought an action in condemnation signaling its intent to take all the right, title and interest of the Shaws. *See Oklahoma City-Ada-Atoka Ry. Co. v. Rooker*, 1960 OK 189, 355 P.2d 552. If there had been action by GRDA warning the Shaws of its intent to take the entirety of their property, the Shaws would not have taken steps to restore their property to a "liveable" condition time after time. GRDA would have this Court decide that just compensation is never due so long as a citizen eventually is able to repair his or her property. Such a ruling would not comport with the law or principles of justice.

III. THE 15-YEAR STATUTE OF LIMITATIONS PERIOD APPLIES WHERE THE SUBSTANCE OR GRAVAMEN OF PLAINTIFFS' CAUSE OF ACT ION IS INVERSE CONDEMNATION.

Oklahoma jurisprudence clearly establishes a 15 year statutory limitation period where, as in *Perry, Pryor* and *Shaw*, the factfinder determines there was a taking:

> "We find if the trier of fact determines there is a taking, even if the taking is the unintended 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 be to allow the taking entity to effectively gain title, or at lease some property interest, short of the prescriptive period."

Underwood v. State ex rel. Dept. of Transp., 1993 OK CIV APP 40, ¶23, 849 P.2d 1113 (rejecting argument that, under *Daly*, 3-year limitations period applied to landowners' claim).

For purposes of determining which statute of limitations applies to a particular action, Oklahoma courts have drawn a distinction between "takings" and consequential damages. A taking occurs when the State physically appropriates, invades or substantially interferes with the use and enjoyment of the actual property of the landowner. *See, e.g., Drabek v. City of Norman*, 1996 OK 126, 946 P.2d 658 (taking due to City water main easement on property, *i.e.*, physical occupation). Consequential damage involves a claim of injury to adjacent private property when there is no physical appropriation or intrusion, but there is damage due to State action. Generally, consequential damage is found where the injury results from State activity on abutting land. In this case, Plaintiffs' claims do not involve consequential damage due to State action on a nearby property; there was an actual physical appropriation of their properties.

A. 12 O.S. §95(3).

The facts establish that the Shaws, Perrys and Pryors had no notice their property would be subjected to recurrent severe flooding, and they incurred expenses time and time again to clean,

repair and restore their real property. GRDA agrees Plaintiffs' inverse condemnation claims for the taking of their real property are subject to a 15-year statute of limitations, but argues Plaintiffs cannot recover any of the expenses for repair and restoration of their real property, without explaining how they are not rooted in the same constitutional cause of action for inverse condemnation as Plaintiffs' real property claims.

GRDA contends the expenses associated with cleanup and repair of their real property should be considered: (A) consequential damages subject to the 3-year statute of limitations under 12 O.S. §95(2); or, (B) if the floods are considered a trespass, not a taking, the cleanup and repair expenses are tort claims subject to a 2-year statutory limitation period pursuant to 12 O.S. §95(3). First, the floods were adjudged to be a taking, not a trespass.

Next, these are the same arguments that were rejected in *Rummage v. State ex rel. Dept. of Transp.*, 1993 OK CIV APP 39, 849 P.2d 1109. The application of 12 O.S. §95(3) to constitutional takings was also rejected in *Corbell v. State ex rel. Dept. of Transp.*, 1993 OK CIV APP 45, 856 P.2d 575 (finding no merit in argument landowners' action was actually one in tort, not inverse condemnation); and *Underwood v. State ex rel. Dept. of Transp.*, 1993 OK CIV APP 40, 849 P.2d 1113.

It is critical to note the substance or gravamen of Plaintiffs' cause of action is inverse condemnation pursuant to Article II, §24. Plaintiffs' assert a constitutional cause of action for a taking of private property by physical occupation which substantially interfered with the use and enjoyment of the property. In determining which statute of limitations applies, courts look to the underlying cause of action. "The right asserted is determinative, not the relief sought." *New Amsterdam Cas. Co. v. Waller*, 301 F. 2d 839, 844 (4th Cir. 1962); *National Discount Corp v.*

O'Mell, 194 F.2d 452 (6th Cir. 1952). The expenses associated with cleanup and repair of Plaintiffs' real property cannot reasonably be classified as a claim for consequential damage to *adjacent property* when the taking was of Plaintiffs' homes and yards.

