

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROBERT and BRENDA PERRY,)
)
 Plaintiffs/Appellees/Counter-Appellants,)
)
 v.)
)
 GRAND RIVER DAM AUTHORITY,)
)
 Defendants/Appellants/Counter-Appellees.)

Case No. 109714 (consolidated w/
Nos. 109715 and 109716)

DAVID and STACY PRYOR,)
)
 Plaintiffs/Appellees/Counter-Appellants,)
)
 v.)
)
 GRAND RIVER DAM AUTHORITY,)
 Defendants/Appellants/Counter-Appellees.)

FILED
SUPREME COURT
STATE OF OKLAHOMA
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JOHN and JANET SHAW,)
)
 Plaintiffs/Appellees/Counter-Appellants,)
)
 v.)
)
 GRAND RIVER DAM AUTHORITY,)
)
 Defendants/Appellants/Counter-Appellees.)

BRIEF IN CHIEF
OF APPELLANT GRAND RIVER DAM AUTHORITY

Appeal from Ottawa County
Case No. CJ-2011-00381-A, B, and C
Judge Robert E. Reavis

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INTRODUCTION

Water is the lifeblood of Oklahoma. The Grand River Dam Authority (GRDA) has an obligation to control, store, preserve, and distribute the waters of the Grand River and its tributaries for the purposes of irrigation, conservation, and the production of electricity. 82 O.S.2011 § 861. It does so through the operation of the Pensacola Dam. To fulfill its obligations, GRDA has the power to condemn land, and can be sued for inverse condemnation or in tort. *Id.* at § 862(h) and (l).

This appeal concerns whether the trial court erred in determining that some homeowners' property had been taken by inverse condemnation when they continued to live on their property for years after the floods receded, and whether the court erred in determining their property was not taken until years after it was first flooded. It also concerns whether the trial court erred in finding that GRDA was liable to these homeowners for their costs in cleaning and repairing their property after intermittent flooding, even though they failed to file their lawsuit until years after the applicable statute of limitations expired. Additionally, this appeal presents this Court with an opportunity to provide much-needed guidance to the parties and trial courts across the State regarding the law of inverse condemnation as applied to the recurring issue of flooding along Oklahoma's rivers.

Remedies are available for landowners whose property is flooded due to the operation of the dam. But Plaintiffs sat on their rights for a number of years, rather than timely file their lawsuit. Furthermore, the floods in this case were temporary, and even if takings occurred, the trial court made inconsistent findings concerning when and what was taken. These decisions should be reversed.

SUMMARY OF THE RECORD

Plaintiffs are three married couples, the Shaws, the Perrys, and the Pryors. They all own or owned homes upstream from Pensacola Dam. The dam impounds water in what is commonly known as Grand Lake. The dam is owned and operated by GRDA, a state agency licensed by the federal government for the purposes of flood control and electrical power generation. 82 O.S.2011 § 861. (R. 607, Shaw Findings of Fact #2; R. 617, Perry Findings of Fact #2; R. 626, Pryor Findings of Fact #2). (“R.” refers to the Record on Appeal; the trial court’s three final orders are referred to by the various Plaintiffs’ last names).

In connection with operating the dam, GRDA has a flowage easement, giving it the right to flood up to 760 feet NGVD. (R. 607, Shaw Findings of Fact #22; R. 617, Perry Findings of Fact #19; R. 626, Pryor Findings of Fact #19). “NGVD” stands for Nation Geodetic Vertical Datum, and relates to sea level. *Bowyer v. Indiana Dep’t of Nat’l Res.*, 944 N.E.2d 972, n. 8 (Ind. App. 2011). A flowage easement “gives the dominant-estate owner the right to flood a servient estate, as when land near a dam is flooded to maintain the dam or to control the water level in a reservoir.” *Black’s Law Dictionary* 549 (8th ed. 2004). All of the relevant property owned by Plaintiffs is above 760 NGVD. (R. 607, Shaw Findings of Fact #23; R. 617, Perry Findings of Fact #19; R. 626, Pryor Findings of Fact #19).

In varying amounts, a series of three floods entered onto and then receded from Plaintiffs’ properties in September 1993, April 1994, and June 1995, and also, in the Shaws’ case, in October 1986. (R. 607, Shaw Findings of Fact #4; R. 617, Perry Findings of Fact #4; R. 626, Pryor Findings of Fact #4). The October 1986 flood also flooded the Pryors’ property, which they purchased after that flood ended. (R. 626, Pryor Findings of Fact #4). Following

each flood, Plaintiffs cleaned and restored their real and personal property damaged by the floods.

Plaintiffs and 36 other property owners filed an inverse condemnation and damages suit against GRDA on October 5, 2001, more than six years after the end of the last flood at issue. They asserted that their properties had been damaged due to the floods and that the damage was caused by GRDA's "impairing and destroying Plaintiffs' use and enjoyment of their property." (R. 27, First Amended Petition #31). Plaintiffs asserted two claims of inverse condemnation—the taking of a flowage easement and the excessive use of an existing flowage easement—and a third claim for consequential damage to private property for public use. They sought damages for property taken, for the diminution in the properties' market value, and for the loss of or cost of repair to their personal and real property. They further sought a judicial finding that GRDA had taken both a flowage easement and the remaining interest in their property, up to the highest elevation of flooding. (R. 27, First Amended Petition).

GRDA filed an answer, which included a denial that a taking had occurred. (R. 52, Answer ## 4, 7, 31).

