Mock Class with Hannah Wiseman
Property Law
Penn State Dickinson Law—University Park

I'm excited to have the opportunity to talk with you during our virtual mock class. At Penn State Dickinson Law, I teach classes in the areas of Energy Law, Land Use Law, and Property Law. Land Use and Property topics address what you may and may not do with property that you own or rent, whether due to the court-created "common law" or to governmental regulation of your property. The "common law" created by courts includes rules such as the law of "nuisance," which prevents you from using your property in a way that substantially, unreasonably interferes with someone else's enjoyment of his or her property. So if you play loud music in the middle of the night, for example, a court might deem this to be a nuisance. If your neighbor sues you, the court is likely to "enjoin" (stop) you from playing loud music in the middle of the night, or require you to pay damages to your neighbor who cannot sleep in her apartment due to your loud music.

Courts view the common law principles that constrain your use of property as "background principles" of property law—rules that have existed for a long time and have long defined what you are not allowed to do with your property. So when you buy a home or lease an apartment, there are certain "ground rules" that you are expected to be on notice of, such as the fact that you do not have a right to use your property in a manner that creates a nuisance for others. Therefore, if a governmental entity, such as a city, state, or the federal government, issues a regulation that constrains your use of property so as to prevent your creation of a nuisance, courts will assume that this regulation is permissible and does not violate a state constitution or the U.S. Constitution. Since you never should have expected to be able to use your property in a manner that created a nuisance, you lacked a property right to do nuisance-creating things. In other words, your purchase or rent of property did not include purchase or rent of the right to create unbearable smells, smoke, noise, or similar irritants that drift onto other people's property.

In other cases, though, a local (city, town, township, etc.), state, or federal government entity regulates people's use of property, or does things to their property, in a manner that impermissibly interferes with people's private property rights. And sometimes, this interference can amount to an unconstitutional "taking" of people's private property rights. The Fifth Amendment of the U.S. Constitution prohibits the federal government, state governments, and local governments from taking "private property for public use without just compensation." Many state constitutions include the same language or very similar language.

A government's "taking" of property can involve a government entity actually taking the property physically, by flooding it or building a highway on it, for example. A taking can also occur when a government regulates property in a manner that interferes with an established property right and reduces the value of property. . . .

The following takings case involves an action by a federal government actor—the U.S. Army Corps of Engineers. The Corps is responsible for owning and maintaining many of the dams in the United States that help control flooding. In this case, the Corps owned and operated flood control reservoirs near Houston.

The plaintiffs in this case—the people filing a complaint and arguing that the defendant violated the law—were the downstream owners (below the dam) whose properties the Corps flooded during Hurricane Harvey. The defendant—the entity that allegedly did something wrong—was the Corps. The plaintiffs filed their complaint in the U.S. Court of Federal Claims, which addresses cases in which plaintiffs claim that the federal government owes them money. The defendant (the Corps) filed a "motion to dismiss [the case] for failure to state a claim," which means that the Corps believed that the plaintiffs had failed to assert anything that defendants did that was officially "illegal." The court granted the motion to dismiss. **Note that an appellate court later reversed the decision excerpted below.** I still assign this case, though, because it is the more interesting one and illuminates several important legal issues.

147 Fed.Cl. 566
United States Court of Federal Claims.

IN RE DOWNSTREAM ADDICKS and Barker (Texas) Flood-Control Reservoirs

This Document Applies To: All Downstream Cases

Filed: February 18, 2020

[Note that "in re" means "in the legal case of; with regard to.]

OPINION AND ORDER

SMITH, Senior Judge

This case is brought by residents of Harris County [Texas] whose homes and properties were flooded by Hurricane Harvey in 2017. These individuals and families suffered both economic loss and the traumatic disruption of their lives, and they seek a remedy from the United States for an alleged taking of their property without just compensation. The Court can only dispense compensation for legal cause when a plaintiff's fundamental property rights have been violated by the United States. In bringing their Fifth Amendment Takings claim, plaintiffs allege that the United States Army Corps of Engineers ("Corps" or "Agency") violated their fundamental property rights.

