

In the United States Court of Federal Claims

No. 00-115L

NOT FOR PUBLICATION

(Filed August 14, 2006)

DAUPHIN ISLAND PROPERTY *
OWNERS ASSOCIATION, INC. *
a non-profit corporation; and *
JAMES W. HARTMAN, *

Plaintiffs, *

v. *

THE UNITED STATES, *

Defendant. *

Daniel Grant Blackburn, Bay Minette, AL, attorney of record for plaintiffs, Dauphin Island Property Owners Association, Inc. and James W. Hartman, and *Lewis S. Wiener, Richard Davis* and *Joseph Stedman*, Washington, D.C., of counsel.

Gary A. Moore, U.S. Attorney’s Office, Southern District of Alabama, and *James E. Brookshire*, Washington, D.C., of counsel.

OPINION AND ORDER

Futey, Judge.

This takings case comes before the court on the parties’ joint motion for final approval of the settlement agreement among the United States, the State of Alabama, the Dauphin Island Property Owners Association (“the Association”), and James Hartman (as representative of the plaintiff class). On July 11, 2006, a fairness hearing was conducted in Mobile, Alabama. For the reasons stated below, the settlement on behalf of the class is approved.

Factual Background

A. Summary of the Litigation and Negotiations

Plaintiffs are owners of property on Dauphin Island, located in Mobile County, Alabama, on or adjacent to the Gulf of Mexico. The Association, which is comprised of “persons, firms, or entities which own property situated on Dauphin Island,” owns certain lands on the island in fee, including stretches of beachfront property. Directly east of the island, the Army Corps of Engineers (“the Corps”) maintains the Mobile Ship Channel (“the Channel”), which provides a navigable waterway to the Port of Mobile. Periodically, the Corps has dredged and deepened the Channel, removing material from the sea floor near the island.

On March 6, 2000, plaintiffs filed the instant case alleging that the Corps’ dredging practices caused significant shoreline erosion of plaintiffs’ property. Plaintiffs further claimed that this amounted to an uncompensated taking of their property, contrary to the Fifth Amendment. After over five years of negotiations, a proposed settlement was filed with the court on July 19, 2005, (“the Settlement”) which included a joint motion for certification of the class. The case was certified as a class action on January 11, 2006. On July 11, 2006, a fairness hearing was conducted in Mobile, Alabama to determine the appropriateness of the settlement and to hear any objections of the class.

B. Summary of the Major Terms of the Settlement

Rather than providing a monetary remedy to class members, the Settlement contemplates studying the causes of the erosion and implementing measures to replenish the beachfront and prevent further wearing away of the shoreline in two ways. First, the Corps agreed to change its dredging practices. Instead of releasing the dredged sand from the Channel into the ocean, the Corps will dispose of the sand in two areas near the shores of Dauphin Island. The theory behind this is that the natural currents of the Gulf Coast will pick up the sand and deposit it on the shores of Dauphin Island, reversing the erosion. In addition, the dredged sand will help diffuse the energy of waves, both ordinary and those produced by hurricanes, that would normally hit Dauphin Island. This will help prevent further erosion of the shoreline. The Corps may be relieved of these duties in case of emergency or if they lack the proper equipment. These new dredging practices are already in place and are expected to reverse much of the damage, albeit over a long period of time.

The second component of the Settlement was the principal topic of negotiation. All of the parties to the agreement have conferred and agreed upon a team of four highly qualified engineers to perform an “impact study.” This study will

attempt to discover if there is a measurable impact on the Dauphin Island shoreline caused by the Corps' dredging practices and will proceed in stages. The entire study will be completed within twelve months of the effective date of a feasibility cost sharing agreement.¹

If the study shows that the Corps' dredging practices had no effect on Dauphin Island, plaintiffs may pursue arbitration under this court's alternative dispute resolution program to disprove these findings. If the outcome of the study is inconclusive, the plaintiffs may reactivate the litigation, but the recovery is capped at \$7,962,000. Finally, if the study is positive, the Corps must formulate a plan within eighteen months of the conclusion of the study to mitigate the prior and prevent future erosion. The Corps will only carry out this plan if it determines that it is feasible within the statutory limit of \$7,962,000. If the plan is not achievable within that limit, plaintiffs may reactivate the litigation and there is no cap on damages. If the plan is not realizable for some other reason, the plaintiffs may reactivate the litigation with a cap on damages of \$7,962,000. If and when a plan is selected, the Corps must begin work on it not more than twenty four months after the selection of a plan and the case will be dismissed at that point.

C. Attorney's Fees

Defendant has agreed to pay stipulated litigation costs of \$485,522.68 for fees and costs incurred up to April 1, 2005. Defendant has also agreed to pay fees and costs incurred after April 1, 2005 up to a total maximum of \$417,480. This will be split among the four law firms representing the class in this case. The fees will not count against the feasibility cap mentioned above. In addition, the fees will not be paid unless the team of engineers determines that damage to Dauphin Island can actually be measured and attributed to a specific cause. This determination will be made within four months of the effective date of the feasibility cost sharing agreement.