The trial court in this case had previously adjudicated another series of cases, commonly known as the *Dalrymple* cases, CJ 1994-444, involving different property owners than those in the instant case. These other property owners had also alleged GRDA was liable for flood damage occurring during the same time period as in the instant case. In those cases, the trial court adopted the findings of its Referee, Dr. Forrest M. Holly, Jr., of the Iowa Institute of Hydraulic Research, and awarded damages. Dr. Holly determined that "the existence and operation of Pensacola Dam caused a quantifiable increase in the magnitude and duration of flooding above 760 feet NGVD...." (R. 607, Shaw Findings of Fact #3; R. 617, Perry Findings

of Fact #3; R. 626, Pryor Findings of Fact #3; *see also* R. 495, Order attached as Exhibit A of Plaintiff's Motion to Adopt Findings of Fact and Conclusions of Law from *Dalrymple v. Grand River Dam Authority*, Case No. CJ-94-444, and Appeal Thereof). That case, which involved different issues and different plaintiffs than in the instant case, resulted in an unpublished 2004 Oklahoma Court of Civil Appeals decision, *McCool v. Grand River Dam Authority*, appeal no. 97,020. (R. 175, Opinion attached as Exhibit B to Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment).

GRDA filed a motion for partial summary judgment, asserting Plaintiffs' claims for damage to real and personal property were barred by the statute of limitations, 12 O.S.2011 § 95 (A)(2) and (3). (R. 87, Defendant's Motion for Partial Summary Judgment). Plaintiffs responded by asserting that issues of limitations, damages, and causation had been resolved by the *Dalrymple/McCool* appeal and that 12 O.S.2011 § 95 did not apply. (R. 175, Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment).

After a hearing on May 14, 2010, the trial court granted GRDA's motion for partial summary judgment as to Plaintiffs' personal property claims, finding those claims were time-barred. The court denied summary judgment as to Plaintiffs' real property claims. The docket entry mistakenly referred to granting the motion as to the real property claims, but this was corrected in a nunc pro tunc order filed November 23, 2010. (R. 596, Nunc Pro Tunc Order).

The following year, in an order filed June 28, 2011, the trial court severed the claims of Plaintiffs. (R. 603, Order Severing Certain Claims). The court then issued Findings of Fact and Conclusions of Law as to each of the three sets of Plaintiffs, resolving the remaining issues in the cases. These orders are the appealable orders in this case. In all three cases, the trial court found:

(1) per Dr. Holly's report, which the trial court again adopted, the existence and operation of the Pensacola Dam had caused a quantifiable increase in flooding. (R. 607, Shaw Findings of Fact #3; R. 617, Perry Findings of Fact #3; R. 626, Pryor Findings of Fact #3);

(2) Plaintiffs' single family residences were subject to a series of floods in October 1986 (except for the Perrys), September 1993, April 1994, and June 1995 caused by the existence and operation of the dam. (R. 607, Shaw Findings of Fact #4; R. 617, Perry Findings of Fact #4; R. 626, Pryor Findings of Fact #4). Specifically, the trial court made the following findings as to each set of Plaintiffs:

(a) Plaintiffs Shaw: "In 1986 the Plaintiffs' property flooded to the extent that four feet (4') of water entered the Plaintiffs' home on the subject property and it took about two (2) months for the plaintiffs to complete the repairs necessary to restore the home to its condition immediately before this flood. . . . About fifty percent (50%) of the flood water present in the house during the 1986 flood was present due to naturally-occurring floodwaters, and the other fifty percent (50%) of the flood water present in the home was caused by the existence and operation of Pensacola Dam." (R. 607, Shaw Findings of Fact ##5-6). The court further found water entered the Shaws' house in 1993, 1994, and 1995. (*Id.* at ##9-17).

(b) Plaintiffs Perry: "In 1993, the Plaintiffs' property flooded but no water entered the living area of Plaintiffs' home. However, approximately one foot (1') of water entered the crawl space of the house, which caused the settling of the foundation of the home and the floor to sink, and exacerbated an existing foundation issue with the detached garage. . . . In 1994, the Plaintiffs' property flooded to the extent that one foot (1') of water entered Plaintiff's home on the subject property. Plaintiffs had to move out of their home for about three (3) months as they completed the repairs necessary to restore their home to its condition immediately before the

flood.” (R. 617, Perry Findings of Fact ##5, 8). The court further found that in 1995, water entered the Perrys’ house’s subfloors and garage. (*Id.* at #11).

(c) Plaintiffs Pryor: “Plaintiffs were told prior to the purchase of the property that their residence had flooded previously in 1986 and had been abandoned by the previous owner. According to the maps created in 2010 by Plaintiffs’ hydrology expert, Dr. Mussetter, the Plaintiffs’ property flooded in 1986. According to Dr. Munsetters’ model and maps, the Plaintiffs’ property flooded to five (5) feet in 1986 with Pensacola Dam in place, but would have flooded only three and one-half (3.5) feet due to natural flood water without the existence and operation of the Pensacola Dam.” (R. 626, Pryor Findings of Fact #4). (GRDA notes that three and a half out of five feet equates to 70 percent). The court further found the water flooded the Pryors’ property, but not their home, in 1993; entered the house in 1994; and entered the ductwork below the house without entering any other part of the house in 1995. (*Id.* at ##5, 8, 11).

(3) except for the 1986 floods mentioned above, the court found that the water present on the property was caused by the existence and operation of the dam. (R. 607, Shaw Findings of Fact ##10, 13, 17; R. 617, Perry Findings of Fact ##6, 9, 12; R. 626, Pryor Findings of Fact ##6, 9, 12);

(4) each flood was so severe that it substantially interfered with Plaintiffs’ use and enjoyment of their property. (R. 607, Shaw Findings of Fact #24; R. 617, Perry Findings of Fact #20; R. 626, Pryor Findings of Fact #15);

(5) due to the flooding, Plaintiffs were deprived of the use and enjoyment of their property and incurred various expenses cleaning, restoring, and replacing property following

each flood. (R. 607, Shaw Findings of Fact ##7, 10, 13; R. 617, Perry Findings of Fact ##7, 10, 13; R. 626, Pryor Findings of Fact ##7, 10, 13);