Two questions must be asked. First, what property did the government take? Second, how did the government take that property? The answers to these questions go to the heart of the

Constitution's taking clause. The waters that actually caused the invasion came from the unprecedented floodwaters from Hurricane Harvey when it stalled over Houston for four days, dumping approximately thirty-five inches of water on Harris County. The federal government erected two dams in the 1940s to mitigate against flood damages in the plaintiffs' area. This storm, which overwhelmed the system's capacity was classified as a once in 2000-year event, which means the last such event occurred during the life of Jesus! [This is actually an inaccurate description of a 2000-year event. A 2000-year event is an event that has a 1 in 2000 chance of occurring in any given year.] Nevertheless, plaintiffs contend that their property was only inundated when the Corps opened the Addicks and Barker Reservoirs' (the "Reservoirs") gates to prevent additional upstream flooding. This leads the Court to the question of whether the government did something wrong? The plaintiffs do not allege that it did, and, even if the plaintiffs had made such an allegation, the Court does not have tort jurisdiction [jurisdiction over common law claims such as nuisance], so it cannot analyze whether the government action was negligent [in violation of a duty that the government owed to the private property owners]. The answer of what caused the damage is thus inescapable to the Court's eye and mind. The damage was caused by Hurricane Harvey, and such a hurricane is an Act of God, which the government neither caused nor committed.

The remaining question is what were the property rights allegedly taken? Plaintiffs suggest that the government took an easement against their property by storing of water on their lands. [An easement is a property right to *use* rather than possess land. A classic easement is when the electric utility owns an easement to place an electric pole and wire on your property.] Put a different way, plaintiffs allege that the government could have done more to ensure perfect flood control efforts, and because the government did not do more, it failed to stop the flooding of their lands. Of course, the water from the hurricane was not the government's water, unless the storm was also created by the government's wind and air and sun and sky. These were flood waters that no entity could entirely control. The government attempted to mitigate against them, but it could not. Thus, plaintiffs' claims are essentially that they were entitled to perfect flood control, simply because government set up a flood control system to help protect residents in the Houston area. Plaintiffs also claim that the mere presence of the water control structures means that the government owned all waters that passed through them. So, do plaintiffs have the right to be perfectly protected from flooding? The simple answer is no; the right to perfect flood control it is not recognized by either Texas property law or federal law. The purpose of the Constitution's Fifth Amendment protections is to protect legally recognized property rights, but those property rights can only be created by the states or the federal legislative and executive departments. While the Court sympathizes with the plaintiff's loss, the Court's function is to say what the law is, not what the law might become.

This case comes before the Court on defendant's Motion to Dismiss . . . . Plaintiffs allege that the Corps intentionally opened the gates and released massive volumes of water from the Addicks and Barker Reservoirs, causing widespread destruction to the homes and businesses located downstream from the Reservoirs along the Buffalo Bayou. Plaintiffs seek relief under the Takings Clause of the Fifth Amendment of the United States Constitution and contend that such a release was a temporary categorical physical taking . . . . ["Categorical" takings are government actions that the courts automatically deem to be a taking if the plaintiff can prove that they occurred—such as the government physically occupying private land.]

I. Background

A. Construction of the Addicks and Barker Dams and Reservoirs

Between 1854 and 1935, the Houston area experienced six major flood events along the Buffalo Bayou. . . . As a result of those . . . . floods, Congress directed the Corps to study flood protection along the Buffalo Bayou and . . . authorized construction of the Addicks and Barker Dams and their corresponding Reservoirs as part of the Buffalo Bayou and Tributaries Project ("Project"). The sole purpose of the Project was to mitigate against flooding downstream of the Reservoirs—detention basins behind the dams "designed to collect excessive amounts of rainfall which would then be released into Buffalo Bayou at a controlled rate."

Construction of the Barker Dam began in February of 1942 and concluded in February of 1945. Construction of the Addicks Dam began in May of 1946 and concluded in December of 1948. Their reservoirs "serve . . . to provide flood protection along Buffalo Bayou." . . . . Both Reservoirs are "dry dams," which means they generally do not hold any water. . . .

