Flooding Liability for Government Entities

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For the TEXAS WATER CONSERVATION ASSOCIATION

January 2019

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In August of 2017, Hurricane Harvey hit the Texas coast causing significant property damage for Texans due to the extensive rainfall and resultant flooding. The National Oceanic and Atmospheric Administration (NOAA) recently estimated Harvey's damage costs at over $125 billion, second only to Hurricane Katrina's level of damage.[1] These damages were magnified due to fact that only 17 percent of homeowners in the eight Texas counties most directly affected by Hurricane Harvey had flood insurance policies.[2] With so much flood damage, and so little insurance purchased to help cover these losses, it was inevitable that many property owners would turn to litigation to attempt to address their losses. Several lawsuits were filed in federal and state courts in Texas alleging constitutional "takings" claims.[3] The increase in these takings lawsuits have made flooding liability a significant issue for government entities that have duties or perform actions associated with flooding such as reservoir operations or drainage control.

The validity and ultimate success of these types of lawsuits has become increasingly difficult to predict. The 2016 Texas Supreme Court case *Harris County Flood Control Dist. v. Kerr*,[4] and the 2012 United States Supreme Court decision *Arkansas Game and Fish Comm'n v. United States*,[5] have caused some commentators to predict that these types of takings claims are now more[6] or less[7] likely to be successful depending on the facts of the case. One must examine the holdings and facts associated with these recent decisions to determine how susceptible a specific government entity is to takings liability.

TAKINGS LIABILITY UNDER STATE LAW

Article I, section 17(a) of the Texas Constitution states: "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person..."[8] This provision is commonly known as the "takings

[1] *See* Adam B. Smith, *2017 U.S. billion-dollar weather and climate disasters: a historic year in context*, Climate.gov, Jan. 8, 2018, https://www.climate.gov/news-features/blogs/beyond-data/2017-us-billion-dollar-weather-and-climate-disasters-historic-year.

[2] *See* Heather Long, *Where Harvey is hitting hardest, 80 percent lack flood insurance*, The Washington Post, Aug. 29, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/08/29/where-harvey-is-hitting-hardest-four-out-of-five-homeowners-lack-flood-insurance/?utm_term=.cf92f8e9cc3d.

[3] *See* Bryan Sims, *Harvey storm-water releases were unlawful government takings: lawsuits*, Reuters, Sept. 13, 2017, https://www.reuters.com/article/us-storm-harvey-lawsuits/harvey-storm-water-releases-were-unlawful-government-takings-lawsuits-idUSKCN1BO0DS.

[4] 499 S.W.3d 793 (Tex. 2016).

[5] 568 U.S. 23, 133 S.Ct. 511 (2012).

[6] *See* John Echeverria and Robert Meltz, *THE FLOOD OF TAKINGS CASES AFTER HURRICANE HARVEY*, Takings Litigation, Oct. 23, 2017, https://takingslitigation.com/2017/10/23/the-flood-of-takings-cases-after-hurricane-harvey/ (stating that, "all of these cases would have been laughed out of court prior to the Supreme Court's 2012 decision in *Arkansas Game & Fish Comm'n v. United States*," but that the "fact-specific framework for analyzing such claims" put forth by the Supreme Court in the *Arkansas Game* case now "gives them a shot.").

[7] *See* Perry Cooper, *Harvey Flood Victims Face Uphill Battle Suing Governments*, Litigation on Bloomberg Law, Aug. 31, 2017, https://www.bna.com/harvey-flood-victims-n73014464034/ ("A 2016 Texas Supreme Court ruling [Harris County Flood Control Dist. v. Kerr] and lessons from the aftermath of Hurricane Katrina point to a difficult road ahead for Houston-area residents seeking to hold county and governmental bodies liable for flood damage from Hurricane Harvey.").

