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# In the United States Court of Federal Claims

Sub-Master Docket No. 17-9001L

(Filed: December 17, 2019)

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 IN RE UPSTREAM ADDICKS AND )  
 BARKER (TEXAS) FLOOD- )  
 CONTROL RESERVOIRS )  
 \*\*\*\*\* )  
 THIS DOCUMENT APPLIES TO: )  
 ALL UPSTREAM CASES )  
 \*\*\*\*\* )

Post-trial decision; government-induced  
 flooding on private property; application of  
 factors identified in *Arkansas Game &*  
*Fish*; liability for a taking of a flowage  
 easement

Daniel H. Charest and E. Lawrence Vincent, Burns Charest LLP, Dallas, Texas, Charles Irvine, Irvine & Conner PLLC, Houston, Texas, and Edwin Armistead Easterby, Williams Hart Boundas Easterby, LLP, Houston, Texas, Co-Lead Counsel for Upstream Plaintiffs. With them at trial were Vuk. S. Vujasinovic, VB Attorneys, PLLC, Houston Texas, Lawrence G. Dunbar, Dunbar Barder, P.L.L.C., Houston, Texas, Jack E. McGehee, McGehee, Chang, Barnes, Landgraf, Houston, Texas, Michael J. Dulaney, Sullins, Johnson, Rohrbach & Magers, Houston, Texas, Lydia A. Wright, Burns Charest LLP, Dallas, Texas, Mary Conner, Irvine & Conner, LLC, Houston, Texas, Kyril V. Talanov, Houston, Texas, and Hilary S. Greene, Houston, Texas.

William Shapiro, Trial Attorney, Environmental & Natural Resources Division, United States Department of Justice, Sacramento, California, for defendant. With him at trial and on the briefs were Kristine S. Tardiff, Laura W. Duncan, Sarah Izfar, Jessica Held, Bradley L. Levine, David L. Dain, and Mayte SantaCruz, Trial Attorneys, Environmental & Natural Resources Division, United States Department of Justice, Washington, D.C. With him on the brief was Lawrence VanDyke, Deputy Assistant Attorney General, Environmental & Natural Resources Division, United States Department of Justice, Washington, D.C.

## OPINION AND ORDER

LETTOW, Senior Judge.

This case brings to the court the occasionally recurring question of the extent and the nature of government-induced flooding on private property necessary to rise to the level of a Fifth Amendment taking of a flowage easement. Particularly, this post-trial decision assesses whether the government may be liable to private property owners in the Houston, Texas

owned land upstream would result, in light of the design of the dams and the plans for their operation. Thus, the necessity defense cannot apply here, because it cannot be said that “necessity” existed in this case, when the flooding that occurred was the direct result of calculated planning.

### CONCLUSION

For the reasons stated, the court finds that the government’s actions relating to the Addicks and Barker Dams and the attendant flooding of plaintiffs’ properties constituted a taking of a flowage easement under the Fifth Amendment. Thus, the court finds defendant liable.<sup>26</sup>

Because liability and damages were previously bifurcated, a plan for addressing damages must now be put in place. The court proposes to adjudicate damages for five out of the thirteen test properties. To that end, the parties shall each propose three properties for consideration as to damages, thus providing to the court with a total of six candidates. The court will then select five test properties from the six properties proposed. Each party is requested to file with the court a notice detailing its three proposed test properties for damages and its respective arguments for selection of those properties as bellwethers by January 21, 2020.

It is so **ORDERED**.

s/ Charles F. Lettow

Charles F. Lettow  
Senior Judge

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<sup>26</sup>The court had previously deferred resolution of the government’s earlier motion to dismiss, *see In re Upstream Addicks & Barker*, 138 Fed. Cl. at 672 (acting pursuant to RCFC 12(i), taking into account the fact-intensive inquiry involved). In light of the detailed post-trial findings of fact and conclusions of law in this decision, that motion to dismiss is DENIED.

Further, pursuant to the court’s previously stated reasons, *see supra*, at 8 n.9, Pls.’ Mot. to Reopen the Trial R., ECF No. 245, is GRANTED, subject to the inclusion of the sworn statement included in Def.’s Opp’n to Mot. to Reopen the Trial R., ECF No. 254. Also pending before the court is Def.’s Mot. to Correct [the Trial] Transcript, ECF No. 241. This motion is GRANTED as to those requests not opposed by plaintiffs, *see* Pls.’ Opp’n to Def.’s Mot. to Correct [the Trial] Transcript, ECF No. 243, but the requests for correction opposed by plaintiffs are DENIED.