B. Plaintiffs' Acquisition of their Properties

Between 1976 and 2015, plaintiffs acquired their respective properties. The houses and structures on those properties were built between 1962 and 2016, either while under the ownership of plaintiffs or their predecessors. All of the test properties are located in Harris County, Texas, along the Buffalo Bayou, and downstream of the Reservoirs.

C. Hurricane Harvey and the Induced Surcharge Release

On August 25, 2017, Hurricane Harvey made landfall along the Texas coast as a Category 4 hurricane. Within twelve hours of making landfall, as Harvey moved towards Harris County, it weakened into a tropical storm but stalled over the Houston area for four days before moving into Louisiana on August 30, 2017. Harvey maintained tropical storm intensity the entire time it was stalled inland over southeast Texas. During the storm, the Reservoir watersheds received an estimated 32-35 inches of rain, and the average rainfall across Harris County was 33.7 inches. . . . Harvey fell within the range of a 2000-year to a greater than 5000-year flood event at all of the relevant storm gage locations.

On August 23, 2017, prior to Hurricane Harvey's landfall, the Governor of Texas issued a disaster proclamation . . . . In addition to . . . disaster proclamations, the Corps activated [a regional team to address the emergency situation and make decisions about how much water to release from the dams].

At approximately midnight on August 28, 2017, for the first time since the Reservoirs' construction, ... the Corps began releasing water from both Reservoirs. Despite these releases, the reservoir pools behind the dams continued to rise. On August 30, 2017, even as the Reservoirs were releasing water, both Reservoirs experienced record-level pool elevations . . . . On August 31, 2017, . . . uncontrolled water was flowing around the north end of the Addicks

Dam . . . . [S]urcharge releases of floodwaters remained necessary until September 16, 2017, at which point normal operations resumed. Despite the Corps' attempt to mitigate against flooding from Harvey's record-setting storm, plaintiffs' properties downstream of the Reservoirs sustained significant flood damage. In an attempt to ameliorate the effects of the damage caused by that record-setting natural disaster, FEMA has obligated over $1.6 billion in approved grants through the individual and households program and over $2 billion in obligated public assistant grants for disaster relief efforts.

III. Discussion

The Court will dismiss a case under . . . . "when the facts asserted by the claimant do not entitle him to a legal remedy."

The Takings Clause of the Fifth Amendment of the Constitution provides "nor shall private property be taken for public use without just compensation." When analyzing a takings claim, the Court will implement a two-step process. The Court's first step is to determine "whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a stick in the bundle of property rights." Once the Court has determined that the plaintiff possesses the requisite property right, the Court then decides "whether the governmental action at issue constituted a taking of that stick."

On August 25, 2017, Hurricane Harvey made landfall along the Texas coast as a Category 4 hurricane. In anticipation of high volumes of rain, the Corps closed the flood gates on both the Addicks and Barker dams to mitigate against downstream flooding. [I]n the early hours of August 28, 2017, the volume of water in the Reservoirs exceeded the capacity of the government-owned land [and] began to spill onto adjacent non-government-owned properties, and the Corps was forced to release water from both Reservoirs . . . . Despite the Corps' attempt to save the downstream properties from Harvey's floodwaters, plaintiffs' properties were inundated with water. These approximately 170 downstream cases ensued, and they turn on the following singular question:

> Do plaintiffs have a protected property interest in perfect flood control, under either federal or state law, when a government-owned water control structure erected for the sole purpose of flood control fails to completely mitigate against flooding created by an Act of God?

Upon careful consideration, and with all due sympathy to the plaintiffs' plight, the Court finds that, under both federal and state law, plaintiffs lack the requisite property interest in perfect flood control in the face of an Act of God, and thus cannot succeed on their takings claims.

A. Property Rights

The courts have long held that "[f]or a takings claim to succeed under the Fifth Amendment, under either a physical invasion or regulatory takings theory, a claimant must first establish a compensable property interest." Moreover, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."

The Supreme Court has repeatedly held that "state law defines property interests." . . . .

B. Perfect Flood Control

1. State Law

As property rights are defined by state law, the Court must look to Texas law to determine whether plaintiffs have a protected property interest in perfect flood control in the wake of an Act of God. After careful review of over 150 years of Texas flood-related decisions, the Court finds that the State of Texas has never recognized such a property right, and, in fact, that the laws of Texas have specifically excluded the right to perfect flood control from the "bundle of sticks" afforded property owners downstream of water control structures. Based on the Court's understanding of Texas jurisprudence, and for the reasons set forth below, the Court concludes that Texas does not recognize a right to perfect flood control in the wake of an Act of God.

