

IN THE DISTRICT COURT IN AND FOR OTTAWA COUNTY  
STATE OF OKLAHOMA

FILED  
DISTRICT COURT  
OTTAWA CO. OKLA.

NOV 26 2008

CATHY WILLIAMS COURT CLERK  
BY \_\_\_\_\_

CITY OF MIAMI, OKLAHOMA, a municipal )  
corporation; JOYCE L. ADAMS; ROLAND )  
ADCOCK and DIANE ADCOCK, husband and )  
wife; RILEY E. ANDERSON and CAROLYN S. )  
ANDERSON, husband and wife; G.D.S. )  
INVESTMENTS, INC.; ROBERT ANDERSON )  
and NAOMI ANDERSON, husband and wife; )  
ELIZABETH ANDREWS; GARRY L. )  
ARNOLD and BEVERLY L. )  
ARNOLD, husband and wife; KENNETH )  
ARNOLD SR. and PATSY ARNOLD, husband )  
and wife; ROBERT ASBELL and TERESA )  
ASBELL, husband and wife; )  
AUTOFORDABLES INC.; VIRGIL BAKER )  
JR. and PATTI BAKER, husband and wife; )  
CHRISTOPHER A. BALDWIN; LEWIS J. )  
BAMBERL JR. and ELNORA K. BAMBERL, )  
husband and wife; BENJAMIN BARNES and )  
TONYA BARNES, husband and wife; ROBERT )  
S. BARNES and TERRI A. BARNES, husband )  
and wife; RUBEN M. BARTON and SHARON )  
K. BARTON, husband and wife; TERRY PAT )  
BEAVERSON ; ROBERT D. )  
BERRY and ANDREA H. BERRY, husband )  
and wife; DON BIDDLE and ELLEN BIDDLE )  
husband and wife; MARK BIRDSELL; )  
SHANNON D. BLACKSTOCK; CODY )  
BLUNDELL and SHERRY BLUNDELL, )  
husband and wife; BOBBY L. BLUNK and )  
BECKY BLUNK, husband and wife; )  
BOAT FLOATER INDUSTRIES, L.L.C. )  
DAN W. BOYD and GAIL BOYD, husband and )  
wife; LUCINDA K. BOYD; E.C. BRANSON JR.; )  
GARY BREWER d/b/a MIAMI SKATELAND; )  
CHESTER BREWINGTON d/b/a THE )  
THUNDERBIRD MOTEL; GERALD W. )  
BRIDGEWATER and PATRICIA A. )

Case No. CJ-08-619

BRIDGEWATER, husband and wife; )  
 CYNTHIA BROSHAR; JIMMY L. )  
 BRUNMEIER; JIM T. BUFFALOE )  
 and KAREN CONLON BUFFALOE, husband )  
 and wife; ANDREA BUNDY; CLARENCE )  
 WILLIAM BURR; RODNEY DEAN )  
 CALLAHAN and ROXILEA CALLAHAN, )  
 husband and wife; DANNY CARTWRIGHT )  
 and KIMBERLY CARTWRIGHT, husband )  
 and wife; GREGG W. CASS and LINSEY R. )  
 CASS, husband and wife; KENNETH G. CASS )  
 and KENNETH G. CASS d/b/a CASS )  
 PLUMBING; JOHN W. CASSELL and )  
 SANDRA CASSELL, husband and wife; )  
 MARVIN CHAMPLIN and JOYCE )  
 CHAMPLIN, husband and wife; CECIL )  
 CHISUM; JEFF CLAY; CRYSTAL )  
 CLAYBURG; F. LEROY )  
 COLLINS and SALLIE M. COLLINS, husband )  
 and wife; ROY T. COLLINS; DARREN )  
 CORNOG and MILLIE CORNOG, husband )  
 and wife; LUCINDA CUMMINS; NATTHEN )  
 and MICKI DAMANN, husband and wife; )  
 DANIEL CADE DAREING; TOM C. DEAN and )  
 TAMMY DEAN, husband and wife; WILLIE )  
 DARLENE DESILVA; TONJA DOKE; HANK )  
 DOWNUM and ROSEANA DOWNUM, )  
 husband and wife; DEBBIE )  
 EDWARDS; JACK ELSEY and CAROLYN )  
 ELSEY, husband and wife; E.M.R. INC. d/b/a )  
 OAKIE BURGER; JOHN ENGESSER and )  
 BARBARA ENGESSER, husband and wife; )  
 RICHARD B. ENYART; AMY J. ERWIN; )  
 DEBRA K. ERVIN; )  
 LESLIE E. FARRIS and RUTH ANN FARRIS, )  
 husband and wife; KENNETH W. FERRIS and )  
 JOYCE FITZGIBBON; E.W. FLETCHER and )  
 SONDR A FLETCHER, husband and wife; )  
 E.W. FLETCHER as trustee of the E.W. )  
 FLETCHER TRUST; AARON RON FORKUM;) )  
 DERRICK FUGATE; RYAN GARRETT d/b/a )  
 S & J QUALITY CARS and UNITEC )  
 GAMING SERVICES; LLOYD GATOBU; )

