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**WATER LAW - TEXAS**

## Fort Bend County v. United States Army Corps of Engineers

**United States Court of Appeals, Fifth Circuit - February 2, 2023 - F.4th - 2023 WL 1465325**

Local political subdivisions brought action under Administrative Procedure Act (APA) challenging United States Army Corps of Engineers' adoption of water control manual (WCM) documenting reservoir regulation plans without including procedures to prevent flooding of their property, Corps' failure to revise WCM after floods, and Corps' failure to acquire their lands when it adopted WCM and after floods.

The United States District Court dismissed complaint, and plaintiffs appealed.

The Court of Appeals held that:

- Subdivisions' claim was not claim for money damages subject to Court of Federal Claims' exclusive jurisdiction;
- Tucker Act did not provide adequate remedy for harms that subdivisions allegedly faced;
- Fact issues remained as to whether Corps' adoption of revisions to WCM rendered subdivisions' claim moot;
- Fact issues remained as to whether Corps complied with Engineer Regulation (ER) when it prepared WCM;
- Corps' failure to amend WCM after recent flooding events and to acquire additional land when it adopted WCM was discrete agency action;
- ER requiring WCMs to be revised "as necessary" did not impose mandatory duty on Corps;
- Fact issues remained as to whether Corps' non-public documents imposed mandatory duty to acquire additional lands; and
- Reassignment of case to another judge on remand was not warranted.

Political subdivisions' claim for injunctive, declaratory, and mandamus relief under Administrative Procedure Act (APA) requiring United States Army Corps of Engineers to acquire additional land upstream from reservoirs was not claim for money damages subject to Court of Federal Claims' exclusive jurisdiction under Tucker Act, even though relief would require Corps to pay money; subdivisions claimed that Corps' failure to comply with its internal regulations resulted in flooding of their property during floods, claim was not premised on Takings Clause, and they sought only prospective relief.

Tucker Act did not provide adequate remedy for harms that political subdivisions allegedly faced as result of United States Army Corps of Engineers' purported failure to implement procedures to prevent flooding of their property, even though private landowners had sought compensation for takings resulting from floodings, and takings claims could compensate subdivisions for past harms; Court of Federal Claims lacked general equitable powers to grant prospective relief, but district court could order such relief in action brought pursuant to Administrative Procedure Act (APA).

Issue of whether United States Army Corps of Engineers' adoption of revisions to water control manual (WCM) documenting reservoir regulation plans rendered moot political subdivisions' claim

that Corps' failure to include procedures to prevent flooding of their property or to acquire their lands violated Administrative Procedure Act (APA) involved fact questions that could not be resolved on motion to dismiss subdivisions' action against Corps.

Issue of whether United States Army Corps of Engineers complied with Engineer Regulation (ER) when it prepared water control manual (WCM) documenting reservoir regulation plans involved fact questions that could not be resolved on motion to dismiss political subdivisions' action under Administrative Procedure Act (APA) alleging that Corps acted arbitrarily and capriciously in adopting WCM.

Engineer Regulation (ER) requiring water control manuals (WCM) to be revised "as necessary" did not impose mandatory duty on United States Army Corps of Engineers to revise WCM for reservoir system after flooding events, and thus federal court lacked jurisdiction under Administrative Procedure Act (APA) to order Corps to revise WCM; regulation did not specify when such conditions required Corps to update WCM, but left that decision to Corps' discretion.

Reassignment of case to another judge on remand was not warranted in political subdivisions' action under Administrative Procedure Act (APA) challenging United States Army Corps of Engineers' adoption of water control manual (WCM) documenting reservoir regulation plans without including procedures to prevent flooding of their property, Corps' failure to revise WCM after floods, and Corps' failure to acquire their lands when it adopted WCM and after floods, even though some of judge's rulings were unconventional; judge's actions would not reasonably cause objective observer to question his impartiality, and reassigning case to another judge would likely entail waste and duplication out of proportion to any gain in appearance of fairness.

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