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## **EMINENT DOMAIN - TEXAS**

### [In re Upstream Addicks and Barker \(Texas\) Flood-Control Reservoirs](#)

**United States Court of Federal Claims - December 17, 2019 - Fed.Cl. - 2019 WL 6873696**

Property owners sued federal government, claiming Fifth Amendment taking of flowage easement from dams constructed, modified, maintained, and operated by Army Corps of Engineers after properties within flood-pool reservoirs were inundated with impounded flood waters during Tropical Storm Harvey.

Following consolidation of actions within master docket and then splitting of actions into two sub-master dockets based on whether property was upstream or downstream from dams, government moved to dismiss 13 upstream bellwether test cases for lack of subject matter jurisdiction and for failure to state claim. Resolution of motion was deferred until trial.

After bench trial, the Court of Federal Claims held that:

- Upstream owners had valid property interests;
- Taking of permanent flowage easement was effected on all bellwether properties;
- Police powers defense did not apply; and
- Necessity doctrine did not apply.

Under federal and Texas law, upstream landowners had valid property interests in their private properties that were not subject to flowage easements, in support of owners' claim for just compensation for Fifth Amendment taking of flowage easements due to inundation of upstream properties within flood-pool reservoirs by impounded flood waters during Tropical Storm Harvey as result of flood-control dams constructed and operated by Army Corps of Engineers.

Army Corps of Engineers' construction, maintenance, and operation of flood-control dams in past, present, and future had taken permanent, rather than temporary, flowage easement of upstream owners' private properties within flood pool reservoirs that resulted in inundation of properties by floodwaters during tropical storm, in support of owners' Fifth Amendment takings claims, although flood waters were only on properties for matter of days, since government had permanent right to inundate property with impounded flood waters.

Severity of invasion of landowners' upstream properties within flood pool reservoirs, by inundation of properties with impounded floodwaters during tropical storm from flood-control dams constructed by Army Corps of Engineers, favored finding of compensable taking, where owners incurred extensive damage to their real and personal property, their ability to exercise right to exclude floodwaters, and their right to use and enjoy property, and they were subject to high likelihood of recurring floods and significant diminution of property values.

Federal government appropriated benefit at direct expense of inflicting significant injury to landowners' upstream property within flood pool reservoirs, by inundation of properties with impounded floodwaters during tropical storm from dams constructed, modified, and operated by

Army Corps of Engineers, in support of owners' taking claims; consistent with dams' purpose, government protected downstream properties while concurrently causing upstream properties to suffer from severe flooding that was not merely consequential result.

Federal government's invasion of landowners' upstream properties within flood pool reservoirs, by inundation of properties with impounded floodwaters during tropical storm from dams constructed, modified, maintained, and operated by Army Corps of Engineers, was foreseeable, in support of owners' taking claims; flooding of properties was predictable result of government action, not merely contributing factor, as Corps should have objectively foreseen from initial construction of dams and at every point onward that reservoir flood pools could and would exceed government-owned land and inundate private properties.

Inundation of all 13 owners' bellwether test upstream properties within flood pool reservoirs, by impounded floodwaters released during tropical storm from dams constructed, modified, and operated by Army Corps of Engineers, would not have occurred but for government's actions, in support of owners' taking claims; inundation of floodwaters onto upstream properties was direct, natural, or probable result of government's activity, not result of local drainage systems, riverine flooding, or outgrants built to reduce flood risk.

Federal government's inundation of owners' upstream properties within flood pool reservoirs, by impounded floodwaters during Tropical Storm Harvey from dams constructed, modified, and maintained by Army Corps of Engineers, severely interfered with owners' reasonable investment-backed expectations, thus effecting compensable permanent taking of flowage easement on all 13 upstream bellwether test properties; owners neither knew, nor reasonably should have known, properties were located in reservoirs and subject to government-induced flooding that rendered them uninhabitable for significant time, required substantial outlays for repairs, and resulted in steep diminution in resale value.

Police powers defense did not apply to absolve federal government from liability for taking of flowage easement on owners' upstream properties that were within flood pool reservoirs and were inundated by impounded floodwaters during tropical storm from dams designed, constructed, and maintained by Army Corps of Engineers, since flooding was not unavoidable harm, but rather, Corps' design and maintenance of dams contemplated flooding beyond government-owned land onto upstream private properties.

Doctrine of necessity did not apply to immunize federal government from liability for taking of flowage easement on owners' upstream properties that were within flood pool reservoirs and were inundated by impounded floodwaters during tropical storm from dams designed, constructed, and maintained by Army Corps of Engineers; although storm was record-breaking, government was responsible for creating emergency in that flooding was not unexpected as Corps knew flooding beyond government-owned land upstream would result from severe storm in light of design of dams and operational plans.