**JIM GERING and CAROLYN GERING.** )  
**husband and wife; MICHAEL J. GLASSMAN** )  
**and DEBBIE GLASSMAN, husband and wife,** )  
**d/b/a GLASSMAN BUILDERS; SCOTT B.** )  
**GLOVER and KIMBERLY GLOVER, husband** )  
**and wife; HARRY T. GRIFFIN and JANICE L.** )  
**GRIFFIN, husband and wife; BARBARA** )  
**HAILE d/b/a SMILE-A-MILE; DONALD** )  
**HALL SR. and PATRICIA HALL, husband** )  
**and wife; DAVID SHANE HALLET; THE** )  
**HARBOR OF MIAMI, INC.; ROBERT** )  
**HARDEE and PHYLLIS HARDEE, husband** )  
**and wife; RODNEY D. HARNER and OPAL** )  
**HARNER, husband and wife; BETTY** )  
**HENSON; CHERI HERNON; JAMES** )  
**HERNON and DIXIE HERNON, husband and** )  
**wife; RACHEL HERREL; DERYL V.** )  
**HERREN and JOYCE E. HERREN, husband** )  
**and wife; JAMES M. HEYBURN and CARRIE** )  
**A. HEYBURN, husband and wife; TOM D.** )  
**HICKEY and MYRA HICKEY, husband and** )  
**wife; DAWN HILDEBRAND; TERESA HILL;** )  
**RICKY DON HILL; TRAVIS HINS;** )  
**HOWARD HOOVER; CASEY HOUGH;** )  
**CHARLES E. HOUSEMAN and CAROL JEAN** )  
**HOUSEMAN, husband and wife; DONA** )  
**HOWELL; DORENA** )  
**JACKSON; TONY JAMESON and JUDITH** )  
**ARNOLD JAMESON; JEET L.L.C., d/b/a** )  
**TOWNSMAN MOTEL; GARY L. JOHNSON** )  
**and RETHA JOHNSON, husband and wife;** )  
**MERRITT W. JOHNSON; RAY L. JUDKINS** )  
**and JUDY JUDKINS, husband and wife;** )  
**BETTY J. KELLY; EMMA R. KENNEDY;** )  
**LINDA G. KERBY; DEMARIS CHILDERS** )  
**KILLION; DEBRA SUE KING; FLOYD** )  
**KINNEY and SHERRY KINNEY, husband and** )  
**wife; HOWARD KLINEFELTER and** )  
**PAULINE KLINEFELTER, husband and wife;** )  
**JIMMY KORONIS and TIFFANY KORONIS,** )  
**husband and wife; STEVE KRESYMAN and** )  
**KAREN KRESYMAN, husband and wife, d/b/a** )  
**MIAMI CAR WASH; IKE LACY and NANCY** )

