May 24, 2018 Newsletter

Judge Lettow's Opinion

As previously reported, 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, which we summarized in the prior newsletter.

I'm very pleased to announce that Judge Lettow just issued a 16 page opinion that analyzed – and rejected -- the government's various arguments.

First, Judge Lettow rejected the government's argument that upstream plaintiffs waited too long to file their inverse condemnation cases (*i.e.,* statute of limitations defense). The opinion states that "plaintiffs' claims accrued no earlier than 2016, and more likely in 2017, rending the filing of these suits well within the six-year limitation period." Opinion p. 8. Thus, upstream plaintiffs can still file claims for several more years.

Judge Lettow also rejected the government's argument that upstream plaintiffs were complaining of government inaction instead of government action. The opinion makes clear that Judge Lettow understands our allegations: "the government acted when it built and then modified the dams in such a way that they could and did impound storm water behind the dams on both government and private property." Opinion p. 8.

Next, Judge Lettow rejected the government's various arguments that the upstream plaintiffs don't have a protectable property interest under Texas law. First, the opinion rejected the government's argument that it has immunity under the federal Flood Control Act by stating that "the court agrees with plaintiffs" that the "Flood Control Act does not supersede or bar this court's jurisdiction over takings claims for flooding, and it does not extinguish plaintiffs' substantive rights to just compensation." Opinion p. 11.

Judge Lettow next addressed the government's "priority of occupation" argument (*i.e.,* the dams were built before upstream plaintiffs acquired their property). Basically, the government was trying to argue that the upstream plaintiffs had notice they may be submerged, and shouldn't be allowed to sue for Just Compensation. The opinion rejected this argument in very strong terms by stating our brief and argument "erase any doubts of the plausibility of plaintiffs' reasonable investment-backed expectations in the face of the takings threat posed by the proximity of the Addicks and Barker dams." Opinion p. 12. In other words, the government isn't allowed to take and use private property just because some plaintiffs might have known they were in the reservoir.

Judge Lettow next addressed the government's argument that it shouldn't be liable because the Army Corps was operating the dams during an "emergency," or that the Army Corps had no choice but to submerge private property owners. Here again Judge Lettow appeared to be persuaded by our arguments, and the opinion forcefully notes that "it was not the government had to respond to Tropical Storm Harvey as an emergency that necessitated flooding private land, but rather it was the design of the dams and the government's procedures for operating them." Opinion p. 12. We are very pleased with this portion of the ruling, as we are well aware that several Houstonians still seem to believe that the government's "emergency" argument was a good one.

Lastly, Judge Lettow took up the government's argument 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). As reported in our last newsletter, we briefed the "one flood" issue in September 2017, and our FAQs have an extensive discussion on whether one submersion can be a taking: www.myreservoirclaim.com/faqs. We're

very pleased that Judge Lettow referenced the case cited in our FAQs in ruling that "this court has previously rejected arguments like those made by the government here." Opinion p. 15 (citing Quebedeaux v. United States, 112 Fed. Cl. 317, 319-20 (2013). We're also pleased that Judge Lettow's opinion correctly observed that "two permanent structures that were designed and are operated in a way that will guarantee future flooding in the absence of change." Opinion p. 15.

Judge Lettow seemed inclined to simply deny the government's motion out of hand, but he deferred ruling on it until trial in light of the "fact-intensive nature of takings cases." Opinion p. 15. This is also a good result for plaintiffs, as it should make it more difficult for the government to try and appeal the opinion prior to trial.

As previously reported, the government tries to win these kinds of cases on motions to dismiss, and by overcoming this hurdle we continue to believe that we have a very good chance of prevailing at trial. In summary, this was a huge win.

Trial Update

As reported in our last newsletter, Judge Lettow asked us to prepare a new scheduling order based on a February 19th trial date, and we did. We anticipate that Judge Lettow will issue a new scheduling order in the next few days, and are optimistic that it will set a liability trial for February 19, 2019, here in Houston Texas.

Have a fun (and safe) Memorial Day Weekend.

/s/ Armi Easterby
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