May 18, 2018 Newsletter

May 16th Oral Argument Update

On May 16, 2018, Judge Charles Lettow heard oral arguments on the government's motion to dismiss. In its motion the government asked the court to dismiss the Upstream cases based on several legal defenses. The government claimed that its submersion of the upstream properties was inevitable (*i.e.,* the government had no alternative course of action available to it during Harvey). The government also argued that it shouldn't have to pay just compensation because it flooded upstream properties to protect the public in an emergency situation. Next, the government contended that the case should be dismissed because the dams were built before plaintiffs acquired their properties. Lastly, the government argued there was no taking because the submersion was an "isolated occurrence," and that one government-induced flood can never be a taking. The government raised some other arguments, but these four were the ones it raised during oral arguments. As previously reported, Upstream Co-Lead Counsel filed a response to the government's motion several weeks ago.

In my opinion the oral arguments went very well for the Upstream plaintiffs. Judge Lettow's questions during oral argument demonstrated that he'd carefully read all of the briefing and that he understands the importance of this case to the Houstonians that were flooded due to the Army Corps' actions during and after Harvey. Here is a brief summary of the oral argument highlights.

With regard to the government's "no alternative" defense, we noted that the government had created the situation that resulted in its supposed lack of an alternative course of action (*i.e.,* the government intentionally operates the dams such that it can and will stores more water than it owns land upon which to store it). We also underscored to Judge Lettow that the Fifth Amendment protects individual property rights against government invasion and use, as opposed to granting the government the right to use (and submerge) private property without paying just compensation. In short, we argued that the government's intentional invasion and use of private property is a classic physical takings case in which the government imposed costs on the few to benefit the many.

We next turned to the government's "emergency" argument (*i.e.,* it shouldn't be liable because the flooding was a byproduct of an emergency situation). We noted in our briefing that the dams were designed and built to impound more rainwater than Harvey generated, and that the Army Corps' storage of this rainwater on private land was 100% consistent with the Army Corps' standard operating policy. In other words, and as attested to by Army Corps documents, there was no "emergency." During oral argument Judge Lettow appeared to agree with us, and even said that "I'm having a little trouble seeing why [the emergency argument] applies in this particular case."

In addressing the government's priority of occupation argument (*i.e.,* the dams were built before plaintiffs acquired their property), we argued that, consistent with several U.S. Supreme Court cases, just because the dams were built first doesn't give the government the right to take and use private property without paying just compensation. Indeed, and as we noted, if that weren't the case the government could take and use land for free in situations where plaintiffs got the land after the dams were built. Finally, we pointed out that the upstream plaintiffs weren't legally allowed to bring a claim until they'd suffered damage. Here again Judge Lettow appeared to agree with us by noting that, prior to the inundation during and after Harvey, "there was no damage at all."

Lastly, the government argued that a "one-time temporary occupation by floodwaters" can never be a taking (*i.e.,* the inundation was merely an "isolated occurrence" that may never happen again).

May 18, 2018 Newsletter

As reflected on our website's FAQs, we briefed the "one flood" issue prior to filing our first case. www.myreservoirclaim.com/faqs. We referred the court to the same case cited in our FAQs during oral argument, and noted that the Army Corps has publicly stated that it has and will continue to, when necessary, store water on upstream property as proscribed by its water control manuals. Richard Long Interview. We also pointed out that under its proposed rule, the government would get a free flood, and that the U.S. Supreme Court made clear in its *Arkansas Game & Fish* decision that temporary government-induced flooding cases can be compensable under the Fifth Amendment.[1]

We also referenced several cases that have rejected the "one flood" rule, and argued that even a single submersion – particularly one that caused the devastation of thousands of homes and businesses -- is sufficient to trigger the Fifth Amendment's obligation to pay just compensation.

I believe Judge Lettow found our arguments persuasive. After the oral arguments concluded Judge Lettow was kind enough to express the court's appreciation for the quality of the legal briefing and arguments. While Judge Lettow did not rule on the motion during the hearing, he did indicate that he anticipated issuing a prompt decision on the government's motion to dismiss. As such, we anticipate that the court will issues its opinion in the next 30 days.

I believe I speak for all Upstream Co-Lead Counsel in saying that we remain optimistic that the court will deny the government's motion to dismiss. The government tries to win these kinds of cases on motions to dismiss, so if we're able to overcome this hurdle we continue to believe that we have a very good chance of prevailing at trial.

[1] As previously reported, the U.S. Supreme Court affirmed Judge Lettow's decision in the *Arkansas Game & Fish* case, and he is clearly very familiar with the law in this area.