[8] Tex. Const. art. I, § 17(a).

clause" of the Texas Constitution. "At the heart of the takings clause lies the premise that the government should not 'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[9] Sovereign/Governmental[10] Immunity does not shield government entities or political subdivisions from liability for compensation under the takings clause.[11]

The term "taking" is used as shorthand to refer to the three types of claims: (1) taking, (2) damaging, and (3) destroying property.[12] The taking may be physical or regulatory.[13] Most flooding inverse condemnation cases involve physical takings where an intentional action taken by the government causes flooding on private land, causing the property to be taken for all practical purposes the same as if the state had formally condemned the property for public use. "A physical taking may occur when the government physically appropriates or invades private property, or unreasonably interferes with the landowner's right to use and enjoy it."[14] The ultimate determination of whether the facts are sufficient to constitute at taking is a question of law.[15]

ELEMENTS OF A STATE TAKINGS CAUSE OF ACTION

A constitutional takings claim consists of three main elements: (1) the state or political subdivision intentionally performed certain acts under its lawful authority; (2) resulting in a taking, damaging, or destruction of the plaintiff's property; (3) for public use.[16] The Texas Supreme Court in *Kerr* also identified other elements besides intent that were pivotal in its decision: "Affirmative Conduct, Specificity, and Public Use."[17] Of these additional elements identified by the Supreme Court in *Kerr*, Affirmative Conduct and Specificity are subsets of first main element, that the government must "intentionally perform certain acts," as explained below.

INTENT

Most of Texas' takings jurisprudence focuses on the element of intent.[18] "[T]he requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result."[19] "The government's knowledge must be determined as of the time it acted, not with the benefit of hindsight."[20] "[T]he State is not strictly

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[9] *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004) (citing *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980).

[10] Although the terms are often used interchangeably, sovereign immunity refers to the State's immunity, while governmental immunity from liability protects political subdivisions of the State such as counties, cities, and school districts. *See Texas Dept. of Aging & Disability Services v. Beltran*, 350 S.W.3d 410, 413 n.2 (Tex. App.—El Paso 2011, pet. denied).

[11] *Gragg*, 151 S.W.3d at 550; *Kerr*, 499 S.W.3d at 799.

[12] *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 n. 2 (Tex. 2004).

[13] *Gragg*, 151 S.W.3d at 554.

[14] *Id*. (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992)).

[15] *Mayhew v. The Town of Sunnyvale*, 964 S.W.2d 922, 932-33 (Tex.1996).

[16] *Steele v. City of Houston*, 603 S.W.2d 786, 788-92 (Tex. 1980); *City of Socorro v. Campos*, 510 S.W.3d 121, 126 (Tex. App.—El Paso 2016, pet. denied).

[17] Kerr, 499 S.W.3d at 799.

[18] *Id*.

[19] *Gragg*, 151 S.W.3d at 555.

[20] *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009).

liable under the takings clause for all intentional actions."[21] "The State cannot have greater liability than would a private citizen engaging in the same conduct."[22] "[M]ere negligence which eventually contributes to the destruction of property is not a taking."[23]

Intent was a major issue in the landmark *Gragg* case, where landowners and lessees of ranch property claimed that the construction and operation of Tarrant Regional Water District's (District) Richland-Chambers Reservoir caused a significant change in flooding characteristics that damaged a ranch downstream.[24] In *Gragg*, the District claimed that the record established no more than mere negligence because "if the reservoir is operated as intended, it would not add more water downstream than would naturally pass through the reservoir."[25] All the parties agreed that the ranch had also flooded prior to the construction and operation of the reservoir, and the District argued that the only way more water would have passed downstream is if the reservoir was operated negligently.[26] But the Texas Supreme Court stated that the property was "rendered useless for its intended purpose because the reservoir's construction and operation changed the *character* of that flooding."[27] The plaintiffs had introduced evidence showing that the District's releases "actually resulted in unnatural surges of water," causing the water to arrive sooner, flow faster, and "more forceful, deeper, and longer-lasting,"[28] making it economically infeasible to continue using the property as a high-intensity cattle-ranching operation. The court also cited that "the District's own modeling showed that the number and duration of floods at the Ranch in the 1990s, after the reservoir's construction, were higher than in the 1940s, a period of comparable rainfalls."[29] The Texas Supreme Court held "that the evidence presented is legally sufficient to support the trial court's findings that the reservoir caused recurrent destructive changes in flooding characteristics that directly impacted the Gragg property such that it was no longer usable for its intended purpose and was taken."[30]