**LACY, husband and wife; ROGER L. LACY II )**  
**and TIFFANY LACY, husband and wife; )**  
**MYIRL JEANEENE LANDERS; JAMES G. )**  
**and NINA P. LARKIN, husband and wife; )**  
**EVERETT LASITER; JEAN LASITER and )**  
**MICHAEL LASITER, husband and wife; )**  
**PATRICIA LAUB; JEFFERY LAVINE and )**  
**JONIA LAVINE, husband and wife; LINDA )**  
**WYRICK LEE; AGNES BLAIR-LLOYD; HERB )**  
**LOGAN and PATRICIA LOGAN, husband and )**  
**wife; GREGG LOVELL; SHEILA )**  
**MACY; PAUL MARQUEZ and DAVA JO )**  
**MARQUEZ, husband and wife; DENISE )**  
**MARTIN; CASSIE MATTINGLY; )**  
**DELMAR MATTINGLY and DEANN )**  
**MATTINGLY, husband and wife; )**  
**MICHAEL MATTINGLY and DEBRA J. )**  
**MATTINGLY, husband and wife; )**  
**ROBERT E. MAXWELL; SABAN )**  
**MCCABE and LEONA MCCABE, )**  
**husband and wife; JEFFRY L. )**  
**MCCOOL and CAROLYN J. MCCOOL, )**  
**husband and wife; KENNETH M )**  
**MCCORD and SHERRI A. MCCORD, )**  
**husband and wife; DEANN )**  
**MCCRACKEN; VICTOR MCKIBBEN )**  
**and NATASHA MCKIBBEN, husband )**  
**and wife; MIAMI ANIMAL HOSPITAL, )**  
**INC.; SCOTT B. MCKINNEY and )**  
**SHELLEY MCKINNEY, husband and )**  
**wife; CLARENCE W. MCMINN and )**  
**MARIAN J. MCMINN, husband and )**  
**wife; CLINTON MILLER; DENVER )**  
**MILLER; NORVELL J. MILLER and )**  
**CORA MILLER, husband and wife; )**  
**JOHN MILLS and JANIS MILLS, )**  
**husband and wife; CHARLES W. MORE )**  
**and HIROMI MORE, husband and wife; )**  
**JACK E. MORRIS; THOMAS MUDRICK )**  
**and SUSAN J. MUDRICK, husband and )**  
**wife; SHERMAN T. MURPHREE and )**  
**SHARI LYNN MURPHREE, husband )**  
**and wife; GEORGE T. MYERS and )**

ELAINE MYERS, husband and wife; )  
 MELVA NEECE; ALAN E. NEWKIRK )  
 and MARY J. NEWKIRK, husband and )  
 wife; JAMES E. NOTT and SUSAN )  
 L. NOTT, husband and wife; LLOYD OGLE )  
 and JOAN OGLE, husband and wife; )  
 TERESA M. O'HARA; DALE OWENS )  
 and CAROL L. OWENS, husband and )  
 wife; EUGENE PARSONS and SUSAN )  
 PARSONS, husband and wife; VINOD )  
 PATEL; DONALD PATTERSON and )  
 CHERYL PATTERSON, husband and )  
 wife; BETTIE PAYNE; DAVID PAYNE )  
 and ALICE L. PAYNE, husband and wife; )  
 FREDDIE L. PAYTON and RAYDENIA )  
 PAYTON, husband and wife; JOHN D. )  
 PAYTON and JOYCE PAYTON, husband )  
 and wife; DAVE PERRY and LETHA )  
 PERRY, husband and wife, d/b/a BIG )  
 DADDY'S BAR- B-Q AND DELI and )  
 LITTLE TREASURES and PERRY'S )  
 TOWING AND RECOVERY; ROBERT B. )  
 PEWITT and ANN L. PEWITT, husband )  
 and wife; TONY PICKETT; SCOTT POTTER )  
 and MELANIE POTTER, husband )  
 and wife; RICKY R. POWERS and KELLI )  
 POWERS, husband and wife, d/b/a )  
 RIVERVIEW AUTO SALES; KERRY )  
 RADOSEVICH and CINDY RADOSEVICH, )  
 husband and wife, d/b/a SERENITY INN )  
 MOTEL; GREG RATLIFF and CAROL )  
 RATLIFF, husband and wife; )  
 JAMES RAWLINS, FLOEY E. RAY; JAMES L. )  
 REDDEN and CATHY L. REDDEN, husband )  
 and wife; JAKE REED, d/b/a REED )  
 UPHOLSTERING; LEANNE E. REEVES; )  
 RANDALL RHODES and NORMA )  
 RHODES, husband and wife; )  
 BENJAMIN D. RICKETTS and JENNIFER )  
 RICKETTS, husband and wife; JOSHUA )  
 RIOJAS; RIOJAS INDUSTRIES INC.; )  
 CYNTHIA ELAINE RIOS; CARSON B. )  
 ROBERTS; ELLEN ROBERTS, d/b/a ONE )