In support, GRDA cites *City of Oklahoma City v. Daly*, 1957 OK 209, 316 P.2d 129, (action for physical injury to adjacent building from vibration caused by City's non-negligent construction of sewer line on nearby property). *Daly* is easily distinguishable because there, the court found there was no physical occupation by the government and *no taking*. The *Daly* Court found the 3-year limitation period in 12 O.S. §95(2) applied to plaintiff's constitutional claim for consequential damage to adjacent private property. *See Drabek v. City of Norman*, 1996 OK 126, ¶11, 946 P.2d 658 ("In *Daly*, the three-year limitation period at 12 O.S. §95 (Second) was held to be applicable to an action involving only consequential damage to adjacent private buildings . . . and not a taking."). In short, although the 3-year statute of limitations has been applied to constitutional claims where there is consequential damage to adjacent property caused by government activity off-site,[6] 12 O.S. §95(2) has been held <u>not to apply</u> where there is an actual taking of the landowner's property. S*ee, e.g., Rummage*, 1993OK CIV APP 39, ¶25. There is no dispute that the 15-year prescriptive period applies to all of Plaintiffs' real property claims, including expenses for repair and restoration, because *Perry, Pryor* and *Shaw* clearly reflect a taking of real property and the purpose of just compensation is to make the landowner whole.

6

For example, in *Moneypenney v. Dawson*, 2006 OK 53, 141 P.3d 549, the lawsuit involved neighbors, not the State. There was no physical occupation or imposition by the state. The Court found the two year statute of limitations of §95(3) was applicable to tort actions. There was no government actor, nor was there an allegation of a constitutional taking.

B. 12 O.S. §95(3).

GRDA alternatively argues 12 O.S. §95(3) applies, but that provision does not apply where a taking is found. *See City of McAlester v. King,* 1960 OK 178, (stating 2-year statute of limitations under 12 O.S. §95(3) does not apply where the cause of action arises from physical invasion, physical injury to property, or impairment of appurtenant right). GRDA essentially argues just compensation does not mandate the inclusion of expenses associated with cleanup and repair of real property, which must be distinguished from the taking of the real property itself.

The trial court's award of just compensation for the cleanup and repair of their real property is necessary to meet the requirement of making Plaintiffs' whole. Where **condemnation** proceedings are instituted, the landowners have notice of what is coming *prior to the taking*, and are able to remove their personal property. That is not the case here. None of the Plaintiffs had any notice their homes and belongings would be subjected to the repeated inundation time and again in 1993, 1994 and 1995. Without the notice that condemnation proceedings would have provided, Plaintiffs repaired and restored their properties time and time again.

Under the circumstances presented, Plaintiffs' repairs and restoration expenses must be considered part of their damages due to constitutional taking. This is particularly true where, had Plaintiffs failed to move things out prior to flood, or repair and restore their properties, GRDA would claim failure to mitigate. Moreover, evidence of restoration and repair expenses are properly admissible at trial in a constitutional takings case. *See City of Tulsa v. Mingo School Dist. No. 16*, 1976 OK CIV APP 27, ¶38. Further, evidence of clean-up and restoration demonstrates plaintiffs' efforts to mitigate existing damage and to prevent further injury to their property. *See* OUJI 3d (Rev. 2009) 5.4.

IV. APPOINTMENT OF COMMISSIONERS IS NOT REQUIRED IN INVERSE CONDEMNATION PROCEEDINGS.

The final argument framed on appeal by GRDA is that 66 O.S. §57 required the trial court to appoint commissioners to determine damages. To information and belief, this argument was not presented to the trial court for determination, and cannot be considered for the first time on appeal. Even if GRDA did raise the issue below, the argument fails for several reasons. The Oklahoma Supreme Court has stated that 27 O.S. §12 applies in inverse condemnation proceeding instituted by an owner of real property; rather than the general condemnation proceedings for railroad companies. *See Carter v. City of Oklahoma City*, 1993 OK 134, ¶11, 862 P.2d 77. Further, 66 O.S. §57 applies when the state "is unable to purchase any real property needed." Here, GRDA never made any effort to purchase the real property in question and, thus, did not prove it was unable to purchase the necessary properties.