Comparatively, the Texas Supreme Court found that the requisite intent was lacking in the recent *Kerr* case. In *Kerr*, approximately 400 homeowners located in the upper White Oak Bayou watershed in Harris County sued Harris County and Harris County Flood Control District (collectively the County) asserting a takings cause of action for flood damage that occurred during Tropical Storm Francis in 1998, Tropical Storm Allison in 2001, and another unnamed storm in 2002.[31] Prior to those three flood events, the homeowners' properties had suffered little to no flood damage, but the area had a long history of flooding.[32] Due to these past flooding issues, Pate Engineers was hired to develop a flood-control plan, which was approved by the County in 1984.[33] This "Pate Plan" proposed channel improvements combined with detention basins with the goal

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[21] *City of Anson v. Harper*, 216 S.W.3d 384, 392 (Tex. App.—Eastland 2006, no pet.).
[22] *Id*. (citing *Jennings*, 142 S.W.3d at 313).
[23] *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997).
[24] *See Gragg*, 151 S.W.3d at 549.
[25] *Id*. at 555.
[26] *Id*.
[27] *Id*. (emphasis in original).
[28] *Id*.
[29] *Id*. at 553.
[30] *Id*. at 549.
[31] *Kerr*, 499 S.W.3d at 795.
[32] *Id*.
[33] *Id*.

of eliminating the 100-year flood plain in the upper portion of the watershed.[34] Despite being approved, the Pate Plan was never fully implemented, and flooding continued.[35] Instead, a new study by Klotz Associates was commissioned to address the flood concerns.[36] The Klotz Plan called for measures different from the Pate Plan.[37] The homeowners claimed that the flooding of their homes was caused by the County's approval of upstream development, combined with a failure to implement the Pate Plan.[38] The County filed a combined plea to the jurisdiction and motion for summary judgment, contending that no genuine issue of material fact had been raised on the elements of the takings claim.[39] The trial court denied the motion, and the court of appeals affirmed.[40]

In a narrow 5-4 decision, the Texas Supreme Court overturned the rulings of the lower courts, and rendered judgment dismissing the case. On the issue of intent, the homeowners argued that their expert provided reliable expert testimony that unmitigated development was substantially certain to result in increased flooding along the bayou in the vicinity of the homeowners' properties, and that full implementation of the Pate Plan would have prevented flooding of all properties not in the 100-year flood plain. The court held that "the homeowners offered no proof that the County was substantially certain its approval of development would result in the flooding of the homeowners' particular lots."[41]

The homeowners contended that court's prior holding in *Gragg* helped their case, because that decision recognized that the recurrence of flooding is probative on the issue of the intent.[42] However, the Texas Supreme Court rejected the homeowners' reliance on *Gragg*. The court reasoned that recurrence can be probative on the issue of intent, but the government's knowledge must be determined as of the time it acted, not with the benefit of hindsight.[43] The flooding events cited by the homeowners occurred in 1998, 2001, and 2002, but the development that the homeowners claimed was responsible for the flooding ended no later than 1990, years before those events.[44] "The homeowners' recurrence argument is made with the benefit of hindsight."[45] The court also stated, "[i]n *Gragg*, one of the flood flood-control district's experts acknowledged that his own modeling showed that higher than natural flooding would occur on the plaintiffs' particular ranch in 10 out of 16 floods, the district's records showed hundreds of releases by the district sufficient to cause flooding on the ranch, and there was evidence that the ranch had suffered "a large number of floods" after the district began the releases, whereas before the district's actions the ranch had never suffered from extensive flood damage."[46] "In today's case, in contrast, the record is devoid of evidence the County knew, at the time it allegedly approved of 'unmitigated'

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[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*. at 796-97.
[39] *Id*. at 797.
[40] *Id*.
[41] *Id*. at 807.
[42] *Id*. at 806.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.

development, that the homeowners' particular properties would suffer from recurrent flooding."[47] "A conscious decision to damage certain private property for a public use is absent here."[48]

AFFIRMATIVE CONDUCT, SPECIFICITY, AND PUBLIC USE

The *Kerr* court also held that "there are other elements of a taking that render the homeowners' claim problematic."[49] Those elements analyzed by the court were Affirmative Conduct, Specificity, and Public Use.[50]

The Texas Supreme Court reviewed prior takings case law, and found that, "[w]e have always characterized a takings claim as based on some affirmative 'act' or 'action' of the government."[51] "We have not recognized a takings claim for nonfeasance."[52] Since nonfeasance cannot support a takings cause of action, the Court held the homeowners could not assert liability for a taking of their properties based on the County's failure to complete the Pate Plan.[53] Instead, the only "affirmative conduct" performed by the County that could possibly support a takings claim was the alleged approval of private development.[54]