**STOP CONVENIENCE; BILL ROBERTSON** )  
**and ETHEL JEANETTE ROBERTSON,** )  
**husband and wife; TOM ROBERTSON and** )  
**MARSHA ROBERTSON, husband and wife;** )  
**BANI G. RODRIGUEZ and SEUNA** )  
**RODRIGUEZ, husband and wife; ROGER LEE** )  
**ROLLINS and ELIZABETH ROLLINS,** )  
**husband and wife; ARCHIE ROWDEN and** )  
**ROSALIE ROWDEN, husband and wife;** )  
**NEDRA K. ROYE; CHARLES D. RUSSELL** )  
**and ANGELA R. RUSSELL, husband and wife;** )  
**ROY RUTHERFORD and PATRICIA J.** )  
**RUTHERFORD, husband and wife; TIMOTHY** )  
**RUTERFORD and AIMEE RUTHERFORD,** )  
**husband and wife; PAULA RUTLEDGE; RYAN** )  
**RUTLEDGE and NAKIA RUTLEDGE, husband** )  
**and wife; LLOYD W. SCHOENHALS and** )  
**DONNA J. SCHOENHALS, husband and wife;** )  
**PATSY SCHUBERT; DENNIS R.** )  
**SENER and LISA MAYES SENTER, husband** )  
**and wife; JIMMY LEE SHARBUTT, JR.;** )  
**PHILLIP J. SHYERS and STELLA L.** )  
**SHYERS, husband and wife; JONATHAN** )  
**SIEVERT and DONNA SIEVERT, husband** )  
**and wife; d/b/a PREMIUM PLUMBING;** )  
**ROBERT SILVERSMITH and KAREN** )  
**SILVERSMITH, husband and wife; CLAUDIA** )  
**J. SISCO; BUFF SPRINGER and VERA** )  
**SPRINGER, husband and wife; ROBIN E. STILL,** )  
**d/b/a STILL CONSTRUCTION; BRADLEY K.** )  
**STOGSDILL and LINDA STOGSDILL, husband** )  
**and wife; BETTY S. SUTTON; ROBERT E.** )  
**SWANSON and VIRGINIA SWANSON, husband** )  
**and wife; VIRGIL E. TARTER; DARRELL** )  
**L. TESTERMAN and MARY J. TESTERMAN,** )  
**husband and wife; TOMMY THULIN and KATHY** )  
**THULIN, husband and wife; BRYON W.** )  
**TRAYLOR and DEBRA L. TRAYLOR, husband** )  
**and wife; ANGELA R. TRIGG; DANNY** )  
**TRUJILLO and LINDA M. TRUJILLO, husband** )  
**and wife; BRUCE TURNER and RUTH TURNER,** )  
**husband and wife; LEE D. UTO and MARILYN A. UTO,)** )  
**husband and wife; ROY J. VANATTA and RETA** )

**A. VANATTA, husband and wife; JIMMY W. VAUGHN and CRISTIE VAUGHN, husband and wife; VONDA GAYLE WAKEFIELD; DAVID R. WALKER and MARY M. WALKER, husband and wife, d/b/a AUTOFORDABLES FINANCE CORPORATION; JOYCE BETTY WEAVER; MIKE WEBB and RUTH WEBB, husband and wife; JAMES K. WEBBER; VERDALE WEEDEN SR, and DONNA WEEDEN, husband and wife; JERI WHITE; J. D. WILHOIT, JR. and ROSE WILHOIT husband and wife; JOHN WILHOIT III; MIKE WILLARD and SALLY WILLARD, husband and wife; BRAD WILLIAMS and TIFFANY WILLIAMS, husband and wife; WARREN WILLIAMS and SHANNON WILLIAMS, husband and wife; JASON WILSON and CEAN WILSON, husband and wife, d/b/a WILSON'S PORTABLE WELDING; RICHARD A. WOOLARD and ROSEMARY WOOLARD, husband and wife; DAVID D. WRIGHT; STEVEN R. WRIGHT; ROBERT YORK and CHRISTINA YORK, husband and wife; individually, and as representatives of a class consisting of all persons and entities located upstream of Pensacola Dam who may have been injured by floods caused or increased by the Dam since.**

**Plaintiffs,**

**v.**

**GRAND RIVER DAM AUTHORITY,**

**Defendant.**

**PETITION**

For their claims against the Grand River Dam Authority, Plaintiffs allege and state as follows:

## I. PARTIES

1. Plaintiffs are individuals, partnerships, corporations and governmental entities which resided, leased, or owned property in Ottawa County, Oklahoma at times relevant to this lawsuit.

2. Grand River Dam Authority ("GRDA") is a conservation and reclamation district and agency of the State of Oklahoma created by the statutes of the State of Oklahoma, 82 Okla. Stat. § 861, *et seq.* GRDA is the owner and operator of Pensacola Dam ("the Dam") and the reservoir formed thereby known as Grand Lake O' the Cherokees ("Grand Lake" or "the Lake").

