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INVERSE CONDEMNATION: STANDARDS AND BURDENS OF PROOF

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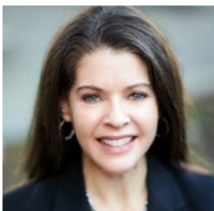

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INVERSE CONDEMNATION: WHAT IT IS AND HOW TO RAISE IT[1]

Generally speaking, inverse condemnation is a cause of action against a public entity when a taking of private property has occurred without a formal exercise of the eminent domain power.[2] The proper way to raise that cause of action varies from state to state. The majority of states allow separate claims to be brought for inverse condemnation, though the statutes of limitation vary greatly.[3] Some states allow inverse claims to be brought as counterclaims,[4] and others either require or allow the affected property owner to file a mandamus action for the government to institute condemnation proceedings.[5] Generally, most inverse condemnation claims are based in state constitutions and therefore are not barred by statutory notice provisions or sovereign immunity.[6]

Some jurisdictions have fee-shifting provisions that apply in the event of a successful inverse condemnation claim.[7] These statutes can lessen the burden on an individual property owner to file an inverse condemnation action.

BURDENS OF PROOF

While most states recognize inverse condemnation claims for both taking and damage claims,[8] a minority of states only allow inverse condemnation claims when there is a physical invasion.[9] Most require some affirmative action from the government that leads to the damage claimed.[10] What types of damages are compensable remain varied. For instance, some states recognize damages for impaired access,[11] while others do not. Damages must be proved by the property owner, and are generally established by the loss in fair market value before the action constituting inverse condemnation and after.[12] Some states also allow damages for expenses incurred in mitigating damages,[13] or for pre-condemnation damages that accrued before the condemnation was filed.[14] Inverse condemnation can be a powerful tool for property owners whose properties are damaged. For example, in a 2019 unpublished opinion, the Michigan Court of Appeals held that inverse condemnation was a proper claim for Flint property owners who had received contaminated water.[15]

REGULATORY CLAIMS

Inverse condemnation is also used as a tool against excessive local government action. Property owners can bring inverse condemnation claims for "regulatory takings"—when a regulation goes "too far" and deprives an owner of some right or rights in their property.[16] Usually, the regulations at issue are zoning ordinances. The majority of states require that property owners first seek variances or other remedies before claiming an inverse condemnation.[17] Additionally, many states require the property owner to be deprived of all or substantially all of the economic advantages of ownership of the property.[18] While most states offer three options for regulatory inverse condemnation claims—damages, an injunction, or invalidation of the regulation,[19] states such as New York, California, and Hawaii have held that the only available remedy is the invalidation of the regulation at issue.[20]

FLOODING CASES

Many states also recognize inverse condemnation claims related to condemnor actions that result in the flooding of properties. Federally, however, the bar that property owners have to jump over may be lower than in some states. The United States Supreme Court has recognized that flooding, even temporary flooding, can give rise to a takings claim under the Fifth Amendment.[21] Some states disagree. Analyzing each of the jurisdictions that the authors practice in, we can see just how differently inverse condemnation claims for flooding of property are evolving.

Georgia

Georgia allows inverse condemnations for flooding of a property based on both direct actions by condemnors and by continuing nuisances, such as a failure to maintain stormwater systems.[22] Georgia differs from the federal standard in that the nuisance must be continuing, and that single instances are not sufficient to create a claim for inverse condemnation[23] unless those instances can be tied to the condemnor's failure to maintain proper drainage structures.[24] Additionally, direct actions by condemnors can include the diversion of water onto the property[25] or when construction of a nearby project causes flooding onto the property.[26]

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North Carolina

North Carolina allows claims for flooding when the flooding is a foreseeable, direct result of government action or construction, and is not attributable to "an act of God."[27] Additionally, the flooding must be recurring for permanent liability to attach.[28] When such flooding occurs, property owners can seek an inverse condemnation action for an "easement for flooding" and all related damages.[29]