(6) the flooding was a “public use” of Plaintiffs’ properties as contemplated by Okla. Const., Art. 2, Secs. 23 and 24, for which GRDA was liable for damages caused by flood waters resulting from the existence and operation of the dam. (R. 607, Shaw Conclusions of Law #1; R. 617, Perry Conclusions of Law #1; R. 626, Pryor Conclusions of Law #1);

(7) all claims for the taking of Plaintiffs’ personal property were barred by 12 O.S.2011 § 95’s two-year statute of limitation, as the court had previously determined. (R. 607, Shaw Conclusions of Laws ##7-8; R. 617, Perry Conclusions of Law ##6-7; R. 626, Pryor Conclusions of Law ##7-8);

(8) Plaintiffs were entitled to damages for inverse condemnation to their real property and damages to their real property, with the applicable statute of limitation for interference with their real property being 15 years under 12 O.S.2011 § 93 and the common law. (R. 607, Shaw Conclusions of Law #9; R. 617, Perry Conclusions of Law #8; R. 626, Pryor Conclusions of Law 91);

The trial court then made awards to each of the three sets of Plaintiffs; as follows:

(a) Plaintiffs Shaw: the trial court found the flooding resulted in a taking or inverse condemnation of the property, on June 2, 1995, with fee title to be transferred to GRDA upon payment of damages. The trial court found that was the date of taking because “the 1995 flood began on June 2, 1995, and it was the last flood in the series which constituted a taking of Plaintiffs’ property by the GRDA.” The trial court awarded \$114,850, composed of \$54,600 for the diminished value of the property (based on values before and after the floods), another \$500 for the residual value of the property, and a total of \$59,750 in damages to the real property for

time and costs in cleaning and restoring the property in 1986, again in 1993, and again in 1994. (R. 607, Shaw Conclusions of Law ##11-12).

Plaintiffs Perry: the trial court found the flooding resulted in a taking or inverse condemnation, “of a flowage easement over all of the property of the Plaintiffs,” on April 7, 1994. The trial court found that was the date of taking because “the 1994 flood began on April 7, 1994, and it was the flood in the series which reached the highest elevation of Plaintiff’s property.” The trial court awarded \$32,990, composed of \$17,000 for the diminished value of the property (based on values before and after the floods), plus a total of \$15,900 in damages to the real property for time and costs in cleaning and restoring the property in 1993, again in 1994, and again in 1995. (R. 617, Perry Conclusions of Law ## 10-12). (GRDA notes that the figure listed in Conclusions of Law #11 of the Perrys’ order is a scrivener’s error, and is properly expressed in the last paragraph of the order).

Plaintiffs Pryor: the trial court found the flooding resulted in a taking or inverse condemnation of the property “for a temporary period of time from September 1993 through June 1995,” because the property was unusable as a single family dwelling during that time. The trial court awarded \$60,850, composed of \$33,000 for the diminished value of the property (based on values before and after the floods), plus a total of \$27,850 in damages to the real property for time and costs in cleaning and restoring the property in 1993, again in 1994, and again in 1995. (R. 626, Pryor Conclusions of Law ##10-12).

The trial court's findings are summarized as follows:

SHAW	PERRY	PRYOR
First flood 50% due to naturally-occurring floods, 50% due to dam	First flood 100% due to dam	First flood 70% due to naturally-occurring floods, 30% due to dam
Taking of fee title	Taking of flowage easement	Taking for temporary period of 1993-1995
Taking occurred June 2, 1995 (start of last flood)	Taking occurred April 7, 1994 (start of flood with highest elevation)	Taking occurred only 1993-1995
Floods in 1986, 1993, 1994, and 1995	Floods in 1993, 1994, and 1995	Floods in 1986 (previous owner), 1993, 1994, and 1995
Damages of \$114,850 (\$54,600 diminished value, plus \$500 residual value, plus \$59,750 clean and restore)	Damages of \$32,990 (\$17,000 diminished value, plus \$15,990 clean and restore)	Damages of \$60,850 (\$33,000 diminished value, plus \$27,850 clean and restore)

GRDA appeals. In an August 2, 2011, order, this Court determined that the trial court's severing of the three sets of claims was the functional equivalent of satisfying the requirements of 12 O.S.2011 § 994, and ordered the appeals to proceed. The three appeals, one by each set of Plaintiffs, were consolidated in an order filed August 15, 2011. Though each of the orders lists Plaintiffs in the captions as "Robert Asbell and Theresa Asbell, et al.," GRDA had captioned this appeal in accordance with Supreme Court Rules.

STANDARD OF REVIEW

GRDA does not dispute the trial court's factual findings as to the amount of damages, or to the accuracy of Dr. Holly's report, which was adopted and included in the trial court's final orders. The issues in this appeal are questions of law. Contested issues of law are reviewable in all actions by a *de novo* standard. *Weeks v. Cessna Aircraft Co.*, 1994 OK CIV APP 171, ¶ 5, 895 P.2d 731, 733 (approved for publication by the Oklahoma Supreme Court). An appellate

court claims for itself plenary, independent, and non-deferential authority to re-examine legal rulings. *Id.*

ARGUMENT AND AUTHORITIES

Inverse condemnation is an action brought by a property owner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain. *Drabek v. City of Norman*, 1996 OK 126, ¶ 4, 946 P.2d 658, 659. GRDA has such authority to condemn, and to be sued for inverse condemnation. 82 O.S.2011 § 862(h) & (m).

Condemnation proceedings differ significantly from inverse condemnation proceedings, *State ex rel. Dep't of Transp. v. Post*, 2005 OK 69, ¶ 7, 125 P.3d 1183, 1186, but both have constitutional and statutory foundations. *Drabek* at ¶ 4, 946 P.2d at 659. The Oklahoma Constitution provides at Art. 2, Sec. 24, in part:

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.

Statutory authority is found at 66 O.S.2011 § 57:

that in case any corporation or municipality authorized to exercise the right of that eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings.