3. GRDA may be served by certified mail, return receipt requested through:

Kevin Easley, Chief Executive Officer  
Grand River Dam Authority  
26 W. Dwain Willis Avenue  
Vinita, Oklahoma 74301-4654;

Gene Lidyard, Division Administrator  
Department of Central Services  
Risk Management Division  
Will Rogers Office Building  
2401 N. Lincoln, Suite 202  
Oklahoma City, Oklahoma 73105; and

W. A. Drew Edmondson  
Oklahoma Attorney General  
313 NE 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105.

## II. JURISDICTION AND VENUE

4. GRDA may be sued in its corporate name pursuant to 82 Okla. Stat. § 862(1).

5. Plaintiffs are seeking alternate forms of relief including just compensation for taking or constitutional damages caused by GRDA pursuant to Article II, Section 24 of the

Constitution of the State of Oklahoma, 27 Okal. Stat. § 12, 82 Okla. Stat. § 862(s), and damages pursuant to Oklahoma common law. This court therefore has jurisdiction over the subject matter of this action.

6. Plaintiffs have substantially complied with the Oklahoma Governmental Tort Claims Act, 51 Okla. Stat. § 151, *et seq.* (the "Act"). Plaintiffs have filed notices of their claims with the GRDA more than 90 days ago, all of which have been constructively denied, and this action has been filed within 180 days the date of such denial.

7. The real and personal property involved in this action is located, and the causes of action pursuant to which Plaintiffs seek relief arose, in Ottawa County, Oklahoma. Venue is therefore proper in this county pursuant to 12 Okla. Stat. § 131 and 82 Okla. Stat. § 862(1).

### **III. NATURE OF THE CASE**

8. Plaintiffs bring this action to recover just compensation and/or damages, together with their litigation costs, attorney and expert fees, and interest, resulting from floods upstream of, and caused or exacerbated by, Pensacola Dam. The floods for which recovery is sought began May, 2007, have occurred repeatedly since then, and will inevitably occur in the future.

### **IV. GENERAL STATEMENT OF FACTS**

#### **A. Location of the Water**

9. This action involves primarily flooding along the Neosho (Grand) River which flows south from Kansas into Oklahoma where it is dammed by the Pensacola Dam and forms Grand Lake.

10. The elevation of the top of Pensacola Dam is 757 feet pensacola datum("p.d.")(which is 1.07 feet below mean sea level). The upper portion of the reservoir, 745

to 755 feet p.d., is supposed to be reserved for flood control purposes and is referred to as the "flood pool." Immediately beneath the flood pool, the next layer of water in the reservoir is the "power pool," which is used for the generation of hydroelectricity.

11. The elevations summarized below are discussed in this Petition and are necessary to understand the nature of the claims asserted by the Plaintiffs:

<b>Approximate Elevation</b>	<b>Description of Activity</b>
a. 735 feet p.d.	The lowest target operating level of the reservoir prior to 1982.
b. 740 feet p.d.	The lowest target operating level of the reservoir from 1982 to 1992.
c. 742 feet p.d.	The lowest target operating level of the reservoir since 1992 (at rare times lowered to 741 feet).
d. 745 feet p.d.	Top of the power pool and bottom of the flood pool.
e. 750 feet p.d.	The elevation up to which GRDA acquired fee title when the Dam was constructed.
f. 754.7 feet p.d.	The maximum reservoir level to which water has been allowed.
g. 755 feet p.d.	Top of the flood pool (the flood pool extends from 745 to 755 feet p.d.)
h. 760 feet m.s.l.	The elevation up to which flowage easements were acquired upstream of the Dam, based upon GRDA's analysis, to allow temporary inundation for flood control.
i. 769 feet m.s.l.	The elevation up to which several entities, including the Corps of Engineers (in a 1947 analysis) determined flowage easements <i>should</i> be acquired because of period

inundation caused by the Dam. (This would require approximately 11,750 acres *above* the 760 foot m.s.l. elevation to which flowage easements were actually purchased).

**B. Creation of Pensacola Dam and Reservoir**

12. Construction of Pensacola Dam began in 1938 and was financed through the use of public funds. At that time, the primary purpose of the project was represented to the public to be flood control and protection for the lower Grand and Arkansas River valleys.

**C. GRDA reserves insufficient storage capacity for flood control**

13. Prior to the construction of the Dam, the United States Army Corps of Engineers ("Corps") issued a report stating that the elevation of the water controlled by Pensacola Dam must be maintained no higher than 735 feet p.d. to allow for sufficient (approximately 1.3 million acre feet) flood control storage.

