

Tarrant Regional Water District v. Gragg: The Supreme Court Rules It's A Brave New World

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In a case of significant consequence to members of TWCA, the Texas Supreme Court handed down a ruling in *Tarrant Regional Water District vs. Gragg* on June 25, 2004. The case involves the District's liability for damages caused by flooding allegedly resulting from the District's construction and operation of its Richland-Chambers Reservoir and a claim by downstream landowners of inverse condemnation of their property by the District. Upholding the lower court rulings against the District, the Supreme Court let stand the judgment awarding the landowners' damages in the amount of \$14,482,669.00 (plus interests accrued since the date of the judgment), and awarding the District a permanent and perpetual flowage easement over the property.

The lawsuit was brought by landowner O.L. Gragg and his lessee, the Schwertner-Priest Partnership, following a flood event in March of 1990. The Gragg ranch is located on the Trinity River approximately eight miles downstream of the location where releases from the District's Richland-Chambers Reservoir enters the Trinity River.

The Richland-Chambers Reservoir, located approximately one mile upstream of the Trinity River, was completed in 1987 and covers approximately 44,000 acres and impounds approximately 1.2 million acre-feet of water drained from two tributaries of the mainstream of the Trinity River - Richland and Chambers Creeks. As a water supply reservoir, Richland-Chambers was designed for purposes of supplying the District's water customers with municipal, industrial and irrigation water, and not to serve as a flood control reservoir.

In 1989, Mr. Gragg leased a portion of his 12,556 acre ranch in Anderson and Freestone Counties, in the Trinity River Basin, to the Schwertner-Priest Partnership. The Partnership ran a cattle operation on the leased property.

According to the Court's opinion, following heavy rains in March of 1990 that caused extensive flooding throughout the Trinity basin, the District for the first time released water through the Reservoir's floodgates, and gave rise to Gragg's allegation that extensive flood damage was suffered on the property. Notwithstanding the fact that the Trinity River had regularly flooded portions of the Gragg property historically, the Graggs' claimed that the prior flooding was insignificant compared to the March 1990 flood, and that subsequent flood events were characteristically different because of the existence and operation of the District's Richland-Chambers Reservoir. The Graggs claimed that the flood events occurred with a greater intensity and occurred faster, and that the floods killed crops in the bottomlands that had provided cattle pastures, and precluded high-intensity cattle ranching operations because the property owners were unable to get the cattle removed from the area prior to the floodwaters encroaching.

After a fifteen-day trial in 1998, the Trial Court found that the District had inversely condemned a flood easement across the Gragg property. The Court then submitted the case to the jury, which awarded the Graggs \$10,214,122.00, and awarded the Graggs' lessee, the

Schwertner-Priest Partnership, \$4,268,547.00 as the difference in the market value of the property immediately before and after the District's condemnation of a permanent and perpetual flowage easement over the property.

Following the Waco Court of Appeals' affirmance of the District Court's ruling, the Tarrant Regional Water District filed its Petition for Review with the Texas Supreme Court. Initially, the Supreme Court denied the Petition, but on rehearing the Court granted the Petition to determine whether the District's construction and operation of the Richland-Chambers Reservoir resulted in a "taking" of the Graggs' property. In its opinion, the Supreme Court divided its discussion into consideration of issues related to the inverse condemnation, bifurcation of the liability and damage determinations by the Trial Court, and whether damages should have been awarded on the basis of a permanent or temporary taking.

With regard to the District's alleged inverse condemnation of the Graggs' property, the Court addressed the District's argument that the landowners had failed to present credible evidence connecting the construction of the Reservoir and its operation to the flood damage experienced by the Graggs. The Court also discussed the District's alternative argument that, assuming that the landowner had established such a causal connection, the District's actions which allegedly resulted in the damage were negligent and not, as a matter of law, a taking of the landowners' property. In rejecting both arguments, the Court focused on other evidence in the case, rather than the District's challenge to the landowners' expert witness hydrologists and the "X-FOR" computer model they had developed on the question of causation. In its discussion tying the construction and operation of the Richland-Chambers Reservoir to flood damage experienced by Graggs, the Court noted that the District took no issue with the claim that the ranch experienced flood damage, but claimed that there was no evidence supporting the findings that the Reservoir was the cause of the flooding, as opposed to the heavy rainfall events themselves.

