

Eminent Domain Update – Top Cases Impacting Water Law

Changing Face of Water Law 2022

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CONDEMNING GOVERNMENT OWNED PROPERTY – CONFLICTING PUBLIC USES

***Hidalgo County Water Improvement District No. 3 v. Hidalgo County Water Irrigation District No. 1*, 627 S.W.3d 529 (Tex. App. – Corpus Christi-Edinburg 2021) (pet. filed)**

The Hidalgo County Water Improvement District No. 3 (“Improvement District”) sought to extend a water line. It was unable to reach agreement with the Hidalgo County Water Irrigation District No. 1 (“Irrigation District”). As a result, the Improvement District filed a condemnation action against the Irrigation District to condemn a permanent underground easement. The Irrigation District challenged the taking under the paramount purpose doctrine and contended the acquisition would interfere with its existing public use by damaging its water lines and adversely impacting the structural integrity of its canal. The Irrigation District also contended the Improvement District could not show its use was of paramount public purpose. The Irrigation District later filed a plea to the jurisdiction asserting governmental immunity. The trial court granted the plea and dismissed the case. The Court of Appeals affirmed.

The case addresses the conflict of two elements of governmental sovereignty – eminent domain and governmental immunity. On the one hand, the power of eminent domain is inherent in sovereignty and is only limited by the constitutional constraints of adequate compensation and public use. On the other hand, governmental immunity is an “essential element of sovereignty” that protects the State, and its political subdivisions, from lawsuits for money damages.

The Court noted that the primary justification for immunity—at least in modern times—is “to shield the public from the costs and consequences of improvident actions of their governments.” Without this protection, public funds would be used to defend lawsuits and pay judgments instead of providing public services, leading to “governmental paralysis.” Thus, immunity “protects the public as a whole by preventing potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation.”

The Improvement District argues there is no threat to the Irrigation District of a judgment for money damages and, thus, immunity does not apply. In fact, the Constitution guarantees payment to the Irrigation District for the taking. It also argued immunity did not apply due to the *in rem* nature of the proceeding, but if it did, it had been waived. The Court of Appeals disagreed and held that, even without a threat of a money judgment, immunity helps preserve the separation of powers. A condemnation case involves the forced transfer of property. It effectively deprives the landowner governmental entity of the right not to engage in the transaction. It also requires, at a minimum, that the governmental entity expend public funds

defending the suit. Applying immunity in condemnation actions preserves the separation of powers by precluding the judiciary from interfering with the policy decisions of co-equal branches of government. Further, governmental entities enjoy immunity from suits for land. Finally, although the condemning statute at issue authorizes condemnation of “any land,” this, without more, was not sufficient to waive immunity. A separate, independent waiver would be required, and this did not exist in this case.

The Court notes that the Texas Supreme Court has “never decided whether a governmental entity is immune from suit to condemn its property.” Only the Dallas Court of Appeals had previously addressed the issue (and held that one governmental entity was immune from a condemnation suit brought by another governmental entity) in an opinion that was later vacated, and thus of no precedential value.

HARVEY STORM CASES

There are four different broad classifications of cases arising from government actions during the Harvey Storm that are pending: (i) “upstream” Addicks/Barker Dam cases against the federal government; (ii) “downstream” Addicks/Barker Dam cases against the federal government; (iii) statutory takings claims against the San Jacinto River Authority; and (iv) constitutional takings claims against the San Jacinto River Authority.

Upstream Cases

In December 2019, Judge Lettow of the U.S. Court of Federal Claims, following a liability-only bench trial for thirteen bellwether cases, issued an opinion finding that the U.S. Government was liable to the property owners upstream of the Addicks and Barker Reservoirs in west Houston. The factual background of the cases is extensive and can be reviewed at the opinion that is linked below.

The court analyzed liability by examining each of the following elements: (A) determining if each plaintiff has established a cognizable property interest; (B) examining a six-factor fact intensive test as set forth in *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23 (2012) - (1) the time and duration of the physical invasion, (2) whether the invasion was intended by the government, (3) whether the invasion was foreseeable, (4) the “character of the land” (or how the land is used), (5) whether the government interfered with reasonable investment-backed expectations of the plaintiff, and (6) the severity of the interference with the plaintiff’s protected property right; and (C) whether the government has any potential defenses to liability.

While the Court recognized that TEX. WATER CODE § 11.086(c) exempts the government from liability for diversions of water caused by the “construction and maintenance of levees and other improvements to control floods,” the Court held that a conscious diversion of water by the

government onto private properties in a reservoir by a flood-control dam is not within this exception and cited *Harris Cty. Flood Control District v. Kerr*, 499 S.W.3d 793, 807 (Tex. 2016). The government argued that its actions did not constitute a taking because it was acting under the police power and under the doctrine of necessity. The court concluded that these defenses are not applicable.

The entirety of the upstream opinion by Judge Lettow can be found here: <http://insideaddicksbarker.com/wp-content/uploads/2019/12/2019-12-17-Upstream-Addicks-Opinion-and-Order-on-Liability.pdf>

The next phase in the upstream cases is a determination of liability for the bellwether cases. The damages trial is currently scheduled to occur in March 2022.