Trial Update

As you know, the government has filed several motions asking the court to extend the schedule, and has steadfastly refused to agree to a trial date. As you know from our prior newsletters, we've successfully opposed these requests, and continued to let the court know that time is of the essence in getting these cases to trial.

You may also recall that Chief Judge Braden set the initial schedule for this case in her November 20th orders, which also appointed Co-Lead Counsel. However, those orders didn't schedule a trial date. Instead, they said that the case will be set for a liability trial "at the earliest date possible."

On May 14th, the DOJ filed yet another motion to amend the scheduling order. The government's motion indicated that it didn't want a liability trial to occur until late 2019 (at the earliest).

Since we didn't have a trial date scheduled, and in light of the DOJ's recent motion, we asked Judge Lettow to hold a status conference immediately after the conclusion of oral arguments. The goal of the status conference was to nail down a fixed date for the liability trial on the 14 upstream bellwether test properties.

We're pleased to announce that, at the conclusion of the status conference, Judge Lettow said he wants to have the liability trial on the 14 bellwether test properties start on February 19, 2019. His current plan is for the liability trial to take place at the federal courthouse here in Houston, and for it to last roughly 9 days. Judge Lettow indicated that he came up with this date after speaking to Judge Lee Rosenthal, who is the Chief Judge of the local federal courthouse here in Houston.

This is great news for a number of reasons. As a lawyer who's been trying cases for the last 22 years, it's my opinion that trials are by far the most

effective way of getting mass-disaster cases like this one resolved. Indeed, cases that don't have trial dates have a tendency to lag, and can sometimes stretch on for years. I also believe that a trial gives us the best chance of winning this case.

Judge Lettow asked us to prepare a new scheduling order based on the February 19th trial date and to send it to the DOJ. We completed these tasks yesterday. Judge Lettow indicated that he'll have a telephonic conference on May 25th to address the new scheduling order. We'll keep you updated on this important issue.

Quick Word on Summary Judgment Practice

Summary judgment practice is a procedural mechanism by which parties to a lawsuit can obtain a judgment without having a full trial. In order to win a summary judgment, the movant has to show there are no disputed issues of material fact. Thus, if there are disputed issue of material fact, there has to be a trial to decide those disputed issues.

We discuss summary judgment practice here because the government said in the status conference that, in the event the court denied its motion to dismiss, it wanted the chance to re-urge its dismissal arguments through a motion for summary judgment. In response, Judge Lettow remarked that the court "doesn't want two bites at an apple," so we don't expect that he'll allow the government to re-urge the same arguments through a summary judgment motion. If they do make this attempt, we will oppose it.

Judge Lettow also indicated that summary judgment practice wouldn't be an efficient use of the court's or the party's time because "in this kind of takings arena, summary judgment doesn't look like a very viable procedural mechanism." We agree, and, as stated above, believe that a trial gives us the best chance of winning this case.

Update on Discovery

As you know from our prior newsletters, Chief Judge Braden appointed me as Co-Lead Counsel for discovery and trial, and also to ensure the interests of individual plaintiffs are represented. In that capacity I've been actively involved in the discovery phase of this case since it began, and have spent the last several months working on discovery and preparing for the liability trial. What follows is a brief update on the discovery phase.

To date the government has produced roughly 900,000 pages of documents, and roughly 400 GB of electronically-stored information. While this may sound like a massive amount of information, we've actually seen larger productions in prior cases. We have a large team that's reviewing and indexing the government's production to identify relevant and helpful exhibits for trial, and we've already amassed a large amount of important evidence. We've also been conducting our own internal investigation of the Addicks and Barker dams, the property behind them that forms the reservoirs, and various other features we believe will be relevant at trial. We anticipate that we'll begin taking depositions in early June 2018.

We're also busy working with our various experts, and expect that expert discovery will conclude in early December 2018. We've discovered who the government's experts are, and will have an opportunity to take their depositions after we receive expert reports.

We've also completed the inspections of the 14 bellwether test properties. These inspections included taking elevation surveys on various parts of each property, as well as a thorough physical inspection by the government and our experts. All of the 14 bellwether plaintiffs have responded to the government's discovery requests, and we expect that the government will take depositions of the 14 bellwether plaintiffs in June 2018.

In summary, discovery is progressing at a rapid but manageable pace, and we expect that it will be complete in early December 2018. We hope to have an order denying the government's motion to dismiss and a new scheduling order confirming the February 19, 2019 trial date by the end of the month. We'll send out another update at that time.

/s/ Armi Easterby
Armi Easterby, Partner
WILLIAMS KHERKHER LAW FIRM