According to the Court, flooding begins to occur at the Gragg ranch from the Trinity River when flow reaches 13,000 cubic feet per second. The Court noted that the District released volumes of water through its floodgates that "greatly exceed what natural flows would have been." Although it is not clear if the incident was tied to any of the flooding damage alleged by the Graggs, the Court recited that the District's Dam operator, Ronnie Buyers, "acknowledged that on at least one occasion the District released more than 23,000 CFS in excess of what natural flows would have been from Richland and Chamber Creeks." The Court also noted that the District's records showed gate releases on "numerous additional releases in excess of natural conditions."

The Court's opinion does not recite that releases from Richland-Chambers Reservoir, upstream of the Trinity River and more than eight miles upstream of the Gragg property, resulted in the same high level of flows at the point of the Gragg Ranch. Instead, the Court tied together the events of higher releases with a reference to an "Internal District Memorandum" that "suggests" in 1991 that the District recognized the potential need to modify its gate release procedures to minimize flooding and avoid adding flood levels in the Trinity River. Based on these facts, and without a clear chain of events connecting the Reservoir releases to the damaging floods, the Court found that the record contained "more than a scintilla of evidence" that supported the Trial Court's findings that the construction and operation of the Richland-

Chambers Reservoir intensified flooding at the Gragg ranch. The Court also found that the presence of the Dam caused releases to be at a higher rate of speed and resulted in a “translatory wave, similar to a surge” of water coming from the Reservoir and causing the flood damage at the ranch.

It appears that the Court envisioned a wall of water traveling down Trinity River towards the Gragg ranch. The Court does not discuss, however, the fact that the releases from the Reservoir approach the Trinity River almost perpendicularly and that to the extent there is a higher flow, that it would have been disbursed across the Trinity watershed upstream thereby reducing the level of any “surge” or “translatory wave” that was found to have inundated the Gragg ranch downstream. The Court also seemed to discount, if not ignore, the effects of the rainfall events themselves. Instead, the Court appears to have been particularly persuaded by the testimony in the record of eyewitnesses to the effect that floodwaters at the ranch moved more swiftly when the floodgates at the Reservoir were open. While there was no direct correlation between the opening of the floodgates and the level of water at the ranch, a fact the Court acknowledged, the Court nevertheless concluded that the eyewitness accounts “did verify water-flow characteristics that occurred when the floodgates were open.” This last conclusion appears to facilitate the explanation that the coincidence of the opening of the gates and the higher floods were directly tied together, even though there appears to be no evidence to show a direct cause and effect between the two events.

In its opinion, the Court also notes that the District’s own modeling showed that both the number and duration of floods at the ranch in the 1990s, after the Reservoir’s construction, were higher than in the 1940s, during a period of comparable rainfalls. As noted above, while there was no evidence of direct tracking of the releases from the Reservoir as the cause of the inundation at the Gragg ranch, the Court appears to have so concluded based upon the fact that the Reservoir was in place at the time the flooding occurred. Although expressly declining to express any opinion on the level of the “causation evidence” presented by Graggs, the Court noted that it would defer to the Trial Court’s resolution of the issue “as long as there is evidence to support it.”

With regard to the question of whether a “taking” occurred because the alleged damages resulted from the District’s negligence, as opposed to an intentional act, the Court indicated that a factor which distinguishes a negligent action from an intentional act which the governmental entity knows is causing harm, or is certain to result to result in harm, can be the “reoccurrence” of the activity. Specifically, the Court noted that, “[i]n the case of flood-water impacts, reoccurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur” and, thereafter, concluded that while non-recurrent flooding results in damage, it does not give general rise to the level of a “taking.” The “recurrence requirement,” according to the Court, assures that a governmental entity is not held liable for taking property when a “project’s adverse impacts, and by implication its benefit to the public, are too temporal or speculative to warrant compensation.”