Texas

A property owner can file an inverse condemnation petition under Art. I, § 17 of the Texas Constitution with the court of competent jurisdiction for a taking, damaging, or destruction of his or her property. In Texas, the recurrence of flooding onto a property may be a probative factor in determining whether there is a taking rising to the level of inverse condemnation.[30] Single flood events do not rise to the level of a taking.[31] Instead, a property owner must show that the damage claimed is a repeated and

recurring injury.[32] Additionally, released water that unnaturally erodes a substantial amount of a downstream owner's land can also rise to the level of inverse condemnation.[33]

The Texas Supreme Court dictates three essential elements for a finding of inverse condemnation: (i) intent, (ii) causation, and (iii) public use. All three elements were present in Tarrant Reg'l Water Dist. v. Gragg.[34] In this case, a ranch had seventeen miles of river frontage and was used for cattle grazing, particularly for young cattle.[35] Although the ranch experienced regular flooding, it was relatively easy to move the cattle around seasonally and the regular, slow flooding also meant the ranchland was quite fertile.[36] But in "March 1990, extremely heavy rains caused extensive flooding throughout the Trinity Basin, and the [Water Control] District released water through the reservoir's floodgates for the first time. For the first time in its history, the Gragg Ranch suffered extensive flood damage."[37] The Tarrant Regional Water District argued that the landowner, Gragg "failed to adduce any competent or reliable evidence that the reservoir's construction and operation caused the flood damage that the Ranch experienced. Second, if Gragg established causation, the District claim[ed] that its actions were merely negligent and d[id] not, as a matter of law, constitute a taking."[38]

The Court found that all three elements were present, especially focusing on causation and intent. On causation, "Gragg was required to prove that the same damaging floods would not have occurred under the same heavy rainfall conditions had the dam not been constructed."[39] It was not enough merely for the landowner to trace the damage back to the dam release. He had to prove that the damage would not have occurred but for the dam's construction. This heavy burden was met by the Gragg family at the trial court level, and the Court did not overturn it. As to intent, the Court emphasized the difference between a negligent taking and an intent to take the property. The element of intent may be proven by circumstantial evidence, and can be based on evidence that "a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result."[40]

In contrast to the Gragg case, the recent flooding within the San Jacinto Regional Water District's territory has led to some failed inverse condemnation claims by plaintiffs after Hurricane Harvey.[41]

Virginia

Virginia follows the federal standard in holding that a single occurrence of flooding may give rise to an inverse condemnation claim.[42] It also allows a property owner to bring a new inverse claim for each instance of flooding where the government's operation of a public improvement leads to that flooding.[43] Recently, however, Virginia courts have focused more on whether the alleged taking is for a public use—focusing on purposeful acts or failures to act instead of negligence.[44]

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Federal

If the federal government took a property owner's real property without first undergoing the statutory condemnation procedures that are required, she should file a Complaint in the Court of Federal Claims. This Article I court was originally created by Congress in 1855 (then called the Court of Claims) and given national jurisdiction to hear individual monetary claims against the federal government based upon the Constitution, federal statutes, executive regulations, or contracts.[45]

Alleging and proving a federal inverse condemnation claim draws from a storied history of United States Supreme Court cases analyzing whether certain conditions rise to the level of a taking. The "polestar" case to determine whether a governmental action rises to the level of a taking is Penn Central Transportation Co. v. City of New York.[46] The Supreme Court outlined several factors (nicknamed the Penn Central factors) for determining whether a taking has occurred: (i) "[t]he economic impact of the regulation on the claimant," (ii) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (iii) "the character of the governmental action. . . . [wherein a] 'taking' may more readily be found when the interference

with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[47]

Over decades of referring to this line of cases, the Court's opinion on whether or not a particular government action is a taking has become clear as mud.