> "[27 O.S. §12] specifically addresses situations . . . where the landowner has brought an inverse condemnation action and where the court then finds a taking and awards the landowner compensation. Section 12 directs that the court 'shall determine an award . . . as part of the judgment, 'to reimburse the owner of title in real property."

Carter v. City of Oklahoma City, 1993 OK 134, ¶12, 862 P.2d 77.

The trial court need not appoint commissioners in an action for inverse condemnation. Moreover, damages have already been determined as to the Perrys, Pryors and Shaws, and the appointment of commissioners at this point is not required, and will only cause needless expense and further delay.

PROPOSITION OF COUNTER-APPELLANTS

I. THE TAKINGS CLAUSE OF THE OKLAHOMA CONSTITUTION DOES NOT RESTRICT THE TERM "PRIVATE PROPERTY" TO REAL PROPERTY; THUS, THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY THE 15-YEAR STATUTE OF LIMITATIONS TO ALL PROPERTY TAKEN AND, INSTEAD, APPLIED THE 2-YEAR LIMITATION PERIOD OF 12 O.S. §95 TO PLAINTIFFS' PERSONAL PROPERTY.

The 15-year statute of limitations for constitutional inverse condemnation claims applies to all private property taken. Article II, §24 of the Oklahoma Constitution requires that the landowner be fully compensated for damages. *See Williams v. Natural Gas Co.*, 1997 OK 72, ¶23, n.23, 952 P12d 483. The *Allman* Plaintiffs, including the Shaws, Pryors and Perrys, brought a constitutional cause of action seeking just compensation for taking of private property. The trial court ruled the 15-year inverse condemnation statute of limitations period applied to Plaintiffs' inverse condemnation claims as to *real property*, but erroneously found the 2-year statute of limitations for tort claims under 12 O.S. §95(3) applied to the taking of *personal property*.

Standard of Review

On appeal, *de novo* review of a grant of summary judgment determines whether a trial court erred in its application of the law, and no deference is given to the trial court's ruling. *See Oklahoma Dept. of Securities ex rel. Faught v. Blair,* 2010 OK 16, ¶54; *Deutsche Bank National Trust Co. v. Roberts*, 2010 OK CIV APP 47, ¶9. "[I]f the judgment is contrary to substantive law, the judgment will be reversed." *Wathor v. Mutual Assur. Adm'rs, Inc.*, 2004 OK 2, ¶4.

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

The Oklahoma Supreme Court has indicated that the term "property," when used in a constitutional takings context, is to be given a very broad interpretation. "As used in this calculus,

property means 'not only real estate held in fee, but also easements, personal property and every valuable interest which can be enjoyed and recognized as property.'" *Kelly*, 2007 OK CIV APP 25, at ¶8 *citing Little*, 2004 OK 74, at ¶22; See also *Curtis v. WFEC R.R. Co.*, 2000 OK 26, ¶13, 1 P. 3d 996. Article II., §24 refers only to "private property."

Pursuant to 12 O.S. §93(4) and common law, the statute of limitations for the substantial interference with the use and enjoyment of private property resulting in a taking is 15 years. When there is "injury to property by action of a public entity that would have been required to institute condemnation proceedings to accomplish the result," the 15-year limitation period applies. *Drabek v. City of Norman*, 1996 OK 126, ¶18.

When limiting the exercise of state power as to the taking of private property, the framers of the Oklahoma Constitution chose language that does not draw a distinction between real and personal property. Section 24, Art. II. of the Oklahoma Constitution provides:

> **"Private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken."**

The Oklahoma Supreme Court previously held the costs of moving personalty from condemned property are compensable in an eminent domain proceeding. In *Little*, 2004 OK 74, the Court approved an instruction in a condemnation case "that the reasonable cost of moving personalty from condemned property and setting it up in another location was compensable in an eminent domain proceeding." 2004 OK 74, at ¶20. However, the Court of Civil Appeals explained in *State ex rel. Dept. of Transportation v. Kelly*:

> "[T]he Oklahoma Supreme Court has determined moving expense and other related costs of transporting personalty from the property constituted an element of damage to the property itself, finding that 'when the necessity exists for the removal of property from lands taken in a condemnation proceeding, the reasonable cost of

> removal is a proper element of damages . . . .' (Citations omitted.) And the Court determined that moving and related expenses have always been an element of recovery in Oklahoma condemnation actions."