The *Kerr* court also recognized that, "in order to form the requisite intent, the government ordinarily knows which property it is taking."[55] The government must know that a *specific* act is causing *identifiable* harm or know that *specific property damage* is substantially certain to result from an authorized government action.[56] The court stated, "[w]e have not recognized liability where the government only knows that someday, somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction."[57] The court determined this was fatal to the homeowners case. "[T]he homeowners offered no proof that the County was substantially certain that the homeowners' particular properties would flood if the County approved the new housing developments."[58]

The Texas Supreme Court also found that the homeowners failed to offer evidence that could prove that an alleged taking had occurred for or applied to "public use." "We have recognized that a taking may occur 'if the injury results from either the construction of public works or their subsequent maintenance and operation,' but we have not held that the public-use element is met where the government does nothing more than approve plats or building permits for private development."[59] "[T]here was no evidence that the County ever had designs on the homeowners' particular properties, and intended to use those properties to accomplish specific flood-control

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[47] *Id*.
[48] *Id*.
[49] *Id*. at 799.
[50] *Id*. at 799-804.
[51] *Id*. at 800.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*. at 805.
[59] *Id*. at 801 (citing *Likes*, 962 S.W.2d at 505).

measures."[60] "The approval of private development in this case—doing nothing more than allowing private parties to use their properties as they wish—presents at best a highly attenuated basis for meeting the public-use element of a takings claim."[61]

Thus, a takings claim based on flooding cannot be successful if the public receives no benefit from the alleged actions. Texas courts will "ensure that the public does not bear the burden of paying for property damage for which it received no benefit."[62]

RECURRENT FLOODING RESULTS IN A TAKING

In takings cases involving flooding, Texas courts will normally focus on the number of flood events to determine if they were recurrent enough to warrant compensation as a constitutional taking.[63] "While nonrecurrent flooding may cause damage, a single flood event does not generally rise to the level of a taking."[64] "[R]ecurrence 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."[65] "The recurrence requirement assures that the government 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."[66] The plaintiff in takings cases must establish "that the damage claimed is the result of a repeated and recurring injury rather than a sporadic one."[67] A claim that property was subject to possible flooding will not support a takings cause of action.[68]

Although success on the merits of a case for a taking based on flooding may only be possible if evidence of recurrence is offered, it may not be a pleading requirement to invoke the trial court's jurisdiction. In *City of Socorro v. Campos*,[69] residents within the "Patti Jo Subdivision" filed suit against the city for building diversion channel designed to redirect flood waters around another subdivision that had experienced extensive flooding in the past, the "Valley Ridge Subdivision."[70] Heavy rains fell in September 2013, and the diversion channel worked to spare the Valley Ridge

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[60] *Kerr*, 499 S.W.3d at 803.
[61] *Id*. at 804.
[62] *Gragg*, 151 S.W.3d at 554 (citing *Tex. Highway Dep't v. Weber*, 219 S.W.2d 70, 71-72 (Tex. 1949)).
[63] *See e.g. Durden v. City of Grand Prairie*, 626 S.W.2d 345, 347 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) (continuous flow of water across a property can be of such a recurring nature that it rises to the level of a taking); *City of Van Alstyne v. Young*, 146 S.W.3d 846, 850 (Tex. App.—Dallas 2004, no pet.) (No taking due to lack of evidence that city was aware of any recurrent flooding that would have put the city on notice that the flooding of the homeowners' home was substantially certain to result from the city's decision not to replace the sump pumps at a sewer lift station; fact that city knew the old pumps would fail was not the same as knowledge that their decision not to replace the pumps would result in a flood.); *Evatt v. Texas Department of Transportation*, No. 11-05-00031-CV, 2006 WL 1349352, at *5 (Tex. App.—Eastland 2006 May 18, 2006, pet. denied) (mem. op.) ("Given the anomalous amount of rainfall which produced the flooding that is at issue in this case, it would be impossible for the homeowners to allege in good faith that the Department knew or was substantially certain that their homes would flood as a result of the adjacent highway construction.").
[64] *Gragg*, 151 S.W.3d at 555.
[65] *Id*.
[66] *Id*.
[67] *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 108 (Tex. 1961).
[68] *See e.g. Howard v. City of Kerrville*, 75 S.W.3d 112 (Tex. App.—San Antonio 2002, pet. denied).
[69] 510 S.W.3d 121 (Tex. App.—El Paso 2016, pet. denied).
[70] *Id*. at 124.