14. GRDA demanded a much higher reservoir level in order to maximize the volume available for power generation. GRDA was successful in obtaining License No. 1494 from the Federal Power Commission in 1939, which permitted elevations up to 745 p.d. for hydroelectric purposes. GRDA knew that this higher elevation would not provide sufficient storage for flood control. In 1992, the Federal Energy Regulatory Commission granted GRDA a new license, and even higher average lake elevations occurred thereafter.

15. GRDA's operation of the reservoir at an elevation of 740 feet p.d. or higher results in available flood storage of only 525,000 acre feet, far less than the amount determined by the Corps as necessary to adequately control flood waters.

**D. Insufficient flowage easements were acquired upstream.**

16. GRDA acquired fee title to land up to elevation 750 feet p.d. to accommodate the reservoir formed by the Dam and perpetual flowage easements to 755 feet p.d. (756.1 m.s.l.).

17. Intermittent flowage easements were acquired upstream generally between elevations 755 feet p.d. and 760 m.s.l. to allow temporary inundations caused by the Dam.

18. In the late 1930's and 1940's, multiple entities conducted backwater studies to analyze the impact of Pensacola Dam and the resulting lake, coming to significantly similar conclusions. In 1947, the Corps of Engineers ("Corps") performed a backwater analysis to determine the actual extent of the upstream flooding caused by the Pensacola Dam. When water coming down the Neosho River hits the reservoir created by Pensacola Dam, some of the water stacks up and pools (the "backwater effect") causing flooding which would not have occurred if the Dam and reservoir had not been there. The Corps determined that Pensacola Dam regularly would cause flooding of property up to an elevation of approximately 769 feet m.s.l. upstream along the Neosho River, and recommended the purchase of flowage easements over an additional 11,750 acres to bring the easements up to that level.

19. Despite the analysis and recommendations of several entities, including the Corps, GRDA recommended that flowage easements be acquired only up to 760 feet m.s.l., arguing that it would be cheaper to pay damages for flooding than to acquire the necessary easements. Accordingly, flowage easements were never acquired above the 760 feet m.s.l. elevation.

20. In 1982, GRDA raised the general operating level of the reservoir from 735 feet to 740 feet p.d. and raised it again in 1992 to 742 feet p.d.

21. Prior to these changes, the incidents of upstream flooding were relatively few. As GRDA has gradually increased the pool levels over the years, it has reduced the reservoir's capacity to store inflows from approximately 20 feet (735 feet to 755 feet p.d.) to, at times, no more than 11 feet (744 feet to 755 feet p.d.).

22. The result of the higher pool levels has been -

- (a) a dramatic increase in the frequency, magnitude and duration of flood events (i.e., water exceeding an elevation of 745 feet p.d. and therefore requiring storage in the flood control pool) and
- (b) the flooding of property (as earlier predicted by the Corps and several other entities) well above the elevation of 760 permitted by the intermittent flowage easements.

23. GRDA has also failed to utilize the option to pre-release water from the reservoir in advance of the flood crest, thus further reducing flood storage capacity in the reservoir.

24. GRDA has also allowed and operated the Dam with a program of tapering releases of flood waters over a period of 21 days, rather than releasing them as soon as possible.

This program -

- (a) further reduces flood storage capacity in the reservoir causing secondary floods if even modest amounts of additional precipitation are received during the taper period, and
- (b) greatly extends the duration (and therefore the damage caused by) all floods.

25. Beginning in May, 2007 and continuing through the date of filing of this action, Plaintiffs have been subjected to flooding caused by Pensacola Dam. Some plaintiffs have been flooded multiple times and flood waters have remained upon their property for weeks at a time causing substantial damage. Floods began on the following approximate dates (and possibly others) since May, 2007:

- (a) May 8, 2007;
- (b) June 2, 2007;
- (c) June 11, 2007; and
- (d) June 29, 2007.

26. Most of the property at issue is not covered by any form of easement permitting flowage of waters diverted by Pensacola Dam.

27. The frequency, duration and purpose for which waters are diverted by Pensacola Dam and stored on property covered by flowage easements acquired in the 1940s constitute a misuse and excessive use of such easements.

#### **V. CLASS ALLEGATIONS**

28. The class consists of all persons and entities located upstream of the Pensacola Dam in Ottawa County, Oklahoma along the Neosho (Grand) River who suffered damages as a result of flooding caused or worsened by the Dam beginning in May, 2007.

29. Plaintiffs are unable to state precisely the size of the class, but believe that the number of class members may exceed 1,000. The class is sufficiently numerous that joinder of all members is impractical.