¹ This type of settlement is contemplated under 33 U.S.C. § 426i, more commonly known as Section 111, which authorizes the Corps to undertake studies and implement measures to prevent or mitigate shore damages caused by projects such as the dredging of the Channel. *See* 33 U.S.C. § 426i. A requirement of Section 111 is that a local entity, such as the State of Alabama in this case, share the costs of the study and implementation. *See* 33 U.S.C. § 426i(b). This type of agreement is commonly referred to as a feasibility cost sharing agreement. Because of recent changes in legislation, Congressional approval is needed for this agreement. By letter dated August 7, 2006, defendant informed the court that this approval has been gained by both chambers of Congress.

Discussion

Under Rule 23(e) of the Rules of the United States Court of Federal Claims “[a] class action shall not be dismissed or compromised without the approval of the court . . .” R.C.F.C. 23(e). The court must determine if the “proposed settlement is ‘fair, reasonable and adequate’ in order to approve it.” *Berkley v. U.S.*, 59 Fed. Cl. 675, 681 (Fed. Cl. 2004) (quoting *In re Prudential Ins. Co. Of America Sales Practices Litigation*, 148 F.3d 283, 316 (3d Cir. 1998)). Many courts have considered the following five factors in determining the fairness of a class settlement:

- (1) The relative strengths of plaintiffs' case in comparison to the proposed settlement, which necessarily takes into account:
 - (a) The complexity, expense and likely duration of the litigation;
 - (b) the risks of establishing liability;
 - (c) the risks of establishing damages;
 - (d) the risks of maintaining the class action through trial;
 - (e) the reasonableness of the settlement fund in light of the best possible recovery;
 - (f) the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation;
 - (g) the stage of the proceedings and the amount of discovery completed;
 - (h) the risks of maintaining the class action through trial;

- (2) Class counsels' recommendation of the proposed settlement, taking into account the adequacy of class counsels' representation of the class;

- (3) The reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms;

- (4) The fairness of the settlement to the entire class;

- (5) The fairness of the provision for attorney fees;

- (6) The ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity.

Berkley, 59 Fed. Cl. at 681-682 (citations omitted).

After a careful review of the settlement, all parties' counsels' comments, and the class members' comments, it is clear to the court that the settlement is fair, reasonable, and adequate by all measures.

First, the plaintiffs have strong claims, however, determining the extent and causes of the erosion without cooperation between all of the parties would be nearly impossible. The extent and complexity of the litigation as well as the risks of establishing liability and damages would be very high, as evidenced by the massive investigation that will proceed under the settlement and the time it will take to complete all aspects of the settlement. Furthermore, the risks of maintaining a class through trial would be considerable in that property ownership may turn over repeatedly during the course of litigation, potentially causing confusion over class membership or requiring repeated consents from potential class members. Overall, the complicated nature of the claim and the class, the recovery under the settlement, including the cost of the studies required, easily balance out the strengths of plaintiffs' claims.

Second, class counsel's competency and acceptance of the settlement weigh heavily in favor of approval. Each member of the class' legal team has excellent qualifications and experience that are more than adequate to litigate this case. Further, class counsel conducted extensive negotiations with the government, and have worked diligently to inform the class members of the terms of the settlement. There have been a number of site visits to Dauphin Island and presentations to the class members and it is, therefore, clear to the court that the lawyers are well informed of the state of affairs on Dauphin Island. Accordingly, plaintiffs' counsels' acceptance of the settlement certainly points the court towards a finding of fairness.

The class members clearly support the settlement. Many members made positive statements about the settlement on their opt-in forms. At the fairness hearing, no objections were made to the settlement. The notice to the class was more than adequate as evidenced by the high number of replies to class counsels' mailings to the potential class members. In addition, the settlement is definitely fair to the entire class. The ultimate goal of the agreement is to repair damage done to the entire island. Although any remedial measures would help the beachfront property owners more directly because they will regain land, the entire island will benefit from the mitigation and prevention of further erosion. The lack of dissension within the class and the clear benefit to the class as a whole heavily favors approving the settlement.

The provision for attorney's fees seems more than fair because any payment will not count against the limit of \$7,962,000. In addition, the attorneys will not receive any fees unless it is determined that the study can proceed. This factor, therefore, certainly weighs in favor of approving the settlement.

Finally, the government's ability to withstand a greater judgment has little relevance here. Although the government could theoretically "always withstand greater judgment because of Congress's ability to tax" it would ultimately fall to the taxpayers to provide the necessary funds. *Berkley*, 59 Fed. Cl. at 713. In addition,

if the case at hand went to trial and the plaintiff class prevailed, the court could only award monetary damages. *Bowen v. Massachusetts*, 487 U.S. 879, 914 (1988). This settlement provides for specific relief instead, which would likely be far more useful to each member of the class than his or her portion of the judgment. Considering the size of the class, each individual's share of a judgment would be small and inadequate to undertake a study and formulate a plan that would allow a reclamation of his or her property and prevention of future erosion. Therefore, it appears that all of the factors weigh in favor of the approval of the class settlement.

Conclusion

For the reasons discussed above, the court finds the Settlement Agreement among the United States, the State of Alabama, and the plaintiff class to be fair, adequate, and reasonable. The court hereby approves the Settlement Agreement as proposed by the parties.

The parties shall file a joint status report indicating progress in the implementation of the Settlement Agreement at intervals of 90 days. The first report shall be filed on Tuesday, November 14, 2006.

IT IS SO ORDERED.

BOHDAN A. FUTEY
Judge