Subdivision from flooding, but the changes made by the city caused the Patti Jo Subdivision to flood for the first time.[71] The Patti Jo Subdivision residents filed a takings claim, and the city filed a plea to the jurisdiction, arguing in part that "its actions in 2013 are not a taking because the petition alleges only a single event of flooding."[72] The El Paso Court of Appeals held that "recurrence goes to the merits of the plaintiff's claims and is not a pleading requirement to invoke the trial court's jurisdiction."[73] Texas jurisprudence is currently split on this issue. Another jurisdiction has held that recurrence is a pleading requirement.[74]

DAMAGES

"When the government takes private property without first paying for it, the owner may recover damages for inverse condemnation."[75] Takings damages include injury resulting from construction of works and of subsequent maintenance and operation.[76] "Adequate compensation does not include profits generated by a business located on condemned land."[77]

Recurrence can also effect a plaintiff's damages for a takings claim due to flooding. In *Brazos River Authority v. City of Graham*,[78] the Brazos River Authority's construction of a dam caused siltation in the Brazos River that eventually caused flooding in a sewage-disposal plant and a water-treatment plant that the City of Graham owned.[79] The evidence established that the dam's construction would subject the sewage-disposal plant to repeated flooding that rendered its operations impossible.[80] The Texas Supreme Court held that the river authority had taken the property.[81] The court ruled that compensation was to be based upon the difference in the plant's value before and after the dam's construction and operation.[82] On the other hand, the water-treatment plant had only flooded once, even though it was possible that it could flood more times in the future as siltation increased.[83] The Texas Supreme Court held that the City of Graham was not entitled to compensation for the diminished value of the plant; the city was only legally entitled for injuries that resulted from the specific flood.[84]

FEDERAL TAKINGS CLAIMS

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[71] *Id*. at 125.
[72] *Id*. at 130.
[73] *Id*. at 130-31 (citing *City of El Paso v. Mazie's, L.P.*, 408 S.W.3d 13, 25 (Tex. App.—El Paso 2012, pet. denied) (citing *Doss v. City of Victoria*, No. 13-07-00306-CV, 2007 WL 4442616 (Tex. App.—Corpus Christi-Edinburg 2007, no pet.) (mem. op.))).
[74] *See Toomey v. Texas Dept. of Transp.*, 01-05-00749-CV, 2007 WL 1349352 (Tex. App.—Eastland May 18, 2006, pet. denied).
[75] *Gragg*, 151 S.W.3d at 554.
[76] *See Hildalgo County Water Improvement Dist. No. 2 v. Holderbaum*, 11 S.W.2d 506, 507 (Tex. Comm'n App. 1928, judgm't adopted).
[77] *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 869 (Tex. 2009) (citing *Herndon v. Hous. Auth.*, 261 S.W.2d 221, 222–23 (Tex. Civ. App.—Dallas 1953, writ ref'd)).
[78] 354 S.W.2d 99 (Tex. 1962).
[79] *Id*. at 101-02.
[80] *Id*. at 104.
[81] *Id*. at 106.
[82] *Id*. at 101, 111.
[83] *Id*. at 108.
[84] *Id*. at 108, 111.

The Federal takings clause is very similar to the takings provision in the Texas Constitution. The Fifth Amendment to the United States Constitution states, "[n]or shall private property be taken for public use, without just compensation."[85] Texas applies a similar standard as "federal courts have applied in determining whether the government's actions have taken property affected by flooding."[86]

The main difference, historically, was that federal courts seemed to require more evidence of permanent or inevitable recurring floods compared to Texas courts to establish a constitutional takings claim.[87] "[O]ne, two, or three floodings by themselves do not constitute a taking."[88] However, in *Ark. Game and Fish Comm'n v. United States*,[89] the United States Supreme Court arguably lessoned the standard for federal takings claims by holding that the government was required to pay compensation for a temporary taking of property caused by flooding.