> For reasons that probably owe more to case-by-case pragmatism than any concern for doctrinal clarity, the Supreme Court's Takings Clause jurisprudence has divided into two broad categories, commonly referred to as regulatory and physical takings, respectively. Regulatory takings typically occur when legal restrictions on the use of private property "go too far," depriving the owner of essential attributes of ownership. Physical takings result from incursions onto private property (normally referred to in quasi-military terms as "invasions" or "occupations") by the government or by parties acting under governmental authority.[48]

One of the higher-profile takings cases in recent years has been the In re Addicks and Barker (Texas) Flood-Control Reservoirs cases, colloquially referred to as the Harvey cases or Harvey takings cases. In late August 2017, Hurricane Harvey decimated the Texas Gulf Coast, dumping approximately 40+ inches of rain in the Houston area alone. Yet many of the people who flooded were high and dry during the hurricane event, only to be flooded days and weeks after the storm had passed. On the western side of Houston exist two dry reservoir dams, Addicks and Barker, which operate to store and release water during heavy rain events. Out of this factual background came two separate, but related, takings claims.

The Upstream plaintiffs claimed that when the federal government (through the U.S. Army Corps of Engineers) impounded water within the confines of the reservoirs but onto private lands, the government took their property.[49] In other words, like backfilling a bathtub, the government failed to buy out all of the land within the outer edges of the bowl of the reservoirs, much of which had been turned into largely single-family residential housing.[50]

The Downstream plaintiffs claimed that when the government eventually released all that water at approximately midnight between Sunday, August 27th and Monday, August 28th, it took Downstream plaintiffs' property by inundating their properties with water from days to weeks.[51] Interestingly, during discovery it turned out that the Corps knew precisely which properties would flood based on the rate of release and internal mapping.

To handle such an unprecedented docket, then-Chief Judge Braden of the Court of Federal Claims created a Master Docket (1:17-cv-3000) and split that docket into an Upstream sub-docket (1:17-cv-9001) and a Downstream sub-docket (1:17-cv-9002). The judges in each case organized the thousands of cases by appointing leadership counsel and designating test property plaintiffs. The test property plaintiffs were intended to be akin to bellwether plaintiffs, whose different fact scenarios were to test out governmental takings liability for each.

The Upstream cases went to trial in early 2019, with an affirmative liability finding of a flowage easement by Judge Lettow in December of 2019. In that opinion, Judge Lettow held: "The government's suggestion that this flooding is not a compensable taking because it was temporary and confined to a single flood event carries no water. . . . The flooding that occurred was the direct result of calculated planning."[52] The Upstream cases now face a trial on damages, expected to occur in the fall of 2021.

Downstream plaintiffs were not so fortunate. After Judge Braden took senior status, Judge Smith took up the Downstream sub-docket and pushed all case deadlines back a year. He held a hearing on the government's Motion to Dismiss and the parties' cross-Motions for Summary Judgment. Without a liability trial, Judge Smith granted the government's Motion to Dismiss and their Motion for Summary Judgment in full in February 2020, and dismissed the downstream cases in September 2021.[53] The downstream plaintiffs filed their notices of appeal in

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November 2020 and their appellate briefs were filed on March 8, 2021. [54]

For the Downstream cases, Judge Smith ruled specifically that "[t]he 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' as articulated in Central Green. 531 U.S. 425."[55] The opinion focused on two points: (i) defining that the alleged property interest at issue was a right to be free from flood waters, and finding no such property right exists under Texas state law or federal common law, and (ii) the character of the waters that flooded the property were not federal waters, but Act-of-God waters. Indeed, Judge Smith made his opinion clear from the first phrasing of the issue: "Do plaintiffs have a . . . property interest in perfect flood control . . . when a government-owned [dam] . . . fails to completely mitigate against flooding created by an Act of God?"[56]

How to reconcile these inconsistent liability rulings? No doubt this will be the primary subject of the (inevitable) appeals to the Federal Circuit.

PLEADING AND TRIAL STRATEGY

The authors of this outline have found it advisable to be as detailed as possible in pleading an inverse condemnation action, as they are often the target of motions to dismiss or state law equivalents targeted at ending the litigation even before discovery. On the whole, trial courts are generally more familiar with tort claims, and owners are encouraged to provide a comprehensive recitation of factual claims and a thorough explanation of the applicable law governing inverse condemnation claims, so as to educate the trial judge from the outset of the litigation.

