

# Opening the Floodgates? Federal Circuit Lets Claims Proceed Against Corps of Engineers for Hurricane-Related Flooding

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Can private property owners make the United States government pay for flood damage to their land during a natural disaster where the United States has undertaken activities to reduce flood risks? The [Flood Control Act of 1928](#) states the United States shall not have “liability of any kind . . . for any damage from or by floods or flood waters at any place.” Courts, however, have taken a more nuanced approach, declining to apply blanket immunity to takings cases under the Fifth Amendment. As a result, over the past decade, they have widened the opening for the United States to be sued for flood-related damages.

In June 2022, the U.S. Court of Appeals for the Federal Circuit continued this trend in [Milton v. United States](#), allowing claims to proceed for downstream flooding damages where federal floodgates operated according to established plans in the wake of Hurricane Harvey. In addition to reaffirming that the 1928 Flood Control Act does not bar a court from hearing every flood control-related takings claim, the court held that those downstream owners had a property interest during the flooding event that the government may have taken. This Legal Sidebar first describes the basis for a private property owner to bring claims for flood damages against the United States, the limitations on such claims, and how courts have applied those principles to Harvey-related cases. It then considers some implications of this case for Congress.

## Takings Claims in the Flood Control Context

Due to [sovereign immunity](#), the United States government may only be sued with its consent. Congress has waived the United States’ sovereign immunity for property claims in the [Tucker Act](#), among other statutes. The Tucker Act directs the U.S. Court of Federal Claims to consider claims for damages “for cases not sounding in tort” which arise under the Constitution, federal law, or contracts with the government. This includes property-related claims brought under the [Fifth Amendment’s Takings Clause](#), which provides that no private property shall be taken for public use without just compensation. Private property includes but is not limited to real estate, and can refer to an ownership or use right recognized

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under either state or federal law. Unlike claims for government-caused damages under the [Federal Tort Claims Act \(FTCA\)](#), a takings claim under the Tucker Act requires no negligence or wrongdoing by the United States. For a Tucker Act claim, a property holder needs to show (1) a compensable property interest and (2) the United States took that property interest without acquiring it through the appropriate legal means.

One type of property interest that arises in federal flood control projects is a *flowage easement*, or right to inundate someone else's land. For example, a party whose activities may cause flooding may acquire the right to a flowage easement from the owners of property that may be flooded. Conversely, a government-induced flood that damages property *may* rise to a [temporary taking under the Fifth Amendment](#) if the United States has not first obtained a flowage easement and paid just compensation to the property owner.

A flowage easement does not require continuous use and may be temporary. In 2012, the Supreme Court held in [Arkansas Game and Fish Commission v. United States](#) that temporary flooding can be a Fifth Amendment taking of a flowage easement that entitles a property owner to fair compensation. The Court identified several factors to determine whether such a taking has occurred: the duration of the flooding, the character of the land and investment-backed expectations, the intent and [foreseeability](#) of government action, and the [severity of the interference](#).

The Supreme Court's explicit recognition of a temporary taking of a flowage easement opened a path for plaintiffs to pursue flood-related damage claims under the Fifth Amendment. Prior to *Arkansas Game and Fish*, plaintiffs had been limited in recovering claims for flood-related damages. If those claims were based on [negligence by the U.S. government](#), they had typically been limited by the [Flood Control Act of 1928](#). Similarly, plaintiffs had limited success pursuing Fifth Amendment takings claims, as illustrated by the Supreme Court's 1939 opinion of [United States v. Spontenbarger](#), which insulated the government from takings liability for federal flood control project activity intended to reduce flooding.

Since the 2012 *Arkansas Game and Fish* opinion, property owners have increasingly turned to the Takings Clause to raise flood-related damages claims against the government. In 2018, the Federal Circuit in [Saint Bernard Parish v. United States](#) considered whether increased flooding during Hurricane Katrina in 2005 around a United States Army Corps of Engineers (USACE)-operated navigation channel constituted a temporary taking of a flowage easement. That case [hinged on](#) whether the water "invasion" was a "[direct, natural, or probable result of an authorized activity](#)" and was foreseeable or intentional. Although it rejected the takings claim in *Saint Bernard Parish*, the Federal Circuit left open the possibility of future takings claims where government action caused flooding. The court said that determining causation for temporary flood-related takings requires consideration of the *entirety* of government actions related to risks, including whether flooding [would have occurred](#) absent federally authorized activity and whether government action [mitigates](#) damages underpinning a claim.