Thus, damages caused by inverse condemnation are to be determined in the same manner provided for condemnation proceedings. Those damages are for just compensation, which includes the value of the property taken, and injury to property not taken. The trial court awarded Plaintiffs damages for the value of the property taken, and damages for cleaning and repairing the property.

I. THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS DAMAGES FOR DIMINISHED VALUE, BECAUSE NO TAKINGS BY GRDA OCCURRED.

In Oklahoma, 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. *Mattoon v. City of Norman*, 1980 OK 137, ¶ 11, 617 P.2d 1347, 1349. The question of substantial interference is one that the trier of fact must decide. *Id.* Additionally, an overt act by the governmental agency resulting in an assertion of dominion and control over property can be an actual or de facto "taking." *Id.* at ¶ 12, 617 P.2d at 1349.

For purposes of this appeal, GRDA does not dispute the factual findings of the trial court, including the adoption of Dr. Holly's report. However, GRDA asserts that those factual findings, when legal rules are applied to them, do not allow for a legal conclusion that inverse condemnation occurred here.

1. For Plaintiffs Perry and Pryor, the flowage of water for temporary periods cannot be considered a "taking."

To constitute a taking, the condemnor's actions must be so substantial an interference as to effectively destroy or impair the land's usefulness. *Morain v. City of Norman*, 1993 OK 149, ¶ 10, 863 P.2d 1246, 1249. This applies to cases of flooding, whether permanent or recurring. *State of Okla. ex rel. Dep't of Transp. v. Hoebel*, 1979 OK 63, ¶ 8, 594 P.2d 1213, 1215. A taking requires an exercise of dominion and control over the property by the condemnor, prohibiting the landowner from exercising dominion and control. *Calhoun v. City of Durant*, 1998 OK CIV APP 152, ¶ 15, 970 P.2d. 608, 613.

The undisputed facts show that after every flood, from the first to the last and from the least serious to the most serious, the Perrys and Pryors returned to their homes and continued to live there. The Perrys restored their home and kept the property until 2001, when they sold it (R.

617, Perry Findings of Fact ##14, 15); the Pryors restored their home and continued to live there until 2005, when they sold it. (R. 626, Pryor Findings of Fact ## 14, 15). Only the Shaws moved out of their house after the 1995 flood. (R. 607, Shaw Findings of Fact # 18).

If the properties had actually been taken at any point during the floods, the usefulness to the Perrys and Pryors would have to be destroyed, or at least seriously impaired to the point that they could not exercise “dominion and control.” The ultimate exercise of “dominion” of a home is to live there. This leads to the conclusion that their homes were not taken, but damaged, for which damages were available for all Plaintiffs if they had acted timely and filed their lawsuit within the applicable limitations period. Limitations is discussed in Part III of this brief.

Morain v. City of Norman, 1993 OK 149, 863 P.2d 1246, is an example of interference that does not rise to the level of prohibiting the landowner from exercising dominion and control. The trial court found that flooding of the plaintiffs’ property was caused by the City of Norman’s drainage improvements and also by “excessive or intensive rainfall.” *Id.* at ¶ 5, 863 P.2d at 1248. Though the trial court concluded “such increased flooding and its likely recurrence interfered with plaintiffs’ use and enjoyment of their property and diminished the value thereof,” *id.*, it concluded that no taking had occurred. The Supreme Court affirmed:

The trial court found that City had committed no overt act exercising dominion or control over plaintiffs’ property and that use of plaintiffs’ property was not a necessary part of any public improvement made by City. Hence, no “taking” of plaintiffs’ property occurred. *State ex rel. Department of Highways v. Cook*, 542 P.2d 1405 (Okla.1975). The trial court further determined that the flooding of plaintiffs’ land was “not so substantial of an interference so as to effectively destroy or impair the land’s usefulness.” Such a finding is supported by the record. Thus, the trial court’s ruling dismissing plaintiffs’ inverse condemnation action is affirmed.

Id. at ¶ 11, 863 P.2d at 1249.

This is exactly what happened to the Perry and Pryor properties: an interference with the use and enjoyment, but not one so substantial as to destroy their properties' usefulness. The best evidence supporting this conclusion is the fact that they continued to live on their properties for years after the last flood, in 1995. The usefulness of their properties was certainly not destroyed, and no evidence was presented that the usefulness was substantially impaired.

Though whether substantial interference occurs is a question of fact, Oklahoma courts have reversed a trial court's conclusion that a taking occurred. An example is *Calhoun v. City of Durant*, 1998 OK CIV APP 152, 970 P.2d 608, which held that the trial court's finding of a taking due to approval of a bond issue was "inconsistent with Oklahoma law." *Id.* at ¶ 8, 970 P.2d at 612.

Furthermore, substantial impairment relates to time, as well as severity. For example, planes flying over property can be considered a taking, where the flights are "daily, frequent, and continuous." *Henthorn v. Okla. City*, 1969 OK 76, ¶ 1, 453 P.2d 1013. By contrast, there was nothing frequent about the floods in the instant case. Even discounting the 1986 flood that occurred seven years before the other floods, all of the trial court's findings of takings concern a 21-month period where for most of that time, there was no flooding at all.

In conclusion, this Court should hold, as a matter of law, that the intermittent flooding in this case, which did not destroy or substantially impair Plaintiffs' Perry and Pryor's continued residence in their homes, is not such a substantial interference that it amounts to a taking.

2. Additionally, for Plaintiffs Shaw and Pryor, the undisputed facts show their property was flooded and taken by naturally-occurring floods, not floods resulting from the Pensacola Dam.

Flooding, whether permanent or recurring, "if severe enough so as to effectively destroy or impair the land's usefulness," may constitute a taking. *State of Okla. ex rel. Dep't of Transp.*

v. Hoebel, 1979 OK 63, ¶ 8, 594 P.2d 1213, 1215. In the case at bar, the flooding caused by GRDA did not destroy or impair Plaintiffs Shaw and Pryor's properties' usefulness, because naturally-occurring flooding, for which GRDA is indisputably not responsible, had already destroyed its usefulness.

