

# In the United States Court of Federal Claims

Filed: April 19, 2018

IN RE DOWNSTREAM ADDICKS  
AND BARKER (TEXAS) FLOOD-  
CONTROL RESERVOIRS

Sub-Master Docket No. 17-9002L

THIS DOCUMENT APPLIES TO:

ALL DOWNSTREAM CASES

## MEMORANDUM OPINION AND SCHEDULING ORDER

On March 2, 2018, the court issued an Order requiring the parties to submit a Joint Status Report by April 12, 2018 that includes:

(1) a final list of the test properties together with a short statement of why each was selected, the proponent, and whether the property owner is an individual plaintiff or a member of a proposed class action; (2) a proposed discovery plan for jurisdictional and liability issues; and (3) a list of individuals tentatively identified for depositions.

ECF No. 66.

The March 2, 2018 Order also scheduled a status conference for April 13, 2018 at the United States District Court for the Southern District of Texas in Houston, Texas, after which the court would attend a site tour of the test properties and the Addicks and Barker Flood-Control Reservoirs. ECF No. 66; 3/1/18 TR at 27. On March 28, 2018, the court issued an Order listing fourteen test properties selected by the parties. ECF No. 81.

On April 6, 2018, the parties filed a Joint Status Report responding to Items 2 and 3 of the March 2, 2018 Order. ECF No. 84. Plaintiffs' proposed Scheduling Order provided for August 24, 2018, as the completion date for all discovery, with a trial to commence shortly after November 12, 2018. ECF No. 84 at 1–2. The Government proposed that fact discovery close on November 15, 2018, expert discovery close on February 28, 2019, with no trial date, but a four-month schedule for summary judgment filings and a June 14, 2018 oral argument. ECF No. 84 at 7–11. In addition, the Government objected to the court attending a site tour of the test properties and the Addicks and Barker Flood-Control Reservoirs prior to the trial. ECF No. 84 at 5–7. During an April 10, 2018 telephone conference to discuss the April 6, 2018 Joint Status Report, the court decided to cancel the site tour scheduled for April 13, 2018. 4/10/18 TR at 5.

During the April 10, 2018 telephone conference, the Government also objected to a schedule that would close discovery before the court ruled on the Government's February 20, 2018 Motion To Dismiss. 4/10/18 TR at 25. As the Government is aware, RCFC 12(i) authorizes the court to defer making a decision on "any defense listed in RCFC 12(b)(1)-(7) . . . until trial." RCFC 12(i);<sup>1</sup> *see also* JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 12.50 (3d ed. 2012) (explaining that the court's power to "[d]efer[] matters until trial . . . allows [the] court to give consideration to matters with such grave consequences as motions for dismissal under Rule 12(b)(1)-(7)"); *see also* 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRACTICE & PROCEDURE § 1350 (3d ed. 2004) ("[T]he court may postpone a decision until evidence is submitted at trial[,] if the jurisdictional issue is intertwined with the merits of the case."). For these reasons, the court has determined that the interests of justice require the court to defer ruling on the Government's February 20, 2018 Motion To Dismiss, pursuant to RCFC 12(i).

In addition, after considering the parties' proposals and argument at the April 10, 2018 telephone conference, the court has determined that the following schedule will supersede prior Scheduling Orders and govern this case:

May 15, 2018

Both Parties Will Exchange The Names And Contact Information Of Expert Witnesses And Rebuttal Expert Witnesses.

Both Parties Will Issue Subpoenas For Depositions<sup>2</sup> And Any Additional Documents Required From Fact Witnesses, Including Third Parties.