In sum, *Arkansas Game and Fish Commission* and *St. Bernard Parish* reflect a shift away from tort-based claims of liability and towards takings claims for temporary flooding damages. The Federal Circuit's recent decision in [Milton v. United States](#) is another such development.

## Trial Court Litigation over Hurricane Harvey Flooding

In August 2017, Hurricane Harvey pushed through the Gulf of Mexico and circled over Houston for days, with rains precipitating [catastrophic and widespread flooding](#). The massive storm dumped several feet of water on the city, whose flood control system relied heavily on the reservoirs behind the Addicks and Barker dams operated by USACE. With water filling the reservoirs upstream of the dams faster than they could drain, USACE opened the system's floodgates and, for the first time since the system was constructed, released water downstream in the direction of Houston. By the time the storm had passed, its accompanying volume of water had temporarily flooded [over 150,000 Houston-area properties](#), including

homes both upstream and downstream of the reservoirs. These upstream homes had largely not existed when Addicks and Barker were constructed on land used for ranching and rice farming, and downstream urban development had [likewise intensified](#) since dam construction.

Beginning in September 2017, hundreds of property owners filed Tucker Act complaints in the Court of Federal Claims seeking compensation for damages from USACE's operation of the Addicks and Barker reservoirs, which they alleged caused a physical taking of property. The court consolidated the cases and split them into two sub-dockets for upstream and downstream property owners. The trial court opinions found that [upstream owners](#) had compensable claims but [downstream owners](#) did not.

As for the [upstream owners](#), Judge Charles F. Lettow found USACE liable for damages for the temporary flooding of properties located behind the reservoirs. In the case of the upstream properties, the reservoirs held waters back and the properties behind them flooded as designed. Although it was widely known that upstream properties could flood as the reservoirs filled, USACE had not acquired flowage easements for the full capacity of the reservoirs. The court determined that when water from Harvey flooded upstream properties, as USACE had planned, those property owners were entitled to compensation for the government's taking of a flowage easement. However, the court has not yet determined the amount of compensation owed. As of [April 2022](#), the court was preparing for trial on the amount of damages to which upstream owners are entitled.

The trial court [dismissed the claims](#) of the downstream owners. Judge Loren A. Smith framed the question as whether Texas or federal law provided the plaintiffs with a cognizable property interest in "perfect flood control in the wake of an Act of God" and [concluded](#) no such interest existed due to the government's right to assert police powers during the natural disaster that unfolded during Harvey. With respect to [federal law](#), Judge Smith cited the [Flood Control Act of 1928](#) and [determined](#) downstream owners had no vested right in perfect flood control simply because they had properties that benefited from flood control structures. Judge Smith also cited *United States v. Sponenbarger* for the "routine" proposition that "when undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." Judge Smith thus [decided](#) no federally recognized property interest existed for property damages attributable to events outside the government's control such as occurred during Harvey's storm.

## Downstream Owners Prevail in *Milton v. United States*

In June 2022, the Federal Circuit [reversed](#) the trial court's dismissal of the downstream cases and determined that the downstream owners had a property interest that, if taken, could be compensable under the Fifth Amendment. The appellate court sent the downstream cases back to the trial court to determine whether there had been a temporary taking sufficiently caused by USACE action that was not subject to a valid defense. The Federal Circuit said the Flood Control Act's limits to liability [did not provide a blanket prohibition](#) for the Court of Federal Claims to hear flood control-related damage claims under the [Tucker Act](#). The Court then examined whether Plaintiffs had a cognizable property interest in the case under Texas and federal law, concluding that property owners *did* have a cognizable property interest in a flowage easement.

[Examining Texas law](#), the Federal Circuit found that a flowage easement downstream of a flood control structure was a valid property right for consideration of a takings claim in the wake of Harvey's flooding. While affirming that property rights in Texas are subject to the valid exercise of police powers, the appellate court declined to apply a blanket police power exception to USACE's operation of the Addicks and Barker floodgates. Specifically, a police power defense for the Harvey cases differed from established police power defenses in Texas for [riparian rights](#) or [nuisance abatement](#). The appellate court also differentiated the downstream owners' claims from other Texas flooding cases, which had not proven that released water had actually reached plaintiffs' properties.