The trial court, in adopting Dr. Holly's report, did not find that the dam was the exclusive cause of the flooding of the property owned by Plaintiffs Shaw and Pryor. According to the court's findings of fact, the Shaws' house was flooded by four feet of water in 1986, and this flood was 50 percent due to the dam, and 50 percent due to naturally-occurring flooding. (R., 607, Shaw Findings of Fact ##5-6). Indisputably, GRDA is not liable for naturally-occurring flooding.

The combination of causes of flooding is not like the actions of joint tortfeasors. The flooding in these cases was caused by heavy rainfall. Naturally-occurring flooding, by its definition, occurs whether or not a dam exists. According to Dr. Holly, and as the trial court found in adopting his report, the dam caused "a quantifiable increase in the magnitude and duration of flooding" (R. 607, Shaw Findings of Fact #3; R. 617, Perry Findings of Fact #3; R. 626, Pryor Findings of Fact #3), but that in 1986, 50 percent of the floodwater in the Shaws' house was caused by natural-occurring flooding. (R. 607, Shaw Findings of Fact #6). In other words, if the dam did not exist, the Shaws' property would have nonetheless flooded. Therefore, the Shaws' property was "taken" by naturally-occurring flooding. The additional flooding caused by GRDA's operation of the dam affected a house already flooded. This additional flooding did not affect the outcome of a taking. If the 1986 flooding was severe enough to effectively destroy or impair the land's usefulness, which the trial court so found (R.607, Shaw Findings of Fact #24), then the Shaws' property was taken by natural flooding in 1986.

The same applies to the Pryors' property. The trial court made similar findings regarding the 1986 flooding of the Pryors' home, finding the equivalent of 70 percent caused by natural flood, and 30 percent dam-caused. (R. 626, Pryor Findings of Fact #4). The fact that the Pryors did not own the home in 1986 cannot negate the fact of a taking of the property, because the right to recover for a taking belongs to the owner at the time of the taking. *Drabeck* at ¶ 17, 946 P.2d at 662. In other words, if the property was taken in 1986, the Pryors bought property already taken. Implicit in the trial court's finding is a conclusion that the 1986 flooding of the property purchased by the Pryors amounted to substantial interference with the use and enjoyment of the property. Thus, the Pryors' property was also taken by natural flooding in 1986.

II. ALTERNATIVELY, IF TAKINGS OCCURRED, THE TRIAL COURT ERRED IN DETERMINING THE TIME AND THE NATURE OF THE TAKINGS.

1. The takings occurred the first time the floodwaters sufficiently interfered with Plaintiffs' use and enjoyment of their properties.

As stated above, a taking requires a sufficient interference with the landowner's use and enjoyment of property. *Mattoon v. City of Norman*, 1980 OK 137, ¶ 11, 617 P.2d 1347, 1349. Additionally, an overt act by the governmental agency resulting in an assertion of dominion and control over property can be an actual or de facto taking. *Id.* at ¶ 12, 617 P.2d at 1349. The question of substantial interference is one that the trier of fact must decide. *Id.* at ¶ 11, 617 P.2d at 1349.

Thus, as with a jury verdict, the trial court's findings as to issues of fact will not be disturbed if there is any competent evidence to support them. *Tax/Investments Concepts, Inc. v. McLaughlin*, 1982 OK 134, ¶ 3, 670 P.2d 981, 983. However, in reaching its decisions, rather than apply the rules to the facts, the trial court in effect created legal rules as to when takings would occur. The trial court did not have the authority to do so. Furthermore, the trial court's

findings as to when the takings occurred was not in accord with a basic rule of inverse condemnation: “When 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.” 27 Am. Jur. 2d *Eminent Domain* § 804 (2011).

2. The trial court erred in its determination of when the takings occurred.

In all three cases, the trial court found that on each occasion the dam caused or increased flooding, the flooding was so severe that it substantially interfered with Plaintiffs’ use and enjoyment of their property. (R. 607, Shaw Findings of Fact #24 and Conclusions of Law #4; R. 617, Perry Findings of Fact #20 and Conclusions of Law #3; R. 626, Pryor Findings of Fact #15 and Conclusions of Law #4). The court further found that the first such occasion was the 1986 flood for the Shaws (R. 607, Shaw Findings of Fact #7) and the 1993 flood for the Perrys (R. 617, Perry Findings of Fact #7) and the Pryors (R. 626, Pryor Findings of Fact #7).

Yet the trial court did not use two of those three dates as the dates of taking. Instead, the court found the takings did not occur for the Shaws until June 2, 1995, when the last flood began (R. 607, Shaw Conclusions of Law #13); and for the Perrys, not until April 17, 1994, at the beginning of the flood that reached the highest elevation (R. 617, Perry Conclusions of Law #12). Only the trial court’s date of the Pryors’ taking, in 1993 (R. 626, Pryor Conclusions of Law #11D), which is discussed below, is consistent with the date that the trial court found was the first substantial interference with the use and enjoyment of property.

The trial court erred in two respects. First, instead of applying a rule to the facts in order to reach a conclusion, it created new, contradictory rules. It found that a taking occurs when the last flood in a series of floods begins (the Shaws), but it also found that a taking occurs when the severest flood in a series of floods begins (the Perrys). The start of a flood might be the date of a

taking, but it is not automatically that date. The date depends on when substantial interference occurs, not necessarily when a flood begins. For example, a devastating flood beginning January 1st, but not reaching a property owner's land until January 2nd, cannot be said to have substantially interfered with the owner's property on January 1st. Furthermore, even if this Court decided to create a rule that tied substantial interference to the start of a flood, it would be contradictory to hold that the flood could be both the severest and the last flood in a series.

