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# Houston Property Owners Win Takings Case Over Hurricane Harvey Downstream Flooding

APRIL 23, 2026 | MICHELLE CASADY

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This week, nearly nine years after Hurricane Harvey ravaged the Gulf Coast, dropping as much as 50 inches of rain across the greater Houston area and causing \$125 billion in damage, a group of homeowners prevailed in their claims that the government owes them for the flooding of their properties.

Thousands of lawsuits were filed in the wake of the historic 2017 storm, and the courts divided them into two categories: property owners who lived upstream

of the Addicks and Barker reservoirs, and property owners who lived downstream of the flood control projects operated by the U.S. Army Corps of Engineers. The dams sit about 17 miles west of the city and were constructed in the 1940s, when fewer than 500,000 people called Houston home, to protect downstream properties from major flooding events.

The upstream plaintiffs won their case in October 2022, and that decision was affirmed in December 2025. Those plaintiffs, who lived behind the dams, argued the USACE intentionally flooded their homes by keeping water behind the dam gates — where they had built homes without warning that their properties were in a floodplain — in an effort to save downtown Houston and the Ship Channel from catastrophic flooding.

On Wednesday, a test group of 12 downstream property owners who live in the watershed of Buffalo Bayou — which flows from the west, through the heart of the city and eventually empties into the Houston Ship Channel — won their case, too. They argued the USACE unnecessarily released water from the dams — which were



A stop sign floats in floodwaters caused by Hurricane Harvey in Houston on Aug. 31, 2017. (John Glaser/Cal Sport Media via AP Images)

built to protect downstream owners — and that the released water flooded their homes, while the rainfall from Hurricane Harvey did not.

The government argued, in part, that the releases of floodwaters that affected downstream property owners were necessary to protect the structural integrity of the dams. The federal government presented evidence that dam failures would have placed 600,000 lives at risk and caused about \$21 billion in damages.

In a 48-page opinion issued Wednesday, Senior U.S. District Judge Loren A. Smith of the Court of Federal Claims wrote that the government's decision to release waters from the dam, knowing it would flood downstream property

owners, constitutes a taking under the Fifth Amendment for which the plaintiffs are entitled to compensation.

“Unique to this case, the flooding here did not occur merely from the construction or operation of a government flood control project,” Judge Smith wrote. “Rather, flooding arose from the government acting in accordance with a discrete regulation that required mandatory releases of impounded water as part of its flood control efforts.”

Richard Mithoff, who represented the plaintiffs, is a legendary Houston trial lawyer, known for his role negotiating a \$2.3 billion tobacco settlement on behalf of Harris and other counties, for representing those impacted by the 2010 Deepwater Horizon disaster and for representing JPMorganChase in Enron-related litigation, among other high-profile cases.

In an interview with *The Texas Lawbook* Thursday, he said this win ranks highly on his list of courtroom victories.

“I think it’s one of the most important and, in many ways, one of the more challenging,” he said. “But it’s also very rewarding because I knew so many of these people involved, and I knew of the hardships. And so, it’s just extraordinarily rewarding for me.”



Water from Addicks Reservoir flows into neighborhoods from floodwaters brought on by Hurricane Harvey in Houston on Aug. 29, 2017. (File photo by David J. Phillip/The Associated Press)

Mithoff and his wife, Ginni, got about four feet of floodwater inside their River Oaks home on Lazy Lane, which backs up to Buffalo Bayou. They were not among the plaintiffs in the litigation stemming from Hurricane Harvey, he said.

“We got back into the house within a couple of months, but we had to live upstairs because the entire downstairs had to be completely rebuilt,” he said. “It was well over \$2 million in damages.”

As of Thursday, a trial date had not been set for the damages portion of the trial.

When the cases were divided into upstream and downstream claimants, many experts in takings law expressed that the downstream cases would be much more difficult to win. Mithoff said he never shared that view.

“I always thought it was a strong case from the outset,” he said. “Simply because it involved, as the judge found, flooding that was caused by the opening of these

gates, which was required under the [USACE's water control] manual.”