30. There are numerous common questions of law and fact regarding the flooding experienced by the class members including -

- (a) Whether Pensacola Dam causes flooding and/or increases the elevation and duration of flooding beyond the elevation of existing flowage easements since May, 2007;
- (b) Whether there has been excessive use or misuse of the existing flowage easements;
- (c) Whether there has been (1) a taking of flowage easements upon property at elevations above the existing easements and (2) a taking of the remainder of land covered by existing easements because of the magnitude, frequency and duration of flooding caused by circumstances not present at the time the easements were acquired; and
- (d) The ultimate elevation to which flooding is caused by the Dam (i.e., the "backwater effect") and the extent of the additional elevation and duration of such flooding.

31. The only individual question of fact is the nature and extent of damage suffered by each Plaintiff. Therefore, common questions of law and fact clearly predominate and a class action is a far superior method of adjudicating the issues of liability than any alternative. Individuals actions would be numerous, with enormous duplication and unnecessary expense, and would present a substantial risk of inconsistent results.

32. The claims and interests of the representative Plaintiffs are typical of, and consistent with, the claims of class members. Plaintiffs are represented by experienced and able counsel and will fairly and adequately protect the interests of the class they represent.

33. GRDA's conduct including failing to purchase necessary flowage easements above elevation 760 feet m.s.l. and refusing to satisfy damage claims for upstream flooding caused by Pensacola Dam has been consistent among representative Plaintiffs and class members.

34. For the foregoing reasons, certification of a class is appropriate pursuant to 12 Okla. Stat. § 2023.

#### **VI. PREVIOUS FINDINGS**

35. Referee Forest Holly has already established the presence and operation of Pensacola Dam causes a significant increase in the elevation and duration of flooding in Ottawa County.

36. It has already been determined that the increased elevation and duration of flooding caused by the presence and operation of Pensacola Dam is for a public purpose.

37. It has already been determined that GRDA is liable for any and all damages caused by that increase in the elevation and duration of flooding.

#### **VII. CLAIMS FOR RELIEF**

##### **First Claim for Relief** **(Inverse condemnation - taking of flowage easements)**

38. The allegations set forth in paragraph 1 through 37 are incorporated herein by reference.

39. GRDA is vested with the power of eminent domain pursuant to 82 Okla. Stat. § 862.

40. Pensacola Dam, owned and operated by GRDA (a public corporation), has repeatedly caused the flooding of Plaintiffs' property, resulting in frequent and substantial damage to such property and impairing and destroying Plaintiffs' use and enjoyment of their property. Such floods are frequent, inevitably recurring, and constitute a taking of a flowage easements over Plaintiffs' property for public purposes, without payment of just compensation.

41. GRDA has failed to employ proper means to acquire such easements and has failed to pay Plaintiffs just compensation therefore.

42. Plaintiffs are entitled to a determination that flowage easements (either permanent or temporary) have been taken upon their property and an award of just compensation, including attorney fees, expert fees, interest, and other relief pursuant to Article II, Section 24 of the Oklahoma Constitution and 27 Okla. Stat. § 12.

**Second Claim for Relief**

**(Inverse condemnation - excessive use of existing flowage easements)**

43. The allegations set forth in paragraphs 1 through 42 are incorporated herein by reference.

44. Some of the Plaintiffs own property which is encumbered in whole or in part by flowage easements acquired in the 1940s for the purpose of flood control.

45. Such easements were acquired, and compensation was paid therefore, based upon operating conditions which would result in infrequent flooding of very short duration. These conditions included much greater available flood storage capacity within the reservoir (by virtue

of lower reservoir operating levels) and a priority upon flood control operation by the Dam which, among other things, mandated the release of flood waters as soon as possible. Additionally, GRDA has failed to implement the option of pre-releases – releasing water from the Dam in advance of the flood crest.

46. In recent years, these conditions have substantially changed as operating levels have been repeatedly raised (and flood storage thereby reduced) by GRDA in order to enhance the generation of electricity for the public (at the expense of flood control). Also, GRDA has failed to pre-release. Additionally, the slow, tapered releases greatly extend the duration of water upon these easements contrary to earlier guidelines which mandated the release of flood waters as quickly as possible.

47. The property covered by existing intermittent flowage easements has therefore been flooded far more often and for much longer periods of time than contemplated when these easements were acquired and has interfered with Plaintiffs' use and enjoyment of their property.

48. The flowage easements above elevation 755 feet m.s.l. were acquired solely to aid in flood control and were not acquired, nor was compensation paid, for such easements to be used for the storage of water to benefit power generation.

