

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Sub-Master Docket No. 17-9001L

(Filed: May 25, 2018)

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

THIS DOCUMENT APPLIES TO:

ALL UPSTREAM CASES

SCHEDULING ORDER

Pending before the court is defendant's Motion to Amend Schedule and Motion for Expedited Consideration ("Def.'s Scheduling Mot."), filed May 14, 2018. The court previously granted the motion for expedited consideration in part, providing for accelerated briefing by the parties on the motion to amend the schedule, *see* Order of May 15, 2018, ECF No. 116, and then holding a preliminary scheduling conference in Houston on May 16, 2018. Now, with briefing completed, the court acts on the motion by defendant ("the government") to amend the schedule. That motion is GRANTED IN PART and DENIED IN PART for the reasons set out below.

DISCUSSION

These upstream cases procedurally are being addressed as a group, "using case management methods akin to those employed in multi-district litigation." *In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs*, __ Fed. Cl. __, __, 2018 WL 2354924, at *1 (May 24, 2018) ("*Upstream Addicks & Barker Reservoirs*"). Fourteen Test Properties have been designated to serve as bellwethers for the hundreds of properties respecting which takings claims have been made. *See id.* at *3. The debate and discourse over scheduling relates to setting a time for trial of the jurisdictional and liability aspects of the claims of these fourteen Test Properties. Damages will not be at issue at this stage of the proceeding.

The government has proposed a schedule that does not set out a trial date. *See* Def.'s Scheduling Mot. at 19. Instead, it would provide a lengthy period for fact and expert discovery, and then contemplate submission by the parties of cross-motions for summary judgment. *See id.*; *see also* Hr'g Tr. 83:1 to 85:7 (May 16, 2018). In response to this proposal, the court commented at the preliminary scheduling conference that "summary judgment just doesn't look like a very viable procedural mechanism to approach this case." Hr'g Tr. 84:23-25. Among other things, the court noted that a decision on the then-pending (now decided) motion by the

government to dismiss might well provide a tentative resolution of at least some issues that could be raised via cross-motions for summary judgment. Hr’g Tr. 85:8-14. Even more importantly, however, because takings cases related to flooding are very fact intensive, courts should be slow to resolve issues on summary judgment and instead provide for a trial that allows for “detailed findings of fact.” *Upstream Addicks & Barker Reservoirs*, 2018 WL 2354924, at *4 (quoting *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 29 (2012)). The government’s motion to dismiss was deferred until trial by the court largely for that reason. *See id.*, 2018 WL 2354924, at *12 (citing Rule 12(i) of the Rules of the Court of Federal Claims). Consequently, the court will not build into the schedule time for summary judgment proceedings.

In other respects, the government objects to the suggested timing of a trial, arguing that a trial in late February 2019 would be prejudicial because of the need to conduct extensive factual and expert discovery and to accommodate also a planned April trial in the Downstream Addicks & Barker cases. *See* [“Def.’s”] Reply in Support of [Its] Mot. To Amend the Existing Schedule and Mot. For Expedited Consideration (“Def.’s Reply”) at 1. These objections appear to be significantly, overstated. At least some of the discovery noted by the government as requiring time relates to damages, not jurisdiction or liability. *See* Def.’s Reply at 7 & n.5, 9-10. Damages should not be a topic for discovery for a trial focusing on jurisdiction and liability of fourteen Test Properties. Otherwise, the government’s claims of prejudice are not persuasive because the schedule contemplated by the court would provide over six months for discovery and over two and one-half months thereafter for detailed preparation for the trial itself. Notably, the court must also take into account the availability of a suitable courtroom for trial in Houston, where all of the plaintiffs are (or were) located. *See* Hr’g Tr. 98:25 to 99:24. In that respect, the court has conferred with the chief judge of the United States District Court for the Southern District of Texas regarding courtroom scheduling.

SCHEDULE

As a consequence, the scheduling order issued on February 21, 2018 and amended on March 13, 2018 is superseded. Taking into account the briefing on Defendant’s Scheduling Motion and the colloquy at the preliminary scheduling conference, the court adopts the following schedule for preparation and trial of jurisdiction and liability for fourteen bellwether Test Properties:

| Event | Deadline |
|---|-------------------|
| Rule 26 (a)(2) Disclosures | July 11, 2018 |
| Close of Fact Discovery | October 19, 2018 |
| Exchange of Expert Reports | October 31, 2018 |
| Close of Expert Discovery | December 7, 2018 |
| Meeting of Counsel, App. A, ¶ 13 | December 11, 2018 |
| Plaintiffs’ Pre-Trial Memorandum, Exhibit List, and Witness List, App. A, ¶¶ 14, 15, and 16 | December 24, 2018 |

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| Defendant's Pre-Trial Memorandum, Exhibit List, and Witness List, App. A, ¶¶ 14, 15, and 16 | January 22, 2019 |
| Pretrial Conference at the Federal Courthouse in Houston, commencing at 10:00 a.m. | February 12, 2019 |
| Commencement of Trial at the Federal Courthouse in Houston, beginning at 9:30 a.m. | February 19, 2019 |

In addition, the court schedules status conferences and a post-discovery conference as follows:

| | |
|---|-------------------|
| Status Conference at the Federal Courthouse in Houston, commencing at 10:00 a.m. | July 24, 2018 |
| Status Conference at the National Courts Building in Washington, commencing at 10:00 a.m. | October 15, 2018 |
| Post-Discovery Conference at the Federal Courthouse in Houston, commencing at 10:00 a.m. | December 10, 2018 |

It is so **ORDERED**.

s/ Charles F. Lettow _____
 Charles F. Lettow
 Judge