Kelly, 2007 OK CIV APP 25, at ¶¶8-9,156 P.3d 734 (emphasis added).

Personal property taken by flooding must be viewed as an element of the total value of the landowner's award of just compensation. Because the cost of moving personal property resulting from a move necessitated by a taking would be a valid expense in an eminent domain proceeding under *Little* and *Kelly*, it seems even more apparent that constitutional claims related to personalty should be treated identically to claims for real property. There is no reason to subject categories of taking damages to different statute of limitations.

B. Fundamental Rules of Statutory Interpretation

As a general rule, appellate courts construes constitutional eminent domain provisions "strictly in favor of the owner and against the condemning party." *Board of County Commissioners of Muskogee County v. Lowery*, 2006 OK 31, ¶11, 136 P.3d 639. "Constitutional and statutory provisions relating to eminent domain must be strictly construed in favor of the landowner and against the condemning party." *Carter v. City of Oklahoma City*, 1993 OK 134, ¶12, 862 P.2d 77. Any doubt as to the type of "private property" under Article II., §24 to which the 15 year statute of limitations applies must be resolved in favor of plaintiffs. *See* 26 A.L.R. 4th 68, 71-73, 83-87 (1983) (just compensation for taking is a fundamental constitutional right not to be limited by statutory construction).

The trial court construed "private property" in Article II, §24 in a manner that does not favor the landowner, and makes an arbitrary distinction between real and personal property that is not present in the Oklahoma Constitution or inverse condemnation statutes. Moreover, this

construction effectively allows GRDA to circumvent the constitutional condition on the exercise of its powers, *i.e.*, its obligation of just compensation

GRDA's operation of the Pensacola Dam for public use impacted and/or destroyed both the personal and real property of plaintiffs. Plaintiffs' homes were flooded; many had to move their belongings and were out of their homes for weeks or even months; others could not move their belongings out in time to avoid flood damage; after the flooding their homes were not in the same condition as before for months; in some cases the flooding happened over and over again. Plaintiffs suffered losses to both their real and personal property. To hold that plaintiffs cannot maintain constitutional claims for 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 personal property is also damaged, must sue within 2 years. Since a landowner may only bring 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 there is personal property involved in the taking.[7] 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

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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.

in a situation where personal property is also 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 can establish the cause of the taking.

Plaintiffs' cause of action should not be confused with their claim for relief. "Limitations periods are applicable not to the form of relief but to the claim on which the relief is based." *Luckenbach Steamship Co. v. United States*, 312 F.2d 545,548 (2d Cir. 1963). It is a fundamental rule that courts look to the nature of the cause of action or of the right sued upon when determining which statute of limitations applies. *See Resolution Trust Corp. v. Greer*, 1995 OK 126, ¶11, 911 P.2d 257, 261 (1995) (limitation period depends on the nature of the right in litigation); *Bechler v. Kay*, 222 F.2d 216 (10th Cir. 1955) *cert. denied,* 350 U.S. 837, 76 S. Ct. 75, 100 L. Ed. 747 (1955) ("The nature of the cause of action determines the applicable statute of limitations.").[8]

The critical issue in determining the appropriate limitations period hinges on the nature of Plaintiffs' cause of action under Article II, §24. "[T]he operative events that underlie a party's claim set the parameters for its cause of action." *Resolution Trust Corp.*, 1995 OK 126, ¶12.

Further, the rules relating to statute of limitations favors applying the longest limitation period. As a policy matter, if there is a question or reasonable dispute as to which of two or more statutes of limitations should be applied, the doubt should be resolved in favor of the application

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[8] 51 Am. Jur. 2d. Limitation of Actions §91, p. 508. *See also Chickasaw Telephone Co. v. Southwestern Bell Mobile Systems, Inc.*, 113 F.3d 1245, n. 4 (10th Cir. 1997); *Sun Oil Co. v. Fleming*, 469 F.2d 211, 214 (10th Cir. 1972); *Hoelting Enterprises v. Nelson*, 23 Kan. App. 2d 228, 929 P.2d 183 (1996) (nature of cause of action determines statute of limitations) (review denied).

of the statute containing the longest limitation period. *F.D.I.C. v. Grant*, 8 F. Supp. 2d 1275, 1299 (N.D. Okla. 1998) (applying the longer statute of limitations to claim for breach of fiduciary duty); *see also* 51 Am. Jur. 2d. Limitation of Actions §92, p. 509.