The Federal Circuit further diverged from the trial court's analysis of the potential relevance of Hurricane Harvey as an [Act of God](#). The Federal Circuit acknowledged that an Act of God could affect a finding of liability under Texas law. It held, however, that an Act of God is only [relevant to the second prong](#) of the takings test—whether the government had effected a “taking,” versus whether a cognizable property interest existed in the first instance. Thus, it was premature for the trial court to dismiss this case.

The court reached a similar conclusion under federal law. The United States had invoked the *doctrine of necessity* to argue that the landowners had no cognizable property interest in situations when the government must exercise its police powers. The Federal Circuit [identified](#) multiple Supreme Court cases in which property owners were not entitled to compensation where property was damaged out of public necessity, such as to prevent a fire or otherwise forestall grave threats to life and property. But, as with the “Act of God” defense, the Federal Circuit said this should be considered when analyzing the second prong of the takings test, not the first prong. The Federal Circuit recognized that the United States has claimed the necessity doctrine as a defense for the Addicks and Barker dam cases and directed the trial court to consider that defense upon remand.

Determining a cognizable property interest of a flowage easement exists for downstream users, the Federal Circuit thus reversed the trial court's decision and returned the downstream cases to the Court of Federal Claims to determine whether that property interest was in fact taken. Specifically, the appellate court asked the trial court to [consider](#) (1) whether a temporary taking occurred based on factors outlined in [Arkansas Game and Fish Commission](#); (2) whether Plaintiffs have established causation given the totality of the government's action to address the relevant risks as outlined in [Saint Bernard Parish v. United States](#); and (3) whether the doctrine of necessity is a valid defense to liability. It remains to be seen how the Court of Federal Claims will apply these for a downstream flowage easement associated with an estimated 500-year flood event like Hurricane Harvey.

## Considerations for Congress

*Milton* marks the next step for potential plaintiffs to sue the United States for flood-related damages. While many of the past century's claims were filed under the FTCA and subject to the Flood Control Act's limits on flood control damages as well as other defenses, over the past decade claims have increasingly turned towards the Takings Clause of the Fifth Amendment. Recognizing such claims in *Arkansas Game and Fish*, the Supreme Court asserted that its “modest” opinion “augurs no deluge of takings liability.” Claims arising from Hurricane Harvey may put that assertion to the test.

Whether the government's conduct in this case is ultimately found to be a compensable taking claim for downstream owners depends on how the trial court, on remand, rules on the three issues outlined above. The outcome is by no means certain and will be closely watched. Still, it is notable that the Federal Circuit determined a downstream flowage easement is a compensable property interest for a flood control project intended to reduce downstream flood damages. Particularly if a taking is found in the next phase of litigation, plaintiffs could increasingly pursue takings claims for single catastrophic events, even where a congressionally authorized federal flood control project functions and is operated according to plans. If the trial court concludes that no taking occurred here—and particularly if it liberally construes the government's claimed defenses—the Federal Circuit's decision in *Milton* would have a limited bearing on the final outcome of plaintiffs' claims. Alternatively, if the trial court finds a taking, federal liability could be substantial.

If Congress is concerned the courts have indeed opened the proverbial floodgates for claims against the government, several options are available. The Federal Circuit has [said](#) that the Flood Control Act, codified and amended in 33 U.S.C. § 702c, does not prevent the court from considering Tucker Act claims because Congress did not clearly and explicitly repeal Tucker Act jurisdiction to hear claims for flood-related damages when it adopted Section 702c. If Congress prefers to expressly limit the Court of Federal

Claims in hearing claims for damages from or by floods or flood waters, it could amend [33 U.S.C. § 702c](#) to explicitly confer immunity to claims brought under the Tucker Act. Where a flowage easement or other property right exists, however, Congress cannot supersede the constitutionally guaranteed right to just compensation in the event of a federal action that takes that property right. In any event, Congress could consider changes to federal assistance for property damage associated with federal flood control projects, risk disclosures, eligibility for flood insurance payments, or other disaster response.

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