

Come Hell or High Water

Texas Lawyer

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On Friday, Aug. 25, 2017, Houston and surrounding communities were preparing for Hurricane Harvey as city officials warned the storm would be more of a rain event than wind event.

On Saturday morning, many property owners woke to find that they had survived the storm with little to no damage; however, their situation would change within the next 24 to 48 hours. Harvey dumped record breaking amounts of rainfall, more than 51 inches in some areas, and by some reports, over 9 trillion gallons of water overall, enough to fill the Great Salt Lake twice over. Where does all that water go? Harris County has the Addicks and Barker reservoirs that help prevent flooding in 22 main channels and bayous within Houston, and are monitored by the Harris County Flood Control District.

On Sunday, the United States Army Corps of Engineers, the HCFCD and local officials began controlled releases from the reservoirs to protect the integrity of the reservoirs from catastrophic damage that could occur from an uncontrolled release, and to preserve storage capacity for future rains. In an attempt to reduce flood levels, the USACE and the HCFCD raised the release rates from 2,000 cubic feet per second to 13,000 cfs, which caused extensive flooding in the channels and bayous. Neighborhoods that were not flooded by the initial storm were now inundated with several feet of water.

A similar event took place north of Houston at the Lake Conroe dam. Lake Conroe rose to a record level of 205.88 feet above mean sea level. The San Jacinto River Authority (conducted a record setting controlled release rate of 79,100 cfs, eclipsing the 1994 record of 33,360 cfs, to protect the integrity of the dam and prevent extensive damage to lakefront properties; however, the release caused extensive flooding along the San Jacinto River and Spring Creek areas.

Flooded out property owners are outraged with the USACE, SJRA, HCFCD, and local officials, and many are asking who is responsible for the damage and what causes of action do I have?

Federal Tort Claims Act and Texas Tort Claims Act

Historically, under the doctrine of sovereign immunity, you could not "sue the king". The FTCA and TTCA, however, provide limited waivers of immunity when property is damaged, by the wrongful or negligent act of a government employee acting in the scope of their duties. Neither statute likely provides affected Harris County homeowners with relief.

The FTCA exempts claims based upon the performance of, or failure to perform, a discretionary function, which the USACE would argue encompasses the controlled releases. Likewise, the TTCA specifically excludes equipment used in connection with operation of floodgates or water release equipment.

Inverse Condemnation

The Federal and Texas constitutions protect private property rights and prohibit the taking of a person's property for a public use without adequate compensation. In other words, when the government physically takes possession, even temporarily, of a property for some public purpose, it has a duty to compensate the property owner. A taking occurs when a government action directly and immediately interferes with the use and enjoyment of a piece of property.

Some affected homeowners have already filed lawsuits against the USACE, HCFCD and SJRA, among others, contending that the controlled releases amounted to an impermissible taking of their homes. Plaintiffs are seeking recovery for property loss, repair costs, diminution in value, lost income and any consequential damages. To recover on an inverse condemnation claim, these homeowners must establish that the governmental agencies made an intentional decision to perform the controlled releases for a public use, resulting in a taking of their property.

The success of these lawsuits and others that will follow likely depends upon the knowledge and intent of the government, i.e., whether the agencies intended to cause the flooding, as well as the length of time each property was flooded, the character of the land at issue and whether the water released initially flowed directly onto the homeowner's property or a river, bayou or other man-made channel.

Conclusion

For homeowners that have experienced continuous flooding, a buyout program may be the best option. Harris County official Ed Emmett has reportedly requested \$800 million from the federal government to buyout properties that cannot be repaired or where a buyout is more cost effective. The HCFCD recently launched its home buyout program, and residents are asked to submit a Notice of Voluntary Interest to the HCFCD. As of Wednesday, Sept. 13, 2017, approximately 1,850 property owners have taken advantage of such program, which is well above the norm of 12 a month. A buyout still has pitfalls, such as limited funding, delays in processing applications, receiving approval from federal, state and local officials and issuing final payments. The typical buyout process takes between two and two and a half years.

Additional lawsuits may be filed against federal, state and local agencies over the next few months and years, but we all need to remember that this was an extreme weather event, setting record amounts of rainfall. The concern was that if there had not been controlled releases, then the reservoirs and Lake Conroe dam could have failed, bringing even more devastation. This was a situation where you are "dammed" if you do and "dammed" if you don't ... pun intended.

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