The general statute at issue, 12 O.S. §95, sets forth the periods of limitation to bring "[c]ivil actions other than for the recovery of real property." Plaintiffs maintain that the subsection thereunder which mentions personal property, §95(3), does not apply to inverse condemnation actions, especially since 12 O.S. §95(3) appears to be a codification in regard to the limitations period for torts of common law fraud and/or conversion of personalty. 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.)

Under the *ejusdem generis* canon of statutory construction, when a general word or phrase is incorporated in a list of specific things, the general word or phrase will be interpreted to include only things of the same type as those listed. The provisions of 12 O.S. §95(3), in essence, contain the statutes of limitations for a list of common law torts.[9] Interpreting the phrase "an action for taking, detaining or injuring personal property" to include a constitutional taking is contrary to the rules of statutory construction.

[9] 12 O.S. §95 sets forth a list of common law torts, including trespass, conversion, replevin, negligence and fraud. "Taking" in this context means "conversion,"someone took physical possession of chattel and kept it; "Detaining" means they took possession of chattel but gave it back; "Injury" means they did not take possession, but damaged the chattel. Interpreting the phrase "an action for taking, detaining or injuring personal property" to include a constitutional taking is contrary to the rules of statutory construction.

C. Federal Law Does Not Distinguish Between Real and Personal Property in an Action for Inverse Condemnation.

Federal courts do not draw a distinction between real and personal property in inverse condemnation actions. In an inverse condemnation action, the statutory limitation period for personal property is identical in every respect to a suit involving real property.

In *Pete v. United States*, 215 Ct. Cl. 377, 569 F.2d 565, 568 (1978), plaintiffs brought a federal inverse condemnation suit seeking just compensation for the taking of three cabin barges, certainly not real property. The government argued the federal inverse condemnation statute only applied to real property. *Pete*, 215 Ct. Cl. at 379-80. Noting the statute "specifically omits the word 'real' as a modifier for 'property,'" the United States Court of Claims disagreed. *Pete*, 215 Ct. Cl. at 381. The Court of Claims found "no rational basis for limiting the allowance of costs in inverse condemnation suits to inverse condemnations of 'real property,'"since "[a]n inverse condemnation suit involving 'personal property' is **identical in every respect** to an inverse condemnation suit involving real property. *Id.* at 382-83 (emphasis added).

The United States Supreme Court "has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 316, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 55 USLW 4781 (1987). "Of course, payment need only be made for what is taken, but for all that the Government takes, it must pay. When it takes property by flooding, it takes the land which it permanently floods *as well as that which inevitably washes away as a result of that flooding*." (Emphasis added.) *See also United States v. General Motors Corp.*, 323 U.S. 373, 384, 65 S. Ct. 357, 156 A.L.R. 390 (1945) (where tenant's equipment or

fixtures taken, destroyed or reduced in value as a result of government occupation of property, the tenant must be compensated).

Other jurisdictions also view personal property as within the meaning of "property" taken in inverse condemnation actions. *See Hawkins v. La Grande*, 315 Ore. 57, 68-69, 843 P.2d 400 (1992) (stating no stretch of definition of "taking" is required to hold that one flood can substantially lessen the value of or destroy personal property); *Sutfin v. State of California*, 261 Cal. App.2d 50, 53, 67 Cal. Rptr. 665, 668 (Cal. Ct. App. 1968) (allowing recovery in inverse condemnation for the personal property).

The purpose of just compensation is to make the landowner whole. The trial court's application of §95(3) to plaintiffs' constitutional claims did not merely extinguish an available remedy; it also relieved GRDA of much of its obligation to pay just compensation for a taking that is acknowledged. GRDA never put plaintiffs on notice of an intent of a permanent servitude at any point, with the end result that plaintiffs made repairs to their property time after time. It is undisputed that GRDA could have instituted condemnation proceedings if it intended to accomplish a permanent servitude, but made a conscious decision not to do so. GRDA should not be unduly rewarded, or relieved of its constitutional obligation.