49. The misuse and excessive use of the existing flowage easements constitutes a taking by GRDA of the value of the Plaintiffs' remaining interest in these properties, without payment of just compensation.

50. Additionally, the increased frequency, magnitude and duration of flowage upon such property has caused substantial erosion. This has caused the boundary of the easements (which is usually defined by an elevation) to continually move and the are covered by the

easement to expand as higher elevation property, which as originally above the original easement line, erodes and sloughs off to elevations below the easement elevation. This “creeping easement” caused by erosion constitutes an additional taking of Plaintiffs’ property without just compensation.

51. Plaintiffs with property covered by flowage easements are therefore entitled to a determination that their property has been taken and an award of just compensation, including attorney fees, expert fees, interest, and other relief, pursuant to Article II, Section 24 of the Oklahoma Constitution and 27 Okla. Stat. § 12.

**Third Claim for Relief**  
**(Constitutional damage to private property for public use)**

52. The allegations set forth in paragraphs 1 through 51 are incorporated herein by reference.

53. By repeatedly flooding and causing erosion upon Plaintiffs’ property, GRDA has damaged such property for public use. Plaintiffs are therefore entitled to recover just compensation for the damages they have suffered, as provided by Article II, Section 24 of the Oklahoma Constitution.

**Fourth Claim for Relief**  
**(Strict Liability)**

54. The allegations set forth in paragraphs 1 through 53 are incorporated herein by reference.

55. GRDA changed and altered the flow of the Neosho River by the construction of the Pensacola Dam and the impoundment of water to form Grand Lake.

56. The alteration of the flow of the Neosho River by such actions has caused flooding and erosion of Plaintiffs' property.

57. GRDA is therefore strictly liable for all damages suffered by Plaintiffs as a result of such flooding and erosion.

**Fifth Claim for Relief**  
**(Trespass)**

58. The allegations set forth in paragraphs 1 through 57 are incorporated herein by reference.

59. Pensacola Dam and GRDA's operation thereof have resulted in the physical invasion of waters over Plaintiffs' property, most of which is not covered by any form of flowage easement.

60. Such invasion was not authorized by Plaintiffs and has resulted in damages to Plaintiffs' property.

61. GRDA is therefore liable to Plaintiffs for all damages caused by its unauthorized flooding of Plaintiffs property.

**VIII. GENERAL DESCRIPTION OF PLAINTIFFS' DAMAGES**

62. As a direct and proximate result of the flooding of their property caused and worsened by Pensacola Dam, Plaintiffs have suffered damages, costs and expenses including, but not limited, to the following:

- (a) The expenditures of sums to mitigate, avert and abate damages caused by flooding;

- (b) Lost revenue and income resulting from the closure or disruption of businesses or other operations on the property during periods of flooding;
- (c) The diminution in the market value of Plaintiffs' real property;
- (d) The damage and loss of real and personal property;
- (e) Expenses including out-of-pocket expenses for alternate housing;
- (f) Attorney fees, expert witness fees, and costs incurred in connection with this litigation;
- (g) Prejudgment interest.

#### **IX. PRAYER FOR RELIEF**

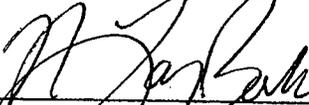
WHEREFORE, Plaintiffs request that the Court grant the following relief:

- (a) An order certifying this as a class action to allow the efficient adjudication of all claims related to the flooding at issue herein;
- (b) Judgment finding that GRDA has (a) taken a flowage easement upon Plaintiffs' property, and (b) taken the remaining interest in property with an existing easement, up to an elevation (to be determined at trial) which constitutes the highest elevation of flooding caused by the Pensacola Dam;
- (c) An award of just compensation to each Plaintiff for the easement or other interest taken from them by GRDA in an amount to be proven at trial in excess of \$50,000;
- (d) In the alternative, an award of all damages suffered by each Plaintiff from flooding caused by Pensacola Dam from May, 2007 to date, in an amount to be proven at trial in excess of \$50,000;

- (e) An award of pre- and post-judgment interest as provided by law;
- (f) An award of Plaintiffs' attorneys fees, expert and appraisal fees, and costs;
- (g) Such further and other relief to which Plaintiffs may be entitled.

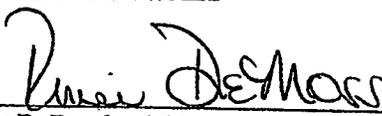
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