Second, the trial court erred because its conclusions contradicted its own findings of fact. For the Shaws and the Perrys, the court found the takings occurred much later than the dates it found a sufficient interference with the use and enjoyment of the property occurred. When a taking occurs depends on when substantial interference occurs, because "[i]n Oklahoma, we have held that 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." *Mattoon v. City of Norman*, 1980 OK 137, ¶ 11, 617 P.2d 1347, 1349. If a court finds sufficient interference to constitute a taking, then the date of sufficient interference must be the date of taking.

Only the trial court's finding that the Pryors' taking occurred in 1993 is in line with the court's factual findings that this was when the first sufficient interference occurred. But these findings are also contradicted by the trial court's other findings. To conclude the taking occurred in 1993 requires: (1) discounting the court's finding that the earlier flood in 1986 flooded to five feet in the house, and (2) concluding that a taking occurs even when the flooding is so minimal that it does not enter the house and only does \$150 in damages, which is all the 1993 flood did to the Pryors' property. (R. 626, Pryor Findings of Fact ##5-7). As a general rule, in deciding whether a taking has occurred, the court's focus is on the character of the action and the nature and extent of the interference with rights in the parcel *as a whole*. 27 Am. Jr. 2d *Eminent*

Domain § 748 (2011) (emphasis added). Some impairment of the land's usefulness is not enough to establish damages for inverse condemnation. *Material Serv. Corp. v. Rogers County Comm'rs*, 2006 OK CIV APP 52, ¶ 9, 136 P.3d 1063, 1066. A flood that does not enter a home and only does \$150 in damage cannot be sufficient to constitute a taking, even if the trial court also states this flood is a sufficient interference with the use and enjoyment of property. (R. 626, Pryor Findings of Fact #7 and Conclusions of Law #4).

This Court has "spelled out the proper function" of the trier of fact in inverse condemnation cases. *Williams v. State ex rel. Dep't of Transp.*, 2000 OK CIV APP 19, ¶ 35, 998 P.2d 1245, 1262. That function is to make the factual findings of a substantial interference which necessarily precede the legal conclusion by the court of a compensable taking. *Id.* This determination of a taking is also to be made by the trier of fact. *Id.* at ¶ 36, 998 P.2d at 1262. In the instant case, the trial court's factual findings do not support its conclusions as to when takings occurred.

A condemnee's damages are judged by the conditions existing when the property is taken. *State ex rel. Dep't of Transp. v. Post*, 2005 OK 69, ¶ 15, 125 P.3d 1183, 1188. This Court should reverse the trial court's orders, and remand with instructions that if takings occurred, then consistent with the trial court's findings of fact, they occurred in 1986 for the Shaws and the Pryors, and 1993 for the Perrys. The trial court's factual findings reveal those were the first instances of sufficient interference with the use and enjoyment of the properties.

3. The trial court erred in its determination of *what* was taken.

The trial court also reached different conclusions as to what was taken by inverse condemnation: for the Pryors, a temporary taking from 1993-95; for the Shaws, fee title; and for the Perrys, a flowage easement. Despite the good deal of discretion a trial court has to fashion an

appropriate remedy, and the possibility that the same floods can do different amounts of damage to different properties, all but the trial court's conclusion that a flowage easement was taken are not in line with its factual findings.

The finding of a "temporary" taking in the Pryors' case is contrary to law. The United States Supreme Court has approved the concept of temporary takings, but in the context of a regulatory taking. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S. Ct. 2378 (1987). Simply put, a taking is a taking. The trial court's finding of a temporary taking allows for the possibility that a taking will happen again and again, when sufficient rain falls. Oklahoma courts have specifically rejected the idea of takings which would allow property to be taken more than once. See *Barton v. City of Midwest City*, 2011 OK CIV APP 71, n. 8, 257 P.3d 422.

The finding of the taking of fee title in the Shaws' case is contradicted by the fact that there was no permanent impoundment of water in any of these cases. Even during the 21-month period covered by the trial court's orders (excluding the 1986 flood), no water entered Plaintiffs' properties during most of that time.

The proper remedy in all three of these cases is the trial court's remedy for the Perrys, a flowage easement. A flowage easement is the right to overflow the land of another in the accumulation and maintenance of an artificial body of water, such as Grand Lake. See 78 Am. Jur. 2d *Waters* § 261 (2011). This was the remedy approved in *Underwood v. State ex rel. Dep't of Transportation*, 1993 OK CIV APP 40, 849 P.2d 1113, where the Court affirmed the trial court's finding of a flowage easement over and across property after what the landowners alleged was almost continual flooding due to construction of a culvert. *Id.* at ¶ 2, 849 P.2d at 1114. This

remedy is in line with the facts of the case, and allows landowners to retain ownership of their property.

This was also the remedy granted by the U.S. Court of Claims in *Stockton v. United States*, 214 Ct. Cl. 506 (Ct. Cl. 1977), where landowners brought a claim of inverse condemnation against the federal government for flooding near Lake Eufaula Dam and Reservoir. The Court there noted that a condemnor is required to compensate owners whose property, due to sovereign waterway improvements, has become permanently liable to “intermittent but inevitably recurring overflows,” (quoting the U.S. Supreme Court in *United States v. Cress*, 243 U.S. 316, 328, 37 S. Ct. 380, 385 (1917)). This language fits the instant case. The floods may be “temporary” in the sense that they ebb and flow, but because they are “inevitably recurring,” the remedy must be permanent.

The Supreme Court’s opinion in *United States v. Cress* considered what might be called the inverse of “substantial interference.” “If any substantial *enjoyment* of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land.” *Id.* (Emphasis added). That is precisely the situation here, considering that the Pryors continued to live on their property without any additional flooding until they sold it until 2005 (R. 626, Pryor Findings of Fact #15), and the Perrys continued to own their property until they sold it in 2001. (R. 617, Perry Findings of Fact #15).