Article 17 of the Texas State Constitution provides that "[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." Texas courts have routinely interpreted this clause to mean that property is owned subject to the pre-existing limits of the State's police power [which is the power to regulate people's health, safety, and general welfare]. Texas courts have also consistently recognized efforts by the State to mitigate against flooding as a legitimate use of the police power.

The Texas Supreme Court has long recognized that flooding is a major issue within the state's borders and that the government must endeavor to control it. In 1926, the Supreme Court of Texas explained that "[o]ver 30,000,000 acre-feet of water annually passes unutilized from the streams of Texas to the Gulf of Mexico, much of it in floods that cause great destruction. Good business sense demands that the floods of Texas be controlled." . . . . This decision demonstrates that the right to protect the public from flooding is not something new, but rather "of ancient origin, universal in its extent."

The Court interprets such precedent to stand for the conclusion that Texas law clearly recognizes the state's authority to mitigate against flooding . . . . Additionally, Texas jurisprudence illuminates precisely how the state's police power is superior to the rights of property owners, and waters are "subject to regulation and control by the State, regardless of the riparian's land which may border upon the stream." . . . .

In addition to holding that efforts expended to mitigate against flooding constitute a legitimate use of [state power], Texas courts have rejected the theory that failure to perfectly mitigate against Acts of God can rise to the level of a taking under Texas law. The court in *McWilliams v. Masterson* held that "[i]t has long been the rule that one is not responsible for injury or loss caused by an act of God." . . . . Under Texas law, to determine whether an occurrence was an Act of God, a court need only ask whether it was "so unusual that it could not have been reasonably expected or provided against." . . . . As Harvey was a 2000-year storm, the likes of which the Houston area had never seen, the storm was of a kind that "could not have been reasonably expected or provided against." As such, the Court concludes that Harvey was most assuredly an Act of God.

When determining whether a party is liable for flood-related damage to another's property, Texas courts have routinely held that "it must be shown that [an] unlawful act caused damages to the owner which would not have resulted but for such act." . . . . Texas law has specifically limited liability in both a takings and a tort context where the operator of a water control structure fails to perfectly mitigate against flooding caused by an Act of God. . . . [T]he Court does not believe that Texas law provides plaintiffs with a right to be free from flood waters.

. . . . Under Texas law, even when a release of water is intentional, a taking does not occur where "the [water control structure] never released more water than was entering the reservoir via rainfall." This is particularly true where the water is not released directly onto a plaintiff's property, but rather is released into a river that consequently floods properties downstream.

* * *

In sum, there exists no cognizable property interest in perfect flood control against waters resulting from an Act of God, and "the Fifth Amendment does not make the Government an insurer" against flooding on a plaintiff's real property when the government fails to completely protect against waters outside of its control. The mere fact that plaintiffs' properties had not sustained this level of flooding prior to Harvey's landfall does not create the right to or provide plaintiffs with a legitimate, investment-backed expectation in perfect flood control. Furthermore, the Court must categorically reject plaintiffs' arguments that the water on their properties was Corps' water. The Reservoirs are dry reservoirs and they contained no water until Harvey made landfall. The closing and later opening of the gates under the Corps' induced Surcharge operation does nothing to make the water "government water," as opposed to "flood waters" . . . .

IV. Conclusion

As the government cannot take a property interest that does not exist, and as the Corps cannot be held liable when an Act of God inundates a plaintiff's real property with flood waters that the government could not conceivably have controlled, plaintiffs have failed to state a claim upon which relief can be granted.

Though the Court is sympathetic to the losses plaintiffs suffered as a result of Hurricane Harvey, the Court cannot find the government liable or find it responsible for imperfect flood control of

waters created by an Act of God. For the reasons set forth above, defendant's MOTION to Dismiss is hereby **GRANTED** . . . for failure to state a claim upon which relief could be granted. . . .

IT IS SO ORDERED.