Mithoff said one of the key moments at trial came during his cross-examination of the USACE's dam safety officer, Robert Thomas.

“He conceded that there was no significant threat to the structural integrity of the dams at the time of the releases,” Mithoff said. “In other words, there was no reason to open the gate other than there was this water manual that said when the water reached a certain level, you open the gates.”

“I think it was very, very important. The impact of that testimony, that confession that I got from Chief Thomas, was pretty significant.”

Judge Smith had originally sided with the government in the downstream cases and dismissed the lawsuits in February 2020, finding that, under state law, the property owners were not entitled to “perfect flood control in the wake of an Act of God” and that federal law provided no protected property interest, either.



**A resident paddles a kayak in his home during rescue operations in Houston on Aug. 31, 2017.** (File photo by John Glaser/Cal Sport Media via AP Images)

But in June 2022, the U.S. Court of Appeals for the Federal Circuit reversed, finding that the property owners had identified flowage easements on their properties, which constitutes a property interest under Texas law.

The appellate court sent the case back to Judge Smith for a trial to determine whether a taking of private property at the hands of the government occurred.

In his Wednesday opinion, Judge Smith found that the flooding was foreseeable and that the USACE possessed maps that charted “with startling precision” where the flood waters would reach.

“Thus, flooding plaintiffs’ properties ‘was not just foreseeable — it was actually foreseen, and it occurred precisely as predicted by [defendant],” he wrote.

Judge Smith, plainly, did not buy the federal government’s argument — or lack thereof — that no temporary taking occurred in this case.

“Aside from its attempt to manufacture factual disputes, defendant failed to offer a substantive rebuttal to plaintiffs’ temporary takings theory,” he wrote.

“Thus, plaintiffs’ assertions proceed largely unopposed. After careful consideration, the Court holds that a temporary taking occurred.”

“Defendant’s only cognizable rebuttal arises from its belief that Harvey’s singular occurrence turns plaintiffs’ claims into a tort. But the alleged taking arose from defendant’s decision to flood plaintiffs’ properties through induced surcharges, not the storm itself.”

Judge Smith also found a permanent taking had occurred.

He wrote that the USACE had known for years of the risks of claims for money damages it faced if it did not purchase flowage easements in downstream properties. The agency decided not to purchase the rights because of “astronomical” costs and a belief that acquiring what the USACE characterized as “such valuable and extensively developed areas ... would be highly unfavorable or unacceptable” to Houstonians.

He explained that the federal government “has been under a mandate since 1966 to acquire all lands ‘below the maximum flowage line of the reservoir.’”

“Under these circumstances, defendant stood idle for 51 years as Buffalo Bayou developed and became densely populated,” he wrote. “But now it claims necessity when it could have resolved the problem decades ago. In this case, where defendant is culpable for creating conditions it believes constituted an emergency, ‘the government immunity from liability under the necessity doctrine would stretch the doctrine too far.’”

Judge Smith made it a point in his ruling to commend the USACE members’ actions during the disaster caused by Hurricane Harvey, writing they “exhibited a high degree of professionalism” and that he “does not intend to diminish or disrespect defendant’s efforts.”

“Nonetheless, defendant failed to establish that conditions threatened the integrity of the dams to create an actual emergency,” he wrote. “... Again, plaintiffs do not question defendant’s decision to open the floodgates. But invoking the induced surcharges before imminent failure prevents a finding that an imminent danger existed.”

In a footnote, Judge Smith gave a nod to his late colleague who presided over the upstream cases.

“The Court wishes to note its appreciation for the scholarship and legal analysis by late Senior Judge Charles F. Lettow,” the note reads. “He issued a recently affirmed decision in a directly related case to this matter.”

The plaintiffs are represented by Richard Mithoff of Mithoff Law Firm, Rand P. Nolen of Fleming, Nolen & Jez and Jack E. McGehee of McGehee, Chang, Landgraf, Feiler.

The federal government is represented by Brian R. Herman of the Department of Justice.

The case number is 1:17-cv-09002.