In *Arkansas Game*, the Arkansas Game and Fish Commission ("Commission") sued the United States alleging that temporary deviations from the U.S. Army Corps of Engineers ("Corps") adopted Water Control Manual ("Manual") constituted a taking of property that entitled the Commission to compensation.[90] The Manual had set seasonally varying rates for the release of water from the Clearwater Dam ("Dam"), which was located 115 miles upstream of the Commission's Dave Donaldson Black River Wildlife Management Area ("Area").[91] Periodically from 1993 until 2000, the Corps had authorized deviations from the Manual that extended flooding into the Area's peak timber growing season at the request of farmers.[92] This flooding benefitted the farmers, but after testing the effect of the deviations to the Manual, the Corps abandoned the proposed revision and ceased its temporary deviations.[93]

The Commission alleged that the deviations caused sustained flooding during tree-growing season, and that the cumulative impact of the flooding caused the destruction of timber in the Area and a substantial change in the character of the terrain, necessitating costly reclamation measures.[94] The Court of Federal Claims ruled in favor of the Commission, holding that "the Corps' deviations caused six consecutive years of substantially increased flooding, which constituted an appropriation of the Commission's property, albeit a temporary rather than a permanent one."[95] However, the Federal Circuit reversed, because it concluded that government-induced flooding can give rise to a taking claim if the flooding is "permanent or inevitably recurring."[96]

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[85] U.S. CONST. amend. V.
[86] *Gragg*, 151 S.W.3d at 555.
[87] *See City of Socorro*, 510 S.W.3d at 131 (citing *Singleton v. United States*, 6 Cl.Ct. 156, 162-63 (Cl.Ct. 1984) ("[i]t is well established that the critical element of an inverse condemnation taking in a flooding case is that of inevitable recurring floods.")).
[88] *Natl. By-Products, Inc. v. U.S.*, 186 Ct. Cl. 546, 577, 405 F.2d 1256, 1273 (1969).
[89] 133 S. Ct. 511 (2012) ("*Arkansas Game*").
[90] *Id*. at 513.
[91] *Id*. at 513, 516.
[92] *Id*.
[93] *Id*.
[94] *Id*. at 513.
[95] *Id*. at 517.
[96] *Id*.

The United States Supreme Court, by a vote of 8-0, disagreed and held that precedent "indicates that government-induced flooding of limited duration may be compensable. None of the Court's decisions authorizes a blanket temporary-flooding exception to the Court's Takings Clause jurisprudence, and the Court declines to create such an exception in this case."[97] We "conclude that recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability."[98] "Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable."[99]

The Supreme Court made it a point to qualify its ruling, stating, "[w]e rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking."[100] The Court also stated other factors that are paramount in federal takings jurisprudence involving flooding. "Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action."[101] "So, too, are the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use."[102]

This dismissal by the Supreme Court of a bright line exemption from takings liability for only temporary flooding could result in an increase in claims being filed against the federal government for actions taking during Hurricane Harvey. Since temporary flooding is not an automatic bar for these potential suits, attorneys for flooding victims may view success with these types of takings claims as being more likely post-*Arkansas Game*.

CONCLUSION

As the jurisprudence associated with takings claims continues to evolve at the state and federal level, it will be interesting to analyze how courts strike the balance between government entities' need to operate without threat of open-ended liability and compensation for property owners whose property is being damaged or taken by government actions for the public good. The recent influx of these types of takings lawsuits in the wake of Hurricane Harvey could serve to further clarify exactly what sort of government conduct is and is not a taking of private property with respect to flooding.[103] In any case, this sort of conflict between the government, property owners, and mother nature is sure to continue into the future.

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[97] *Id*. at 513.
[98] *Id*. at 515.
[99] *Id*. at 519.
[100] *Id*. at 522.
[101] *Id*.
[102] *Id*.
[103] *See San Jacinto River Auth. v. Burney*, Nos. 01-18-00365-CV, 01-18-00406-CV, 01-18-00407-CV, 2018 Tex. App. LEXIS 9891 (App.—Houston [1st Dist.] Dec. 4, 2018); *Waller v. Sabine River Auth. of Tex.*, No. 09-18-00040-CV, 2018 Tex. App. LEXIS 10010 (App.—Beaumont Dec. 6, 2018).