

Hurricane Harvey Litigation Update: Conflicting Opinions Spur Trial on Damages and Appeal

Litigation arising out of Hurricane Harvey (Harvey) has been ongoing since the first lawsuit was filed within days of Harvey making landfall on August 25, 2017, inundating Houston with an unprecedented amount of rainfall and flooding. The litigation, which is pending in the U.S. Court of Federal Claims, centers around the U.S. Army Corps of Engineers' decision to release the Addicks and Barker reservoirs after Harvey made landfall. These reservoirs were constructed in the 1940s to reduce the potential of catastrophic flooding in downtown Houston and the Houston Ship Channel.

After Harvey made landfall, the reservoirs began filling up at an alarming rate and water began to flow around the edge of one of the dams. On the morning of August 28, 2017, the U.S. Army Corp of Engineers was forced to begin releasing water to ensure that the reservoirs did not experience catastrophic overflow and/or failure. Those properties that were affected by flooding due to the reservoirs overflowing pre-release are referred to as the "upstream claimants" in the litigation. The properties that were flooded after the reservoirs were intentionally released are referred to as the "downstream claimants."

With respect to the status of the litigation, Judge Charles F. Lettow overseeing the upstream claimants' actions heard testimony and received evidence for certain test or "bell-weather" claims in May 2019. He issued his opinion and order in December 2019, finding that the government's conduct relating to the reservoirs and the attendant flooding of various properties constituted an unconstitutional "taking" of a flowage easement under the Fifth Amendment to the U.S. Constitution, and that the upstream claimants therefore were entitled to compensation from the government. Judge Lettow then ordered the test cases to proceed with discovery on damages, providing that he would receive testimony related to the test properties' damages in November 2020. Unfortunately, it appears that the damages phase has been continued for the time being, presumably because of COVID-19 related issues.

Conversely, Judge Loren A. Smith overseeing the litigation involving the downstream claimants' actions granted the government's motion to dismiss effectively finding that neither Texas law nor federal law creates a protected property interest in perfect flood control in the face of an "Act of God." The final order was executed in September 2020 and the downstream claimants have formally begun the appellate process.

The upstream claims obviously have the most viable subrogation potential at this time since Judge Lettow overseeing those claims has already issued an affirmative finding of liability against the government. While the downstream claims present more of a challenge given the adverse ruling and pending appeals process, we nevertheless recommend that such claims be referred to ensure the viability of the claims are protected should the adverse ruling ultimately be reversed.

Because a "takings" claim under the Fifth Amendment to the U.S. Constitution has a six year statute of limitations, Cozen O'Connor continues to accept assignments of property and auto losses resulting from the release of the Addicks and Barker reservoirs. Please feel free to contact us regarding any questions you may have, or claims which you may wish to assigned to us.



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