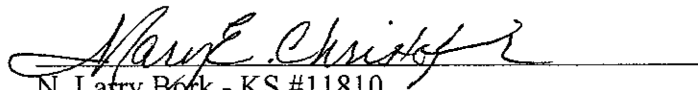
Personal property is included within the meaning of the constitutional term "private property," and the same 15-year statutory limitations period applies to all property for which recovery is sought in an inverse condemnation action. There is no discernable rationale for drawing a distinction between a constitutional taking of real and personal property.

In conclusion, in granting partial summary judgment, the trial court mistakenly applied the 2-year tort statute of limitations to a portion of Plaintiffs' constitutional claims. To hold that

plaintiffs cannot recover for the flood damage to their personal property is contrary to law, and would allow GRDA to effectively circumvent its obligation of just compensation. The trial court should have recognized Plaintiffs were entitled to recover compensatory damages for the personal property taken from them in the same series of floods, not just for the taking of their real property.

Plaintiffs ask that this Court hold the 15-year statutory limitation period applies to all private property taken, incl uding 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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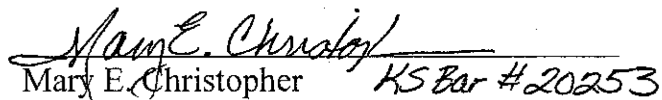

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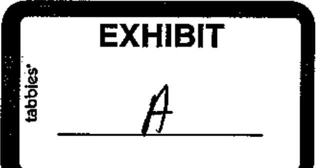
EXHIBIT
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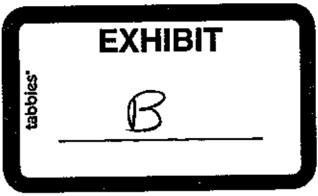
EXHIBIT "A"

	1986	1993	1994	1995
Perrys Just compensation awarded for Dam-caused flooding. Natural floods would not have touched any part of property.	N/A-- not owned by Perrys in 1986.	Perrys' yard covered 1' deep with floodwater, which entered crawl space under floor of home; floor sank, foundation settled, exacerbated garage issue; Perrys out of home for duration of flood; 40 hours clean up; flooding entirely due to Dam.	Inside of Perrys' home inundated with floodwater 1' deep; yard also flooded; Perrys out of home approx. 3 months until repairs complete; flooding entirely due to Dam.	Perrys' yard covered and floodwater got into sub-floors of home and into garage; Perrys out of home for duration of flood; 40 hours clean up; flooding entirely due to Dam.
Pryors Just compensation awarded for Dam-caused flooding. Natural floods would not have touched any part of property.	N/A-- not owned by Pryors in 1986.	Pryors' yard covered in floodwater; Pryors out of home for duration of flood; 10 hours clean up; flooding entirely due to Dam.	Inside of Pyrors' home inundated with floodwater 2' deep; yard also flooded; Pryors out of home approx. 6 months until repairs complete; flooding entirely due to Dam.	Pryors' yard covered and floodwater got inside the duct work of their home; Pryors out of home for duration of flood; 50 hours clean up; flooding entirely ue to Dam.
Shaws Just compensation awarded only for portions of flooding caused by Dam.	Inside of Shaws' home and yard inundated with 2' more flood-water due to Dam (4' total); Shaws out of home approx. 2 months until repairs completed.	Inside of Shaws' home and yard inundated with 2' floodwater, Shaws out of home approx. 2 months until repairs completed; flooding in house entirely due to Dam .	Inside of Shaws' home inundated with 3 ½' flood water, yard covered by water; Shaws out of home approx. 2 months until repairs completed; flooding in house entirely due to Dam.	Inside of Shaws' home inundated with 1' flood water, yard covered by water; Shaws abandon property due to multiple floods, retain title; flooding in house entirely due to Dam.

(R. 607-16 [Shaw] FOF ¶¶ 5,9, 12, 16-18; R. 617-25 [Perry] FOF ¶¶ 5, 8, 11, 14; R. 626-33 [Pryor] FOF ¶¶ 5, 8, 11, 14.)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