Inverse condemnation trials often focus on narrow determinations of fact, especially relating to whether the condemnor *intended* to damage private property for a public use or whether it was merely negligent in its acts. Although these are tort law principles—and inverse condemnation claims are not tort claims—trial courts may nonetheless apply them as they focus on the public use requirement and consider whether the condemnor could have filed a *de jure* condemnation action to take or damage the property rights it is claimed to have *de facto* taken or damaged. Practitioners should be thorough in producing evidence in support of their inverse condemnation claim at trial, to ensure that the trier of fact is fully apprised of the scope of the alleged taking and can fairly render a verdict in favor of the aggrieved property owner.

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Notes

1 The authors would like to recognize and thank Ashlynn Hutton, an attorney with Parker Poe Adams & Bernstein LLP, for her substantial contribution to researching and writing this article.

2 *§* 21:43 Inverse condemnation, 3 Local Government Law § 21:43 (Oct. 2020).

3 See, e.g., N.C. Gen. Stat. Ann. §§ 40A-51, 136-111 (2011) (24 months); Tomasek v. State, 196 Or. 120 (1952) (six years without notice requirement); White Pine Lumber Co. v. City of Reno, 801 P.2d 1370 (Nev. 1990) (fifteen years).

4 See, e.g., North Carolina Dep't. of Transp. v. Cromartie, 214 N.C. App. 307 (2011); State of Texas v. Whataburger, Inc., 60 S.W.3d 256 (Tex. Ct. App. 2001); Herring v. Gulick, 5 Haw. 57 (1883) (it is not decided whether an inverse claim must be made in the condemnation action or may be brought as a separate action).

5 See, e.g., Nolan and Nolan v. City of Eagen, 673 N.W.2d 487 (2003) (Minnesota inverse claims are petitions for writ of mandamus seeking the condemnor to commence inverse condemnation proceedings); Kruse v. Village of Chagrin Falls, 74 F.3d 694 (6th Cir. 1966) (Ohio inverse claims can be brought as own action or through petitions for writ of mandamus); State ex rel. Henson v. West Virginia Dep't. of Transp., 203 W. Va. 229 (1998); Mapes v. Madison Cnty., 252 Iowa 395 (1961).

6 *§* 27:30 Notice of claim; statute of limitations, 4 Local Government Law § 27:30 (Oct. 2020); compare, Hise v. State of Tennessee, 968 S.W.2d 852 (Tenn. Ct. App. 1997) (claims only against counties, not the state).

7 See, e.g., Va. Code Ann. § 25.1-420.

8 See The Law of Eminent Domain: Fifty-State Survey, American Bar Association Condemnation, Zoning & Land Use Committee (2012).

9 See, e.g., Robinson v. City of Ashdown, 301 Ark. 226 (1990); O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981).

10 See, e.g., Christ v. Metro St. Louis Sewer Dist., 287 S.W.3d 709 (Mo. Ct. App. 2009).

11 See, e.g., Third & Catalina Assocs. v. City of Phoenix, 182 Ariz. 203 (App. 1994).

12 See, e.g., A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty., 222 Ariz. 515 (App. 2009); Fulton Cnty. v. Baranan, 240 Ga. 837 (1978).

13 See, e.g., Cuna Mut. Life Ins. Co. v. Los Angeles Cnty. Metro. Transp. Auth., 108 Cal. App. 4th 382 (2003).

14 See, e.g., Klopping v. City of Whittier, 8 Cal. 3d 39 (1972); Clay Cnty. Realty Co. v. City of Gladstone, 254 S.W.3d 859 (Mo. 2008); Buzz Stew, LLC v. City of N. Las Vegas, 181 P.3d 670 (Nev. 2008).

15 Gulla v. State of Michigan, No. 340017, 2019 WL 320531 (Mich. Ct. App. Jan. 24, 2019).

16 See, federally, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (recognizing three criteria for a federal regulatory taking inverse claim).

17 See, e.g., The City of Coeur d'Alene v. Simpson, 142 Idaho 839 (2006); Molo Oil Co. v. The City of Dubuque, 692 N.W.2d 686 (Iowa 2005).