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<sup>1</sup> Although the United States Court of Appeals for the Federal Circuit has not defined the phrase "until trial," other federal appellate courts have "observed that the method and timetable for deciding a Rule 12(b) motion is left to the sole discretion of the trial judge" and have interpreted Federal Rule of Civil Procedure 12(i) and its predecessor, Rule 12(d), to allow for deferral until *after* trial. *See In re School Asbestos Litigation*, 921 F.2d 1310, 1316 (3d Cir. 1990); *see also Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1195 (6th Cir. 1988) (same); *Roxse Homes, Inc. v. Adams*, 83 F.R.D. 398, 408 (D. Mass. 1979) ("It seems appropriate, . . . to interpret Rule 12[(i)] as allowing a court to defer [making a] 'determination' even after [the] 'hearing,' since the reasons for doing so may become manifest only after [the] hearing has exposed them to examination.").

<sup>2</sup> In the April 6, 2018 Joint Status Report, Plaintiffs identified thirteen federal employees as likely deponents. ECF No. 84 at 4. The Government was unable to identify any specific potential deponents, because it was waiting for Plaintiffs to respond to certain written discovery, as well as the responses of approximately twelve third-party subpoenas sent to officials from "various local government entities and/or development entities." ECF No. 84 at 11. Nevertheless, the Government requested that each party be allowed to take "up to thirty fact and expert depositions." ECF No. 84 at 11. The court considers the number of depositions suggested by both parties to be reasonable in a case of this size. Therefore, each party may take up to thirty depositions, but no deposition will exceed six hours, without leave of the court.

May 17, 2018 The Court Will Convene A Telephone Conference At 1:00 P.M. (EST). Dial-In Information Will Be Provided Under Separate Cover.

September 14, 2018 Fact Discovery Concludes.

October 15, 2018 Both Parties Simultaneously Will Exchange Expert Reports.

December 7, 2018 Expert Discovery Concludes.

January 11, 2019 The Government Will File A Statement Of Material Facts To Support Any Motion For Summary Judgment, Together With Any Affidavits Or Declarations. *See* Rule of the United States Court of Federal Claims (“RCFC”) 56(a).

January 18, 2019 Plaintiffs Will File A Response, Either Accepting Or Rejecting The Government’s January 11, 2019 Statement Of Material Facts. (If Plaintiffs Accept The Government’s January 11, 2019 Statement Of Material Facts, The Court Will Set A Briefing Schedule On February 1, 2019. If Plaintiffs Do Not Accept The Government’s January 11, 2019 Statement Of Material Facts, A Pre-Trial Conference Will Be Held On February 1, 2019.).

February 1, 2019 The Court Will Issue A Briefing Schedule For Summary Judgment And Oral Argument, Pursuant To RCFC 56, Or A Pre-Trial Conference And Hearing Will Be Held At 10:00 A.M. (CST) At The United States District Court For The Southern District Of Texas In Houston, Texas. *See* RCFC App’x A, VI (Post-Discovery Proceedings).

February 28, 2019 Both Parties Will Meet And Confer And Designate And Exchange Exhibit Lists, Including Any Exhibits To Be Proffered As A Summary. *See* RCFC App’x A, VI 13 (b), (c); *see also* FED. R. EVID. 1006.

Both Parties Will Meet And Confer And Designate And Exchange Witness Lists, Including Experts And Rebuttal Experts. *See* RCFC App’x A, VI 13(b), (c).

Both Parties Will Exchange The Direct Testimony Of Experts.

March 8, 2019 Both Parties Will File A Joint Certification. *See* RCFC App’x A, VI 13(d).

March 25, 2019 Both Parties Simultaneously Will File Any Pre-Trial Memorandum Of Law (Optional).

- April 8, 2019                    An Evidentiary Hearing To Develop The Factual Record Required To Adjudicate Contested Issues Concerning Jurisdiction And A Trial On Liability Will Commence At 10:00 A.M. (CST) At The United States District Court For The Southern District Of Texas In Houston, Texas. Both Parties Will Provide Opening Statements.
- April 9, 2019                    The Court Will Conduct A Ground And Aerial Site Tour With Both Parties' Counsel And Expert Witnesses.
- April 10, 2019                  The Evidentiary Hearing And Trial Will Resume And Continue Until Completion.

**IT IS SO ORDERED.**

s/ Susan G. Braden  
**Susan G. Braden**  
**Chief Judge**