The Court dismissed the District’s negligence argument, however, finding that the operation of the Reservoir, *i.e.*, releases from the floodgates, combined with the construction of the Reservoir, had changed the characteristics of the flow of the river and the downstream

flooding. In the Court's opinion this demonstrated that the flooding was "the inevitable result of the Reservoir's construction and of its operation as intended." In this context, the Court again talked about the "unnatural surges of water" that resulted from the releases by the District.

In an apparent response to concerns expressed by TWCA, and several of its member entities, about the potential impact on water suppliers if the Supreme Court upheld the lower courts' rulings, the Court distinguished the Richland-Chambers Reservoir as being "unique in a number of respects," from other reservoirs around the state. Specifically, the Court observed that the Richland-Chambers Reservoir has "comparatively limited excess storage capacity of about eight percent." It is important to note, as stated above, at the beginning of its opinion the Court also noted that the Richland-Chambers Reservoir was not designed to operate as a flood control reservoir and therefore had less than two feet of free board below the "overflow point." According to the Court, "water supply reservoirs normally have excess capacity ranging from twenty-five to one hundred percent."

The Court went on to quote from an earlier opinion, *Brazos River Authority vs. City of Graham* 354 S.W.2d 99, 105 (Tex. 1961), in which it had expressed the proposition that entities like the District were necessary and beneficial, but when their activities require that they acquire property for a public purpose they need to proceed, if necessary, under the power of eminent domain. According to the Court, "Such a policy has not resulted in a destruction of flood control and improvement agencies in the past and there is no reason to apprehend that the continuation of such policy will prove overly costly or inimical to the American way of life in the future." (citing *Brazos River Authority, supra*).

Another significant issue raised by the District had to do with the Trial Court's failure to bifurcate the proceedings and conduct a bench trial on the taking issue and, if necessary, then hold a separate trial to allow a jury to assess damages to the landowner. Citing Texas Rule of Civil Procedure 174(b) allowing the Trial Court to order separate trials, the Court indicated that its review of the Trial Court's action denying the District's motion would be for an "abuse of discretion." Concluding that the Trial Court had not abused its discretion, the Court noted that while it had "mandated bifurcation" in two of its earlier decisions, it had not established a "bright-line rule" requiring bifurcation in all cases involving alleged takings. With regard to the damage issues and the question of whether the alleged "taking" was permanent versus temporary, the Court went back and relied upon the evidence of the "reoccurrence" of floods events. The Court concluded that the record supported the Trial Court's determination that the Reservoir's construction and operation caused a permanent taking.

The Court's ruling in this case sends a loud and disheartening message to the owners and operators of reservoirs. As the Court did not require proof of any direct connection between the release of water from the dam and the flooding which coincidentally occurred downstream, the Court created a form of strict liability for dam operators. Specifically, if following the release of water from an impoundment, downstream flooding occurs, the dam operator is likely to be held liable. Moreover, to the extent that there is a possibility that such events can reoccur with any frequency, there is a high degree of likelihood that the dam operator will be found to have permanently "taken" the downstream property.

Pursuant to this ruling, and the strict liability theory that arises out of the holding, reservoir owners and operators may have to change their operating procedures to avoid liability to reduce the amount of water maintained by the dam. They may have to increase, or even create, a flood pool level behind the dam in order to capture more of the inflows from a rainfall event and postpone releases to avoid liability for downstream flooding. Issues which remain unanswered include the impacts that such changes and procedures could have on the yield of the reservoir, as well as the cost of operating the same. As for the future, the ruling could have a chilling effect on plans for new reservoirs, and expansions of existing facilities, including the ability to finance such projects.