Only the Shaws left their home after the 1995 flood, though they continue to own it. (R. 607, Shaw Findings of Fact #18). While they might assert that, unlike the other Plaintiffs, they no longer have any substantial enjoyment of the property, evidence that the floods are infrequent but recurring calls for the finding of a flowage easement. As stated in *Cress*, where “land is not constantly but only at intervals overflowed, the fee may be permitted to remain in the owner,

subject to an easement in the United States to overflow it with water as often as necessarily may result from the operation of the lock and dam for purposes of navigation.” *Id.*, 243 U.S. at 329, 37 S. Ct at 385. Again, this is exactly the situation in the instant case, and the same remedy is appropriate.

Therefore, this Court should reverse the trial court’s orders, and remand with instructions that, consistent with the trial court’s findings of fact, all the takings in these cases were takings of flowage easements. The trier of fact, be it the trial court or a jury, should then determine damages for the takings. The measure of compensation for a flowage easement is the diminished difference in the fair market value of the land, and is determined by comparing the value before acquisition of the easement to the value after acquisition. *Hendricks v. U.S.*, 14 Cl. Ct. 143, 144 (Cl. Ct.1 987).

III. THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS ADDITIONAL DAMAGES FOR CLEANING AND REPAIRING THEIR PROPERTY, BECAUSE ALL THOSE CLAIMS ARE TIME-BARRED.

Drabek v. City of Norman provides the rules for determining when an action involving inverse condemnation is time-barred. For a taking of real property, the statute of limitations is 15 years. *Drabek* at ¶ 16, 946 P.2d at 661-62. This conclusion is based on what is now 12 O.S.2011 § 93(4), which provides a 15-year limitations period for “[a]n action for recovery of real property not hereinbefore provided for,” and on the concept that the same, 15-year period for adverse possession should apply because anything short of that would allow the condemnor to gain title short of the prescriptive period. *Id.* at ¶¶ 5-16, 946 P.2d at 660-62.

On the other hand, for damages to property, “[w]here the trier of fact determines that there has been no taking, the limitation period is the three-year period set out in *Daly*.” *Id.* at ¶ 11, 946 P.2d at 661. *City of Oklahoma City v. Daly*, 1957 OK 209, 316 P.2d 129, applied 12

O.S. § 95 (2), which sets out a three-year limitation period for “[a]n action upon a contract express or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment.”

In addition to awarding diminished value damages for what the trial court found were takings, the trial court also awarded damages for cleaning and repairing Plaintiffs’ properties. As to the latter category, the trial court awarded the Shaws \$59,750, the Perrys \$15,990, and the Pryors \$27,850. For the Shaws and the Perrys, some of the damages were incurred before the date set by the trial court as the date of taking, and the rest were incurred after the trial court’s date of taking. For the Pryors, the damages were all incurred after the trial court’s date of taking.

1. Property damage incurred before the taking of Plaintiffs’ properties by inverse condemnation is not subject to the statute of limitations for inverse condemnation. Any claim must be brought within no more than three years, which all Plaintiffs failed to do.

Assuming Plaintiffs’ properties were taken at some point by inverse condemnation, then any damage to the properties would have to occur either before or after the taking. For damages incurred before the taking, whether using the trial court’s date or some other date, the 15-year statute of limitations for inverse condemnation cannot possibly apply, because it only applies for takings. “[W]here the trier of fact determines that there has been no taking, the limitation period is the three-year period set out in *Daly*.” *Drabek* at ¶ 11, 946 P.2d at 661. Therefore, as mandated by *Daly* and *Drabek*, the three-year limitation period found in 12 O.S.2011 § 95(2) applies for damages incurred before a taking.

Plaintiffs conceded this point at the hearing on GRDA’s Motion for Partial Summary Judgment. (R. 587, Hearing Transcript of May 14, 2010, 29:16-17). Even assuming takings did not occur until the last flood in the series in 1995 (and the trial court found takings occurred in all cases before that date), Plaintiffs’ 2001 lawsuit was filed well after the three-year period

expired. Plaintiffs had a remedy for damages to property not taken, but they sat on their rights and failed to timely file their lawsuit. By failing to timely file, their claims for any damages that occurred before the taking of their property are barred.

Alternatively, Plaintiffs failed to file within the two-year limitations period for trespass claims. GRDA is aware that trespass law does not apply to property damage where there is a taking. *See, for example, Daly* at ¶ 12, 316 P.2d at 131. However, the facts of the instant case fit the definition of trespass: an actual physical invasion of the property of another without permission of the person lawfully entitled to possession. *Fairlawn Cemetery Ass'n v. First Presbyterian Church, U.S.A. of Okla. City*, 1972 OK 66, ¶ 14, 496 P.2d 1185, 1187.

If Plaintiffs' claims are considered trespass claims, they are barred for two reasons. First, just as Plaintiffs failed to meet the three-year limitations period, they failed to file their lawsuit within the two-year limitations period for trespass found in 12 O.S.2011 § 95(3). Second, they failed to meet the notice and limitations period requirements of Oklahoma's Governmental Tort Claims Act, 51 O.S.2011 §§ 151-200. Specifically, they did not present their claims to GRDA within one year of the date the loss occurred, as required by 51 O.S.2011 § 156(B), making their claim "forever barred" by the terms of the statute. GRDA is a state agency and is entitled to the protection of the Government Tort Claims Act. *Mustain v. Grand River Dam Auth.*, 2003 OK 43, ¶ 20, 68 P.3d 991, 998. Recently, the Court of Civil Appeals concluded that while claims grounded on inverse condemnation are not governed by the Act, other state law claims grounded in tort are subject to the Act. *Barton v. City of Midwest City*, 2011 OK CIV APP 71, ¶¶ 24-27, 257 P.3d 422, 426-27.