18 See, e.g., Homeward Bound, Inc. v. Anchorage Sch. Dist., 791 P.2d 610 (Alaska, 1990); Tim Thompson, Inc. v. Village of Hinsdale, 247 Ill.App.3d 863 (2nd Dist. 1993); Gove v. Zoning Bd. of Appeals of Chatham, 831 N.E.2d 865 (Mass. 2005); Bayside Warehouse Co. v. City of Memphis, 470 S.W.2d 375 (Tenn. Ct. App. 1971).

19 See, e.g., *§* 21:43 Inverse condemnation, 3 Local Government Law *§* 21:43 (Oct. 2020).

20 See Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587 (1976); Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979); Allen v. City & Cnty. of Honolulu, 58 Haw. 432 (1977).

21 Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 34 (2012) ("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.")

22 See, e.g., Hayman v. Paulding Cnty., 349 Ga. App. 77 (2019).

23 See, e.g., DeKalb Cnty v. Orwig, 261 Ga. 137, 139 (1991).

24 See Hayman, 349 Ga. App. 77.

25 See, e.g., Reid v. Gwinnett Cnty., 242 Ga. 88 (1978); McFarland v. DeKalb Cnty., 224 Ga. 618 (1968).

26 See, e.g., Dep't. of Transp. v. Ballard, 208 Ga. App. 474 (1993).

27 See Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603 (1983).

28 Or it must be shown that the property will be subject to inevitably recurring flooding. See id.

29 See id.

30 See, e.g., Kopplow Development, Inc. v. City of San Antonio, 399 S.W.3d 532 (Tex. 2013); Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546 (Tex. 2004).

31 See id.

32 See City of Van Alstyne v. Young, 146 S.W.3d 846 (Tex. App. 2004).

33 See Sloan Creek II, L.L.C. v. N. Texas Tollway Auth., 472 S.W.3d 906, 911 (Tex. App. 2015).

34 151 S.W.3d 546 (Tex. 2004).

35 Id. at 549.

36 Id.

37 Id. at 550.

38 Id. at 551.

39 Id. at 554.

40 Id. at 555.

41 See generally San Jacinto River Auth. v. Burney, No. 01-18-00365-CV, 2018 WL 6318506 (Tex. App.—Houston [1st Dist.] Dec. 4, 2018, no pet. h.).

42 See Livingston v. Virginia Dep't of Transp., 284 Va. 140, 152 (2012) ("our case law holds that a single occurrence of flooding can support an inverse condemnation claim.")

43 See id. at 152; 161.

44 See AGCS Marine Ins. Co. v. Arlington Cnty., 293 Va. 469, 479-83 (2017).

45 See United States Court of Federal Claims, https://www.uscfc.uscourts.gov/ (last visited March 12, 2021).

46 438 U.S. 104 (1978). See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 336 (2002) (quoting "polestar" language approvingly); Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar . . . remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings.").

47 Penn Cent., 438 U.S. at 124 (citations omitted).

48 Brian T. Hodges, Will Arkansas Game & Fish Commission v. United States Provide a Permanent Fix for Temporary Takings?, 41 B.C. ENVTL. AFF. L. REV. 365, 366 (2014); see also generally Richard A. Epstein, Physical and Regulatory Takings: One Distinction Too Many, 64 STAN. L. REV. ONLINE 99 (2012) (acknowledging the separate analyses for physical and regulatory takings, and arguing for stronger regulatory takings protections); Josh Patashnik, Physical Takings, Regulatory Takings, and Water Rights, 51 SANTA CLARA L. REV. 365 (2011) (same, for water-rights takings).

49 See generally Amended Individual Upstream Master Complaint, In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, Cause No. 1:17-cv-9001-CFL, Doc. 17 (Filed January 16, 2018).

50 Id.

51 In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, Cause No. 1:17-cv-9002-SGB, Doc. 23 (Filed January 16, 2018).

52 In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 252.

53 In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 147 Fed. Cl. 566.

54 In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, Cause No. 1:17-cv-9002-SGB, Doc. 243-247 (Filed Nov. 4, 2020); see also Taking – Addicks & Barkers Res.; Milton, et al. vs. United States, Docket No. 21-1131, Doc. No. 34 (Filed March 8, 2021).

55 147 Fed. Cl. at 583.

56 Id. at 576.

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