

Bond Case Briefs

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In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs

United States Court of Federal Claims - October 28, 2022 - Fed.Cl. - 2022 WL 15805669

Property owners sued federal government, claiming Fifth Amendment taking of flowage easement from two dams designed, constructed, maintained, and operated by Army Corps of Engineers, after properties within flood-pool reservoirs were inundated with impounded flood waters during Hurricane 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 and bifurcation of upstream cases to consider liability and damages separately, the Court of Federal Claims determined that partial taking of non-categorical, permanent flowage easement was effected on all 13 upstream bellwether test case properties. After cases moved to discovery on damages, six upstream properties were chosen for just compensation phase, and bench trial was held.

The Court of Federal Claims held that:

- Just compensation was warranted for real property taken by flowage easement;
- Just compensation was warranted for personal property taken by easement;
- Awards for certain personal property required reductions for lack of documentation;
- Just compensation was warranted for displacement costs;
- Just compensation awards would be offset by government's direct payments; and
- Interest rate of 3.62% was warranted on owners' just compensation awards.

Government's flowage easement that effected permanent physical partial taking of owners' real property upstream from dams operated by Army Corps of Engineers required just compensation in amount of difference between property's market value with and without easement plus depreciation resulting to remainder of property after Corps flooded properties with impounded water during hurricane; easement left owners fee simple interest in properties, allowing them to continue lawful use subject to risk of occasional flooding caused by dams, market was aware of flood risk even if not aware of easement, and award reflected properties' value in their damaged state subject to easement and included only repair costs incurred to restore property to pre-taking state and only for remainder of any lease.

Government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers required just compensation for personal property, fixtures, and improvements damaged or destroyed by Corps' flooding of properties with impounded water during hurricane, since owners' personal property was not merely damaged by government's taking of their real property, but rather, owners' personal property itself was taken by government, and their personal property losses were compensable even if Corps did not intend to cause such damage and did not acquire personal property for public use.

Property owners' displacement costs would be awarded as just compensation for government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers, including owners' costs of securing substitute housing actually and necessarily incurred due to Corps' flooding of properties with impounded water during hurricane, since owners' displacements extended from time their homes were rendered uninhabitable until their homes were repaired and safe to occupy once again, but dislocation awards would be reduced by half to reflect each owner's co-tenancy and would not be based on monthly rental value of properties as that would duplicate their real property awards.

Property owner's costs for displacement of tenants from his rental units would be awarded as just compensation for government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers, including owner's costs in lost income and utility payments for one unit and lost rent for another unit due to Corps' flooding of properties with impounded water during hurricane, since owner's units were vacant because of government's taking, but award was reduced by half to reflect owner's proportional ownership of property, and costs incurred in traveling from his home in California to Texas to oversee repair of his properties and testify during liability trial were incidental and thus noncompensable.

Federal Emergency Management Agency's (FEMA) direct payments to property owners were required to be offset from owners' just compensation awards for government's flowage easement that effected permanent physical partial taking of their real and personal property upstream from dams operated by Army Corps of Engineers, due to Corps' flooding of properties with impounded water during hurricane, even though FEMA made funds available to others whose homes were flooded during hurricane but not because of government taking, since owners would receive double recovery if FEMA payments were not deducted, and government reimbursed for some losses of property once by issuing FEMA relief and should not be compelled to pay again for damage to property by same flood pursuant to just compensation award.