Both the two-year statute of limitations and the Governmental Tort Claims Act were discussed in the unpublished Court of Civil Appeals case, *McCool v. Grand River Dam*

Authority, which was not an inverse condemnation case, but “an action for property damage due to flooding.” (R. 175, Plaintiffs’ Response to Defendant’s Motion for Partial Summary Judgment, Exhibit B, *McCool* introduction). Neither statute was held dispositive there, but that was because different arguments were made, and because the plaintiffs in that case, unlike these Plaintiffs, “indisputably sued within two years of each flood for which they sought recovery.” (*Id.* at *McCool*, Sec. IVB.). This is exactly what Plaintiffs failed to do. They waited until years after the statute of limitations expired to file their lawsuit. Clearly, they cannot tie these claims of damage before inverse condemnation may have occurred to a statute of limitations that only applies after inverse condemnation occurs. Their claims for property damage incurred before takings of their properties are time-barred, and the trial court erred in awarding them damages.

2. Property damage incurred after the taking of Plaintiffs’ properties by inverse condemnation is recoverable only for property “not taken.” Here, all the property was taken.

Once property is taken by inverse condemnation, Okla. Const. Art. 2, Sec. 24, provides just compensation for the taking: “Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken.” Here, there is no property that was “not taken.” *All* of the damages awarded by the trial court for cleaning and restoring the property after it determined a taking had occurred were incurred on the *same* property the trial court determined was taken. Once a taking occurs, the Constitution does not allow damages for the property’s value and, additionally, for damages to the property. It only allows the former, as once a person’s property is taken, that person no longer has an ownership interest in that property. The Constitution’s award for “injury to any part of the property not taken” applies where, for example, a person owns Blackacre, and one portion of it is taken and the rest of it is damaged due to the taking. In the instant case, there is no “rest of” Blackacre. This is true

regardless of the extent to which the trial court found the property was taken, whether a fee title (the Shaws), a flowage easement (the Perrys), or a temporary taking (the Pryors). In all cases, the trial court awarded damages for (1) the diminished value of and (2) the injury to the same properties it had determined were taken by GRDA. This was error.

In summary, the damages awarded Plaintiffs for their time and costs in cleaning and restoring property were either incurred before inverse condemnation occurred, for which any applicable statutes of limitations had expired, or after inverse condemnation occurred, for which compensation for injury is available only for property not taken. None of the property here was “not taken.” If Plaintiffs had timely filed their lawsuit, they might have recovered damages to the property before the taking. If Plaintiffs had additional property that was not taken, they might have recovered damages for that property injured by the taking. Neither example applies here. The trial court’s awards of damages for cleaning and restoring the properties must be reversed.

IV. THE TRIAL COURT ERRED IN NOT FOLLOWING THE CONSTITUTIONAL AND STATUTORY PROCEDURES REQUIRED IN INVERSE CONDEMNATION CASES.

The eminent domain statute, 66 O.S.2011 § 57, includes the following language related to inverse condemnation:

in case any corporation or municipality authorized to exercise the right of that eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings.

The “manner” is the streamlined condemnation procedure providing for, among other things, the appointment of commissioners to determine the value of damages. *See, for example,*

Bd. of County Comm'rs of Creek County v. Casteel, 1974 OK 31, 522 P.2d 608. Yet while commissioners have been appointed in some inverse condemnation cases, such as *Williams v. State ex rel. Dep't of Transportation*, 2000 OK CIV APP 19, 998 P.2d 1245, they have not been appointed in others, such as *Perkins Whistlestop, Inc. v. State ex rel. Dep't of Transportation*, 1998 OK CIV APP 7, 954 P.2d 1251. Commissioners were not appointed in the instant case.

The Court of Civil Appeals has spoken directly to this point, in *Williams v. State ex rel. Dep't of Transportation*, 2000 OK CIV APP 19, 998 P.2d 1245. While acknowledging that *Carter v. City of Oklahoma City*, 1993 OK 134, ¶ 15, 862 P.2d 77, 81, stated that “it is not critical that commissioners be appointed in an action for inverse condemnation,” the Court noted that Art. 2, Sec. 24 of Oklahoma’s Constitution mandates appointment of commissioners to determine damages in both regular and inverse condemnation cases. *Id* at n.15. If this Court determines it is necessary to remand this case, it should instruct the trial court to appoint commissioners per the statute, and give whatever additional instructions are necessary to clarify the procedure to be followed.

CONCLUSION

For these reasons, Defendant, Grand River Dam Authority, respectfully requests this Court reverse the trial court’s awards of damages for the diminished value of Plaintiffs’ properties and for the cleaning and restoring of the properties. GRDA did not take their properties through inverse condemnation. If this Court determines the properties were taken, it should reverse and remand with instructions to the trial court to find, consistent with the trial court’s factual findings, that GRDA has taken flowage easements in all three cases, and that such takings occurred in October 1986 for the Shaws and the Pryors, and September 1993 for the Perrys. In either case, this Court should reverse the trial court’s awards of damages for cleaning

and repairing Plaintiffs' properties, because all those claims are time-barred. Finally, GRDA requests this Court, on remand, to instruct the trial court as to the proper procedure to be followed in determining damages.

Respectfully submitted,



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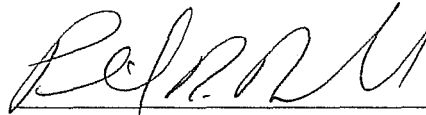
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CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the above and foregoing document was mailed this 16th day of February, 2012 to N. Larry Bork, Esq., 515 S. Kansas Ave., Topeka, KS 66603 and Scott R. Rowland, Esq., 1100 OneOk Plaza, 100 East Fifth Street, Tulsa, OK 74103, by depositing it in the U.S. Mails, postage prepaid

I further certify that the same was mailed to, or filed in, the Office of Ottawa County Court Clerk, 203 Courthouse, 102 E. Central Ave., Miami, OK 74354 on the 16th day of February, 2012.

A handwritten signature in black ink, appearing to read "Phil R. Richards", written over a horizontal line.

Phil R. Richards