Downstream Cases

On February 18, 2020, Judge Smith of the U.S. Court of Federal Claims, ruling on the Government's Motion to Dismiss and parties' Cross-Motions for Summary Judgment, issued an opinion dismissing the claims brought by the bellwether defendants that owned property downstream of the Addicks/Barker reservoirs. Contrary to the finding in the upstream case, the Court found that the downstream property owners had no property interest that had been taken by the Government.

The Court held that, under Texas law, efforts expended to mitigate against flooding constitute a legitimate use of the police power, and that the failure to perfectly mitigate against flooding can rise to the level of a taking under Texas law. The Court found that the plaintiffs were seeking a right to "perfect flood control" and decided that no such property right existed under either Texas law or Federal law.

The entirety of the downstream opinion by Judge Smith can be found here: <https://www.courthousenews.com/wp-content/uploads/2020/02/harvey-downstream.pdf>

After dismissing the bellwether cases, the Court gave all other downstream owners an opportunity to file briefing as to why the result in the bellwether cases should not control their particular case. Some downstream owners filed responses, but the Court ultimately dismissed all the downstream cases.

The first set of downstream cases (the bellwether cases plus those cases that did not file briefing as to why the bellwether result should not control their cases) is on appeal at the Federal Circuit. Oral argument was held on January 12, 2022. The remaining cases are on appeal at the Federal

Circuit, but briefing has been stayed until a decision is issued in the bellwether case appeal.

Statutory Takings Claims Against SJRA

***San Jacinto River Authority v. Medina*, 627 S.W.3d 618 (Tex. 2021)**

SJRA released record amounts and velocities of water from Lake Conroe into the San Jacinto River during the Harvey Storm. Contending this caused flooding downstream, homeowners filed suits in district court, raising inverse condemnation claims under Article 1, Section 17 of the Texas Constitution (constitutional takings claims) and statutory takings claims under the Private Real Property Rights Preservation Act (“Act”). The SJRA filed a motion to dismiss on grounds of governmental immunity. The trial court denied the motion. SJRA appealed and added an argument that, pursuant to jurisdictional statutes applicable to Harris County Courts at Law, the District Court has no jurisdiction for condemnation claims. The Court of Appeals dismissed the constitutional takings claims without prejudice, holding that jurisdiction for these claims in Harris County lies solely in the County Courts at Law, and affirmed the lower court regarding the Act as claims thereunder must be filed in District Court. The Court of Appeals further held that the Act allows for physical takings (such as these flood claims) and was not applicable solely to regulatory takings. The Court also found that the homeowners had stated a claim that was not subject to dismissal on the pleadings. SJRA appealed, and the Texas Supreme Court affirmed.

The Texas Supreme Court held that, while the Act excludes formal statutory condemnation claims (*i.e.*, direct claims initiated by a condemning authority under Chapter 21 of the Property Code), the Act does create liability (and thereby waives governmental immunity) for constitutional takings claims arising from a physical invasion, such as the flooding alleged by the property owners, and is not limited solely to regulatory takings.

Constitutional Takings Claims Against SJRA

***San Jacinto River Authority v. Bolt*, 2019 WL 2458987 (Tex.App.—Houston[1st Dist.] June 12, 2019, pet. filed)**

The River Authority challenged the plaintiffs’ pleadings with a Rule 91a motion to dismiss and asserted that the homeowners did not plead sufficient facts to establish a waiver of the River Authority's immunity. The trial court denied the River Authority’s motion and the River Authority appealed.

The River Authority asserts six reasons why the plaintiffs’ pleading is insufficient. The River Authority's first two reasons assert that the plaintiffs’ flooding did not constitute a taking because their properties were affected by a confluence of water and because the peak inflow into Lake Conroe exceeded its peak outflow. The Court rejected a bright-line rule that there can be no taking when water that travels downstream converges with other inflows before inundating a

plaintiff's property. Similarly, the Court rejected a bright-line rule that a dam operator can never be liable if, during the duration of a storm, the peak outflows from the dam never exceed the peak inflows into the water body.

The River Authority next argues that the homeowners' flooding did not constitute a taking because the water was released from Lake Conroe directly into the West Fork of the San Jacinto River and not directly into their respective properties. The Court of Appeals rejected that argument noting that liability had been found in other downstream cases both in Texas (*Tarrant Regional Water Distr. v. Gragg*, 151 S.W.3d 546 (Tex. 2004)) and in the U.S. Supreme Court (*Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (holding that a property owner 115 miles downstream from a dam could maintain a federal takings claim)).

The River Authority's next two arguments are that the plaintiffs' pleading does not sufficiently plead intent or that the flooding was for a public purpose. The River Authority argued that its government-mandated powers do not include functioning as a flood control facility. The Court of Appeals rejected that argument, noting the River Authority's admission that it "released water from the dam on Lake Conroe in order to prevent a failure of the dam due to substantial inflow resulting from Hurricane Harvey." The Court also noted that, in *Gragg*, the governmental entity was not a flood control entity, but that a public purpose was, nonetheless, present.

The Court also rejected the River Authority's last argument that the plaintiffs' inverse-condemnation claims lacked sufficient detail to support a flowage easement taking.

Other Flooding Cases

***Carrasco v. City of El Paso, et al.*, 625 S.W.3d 189 (Tex. App. – El Paso 2021, no pet.)**

Plaintiff Carrasco bought a lot on a cul-de-sac and built a house. When he connected to the public sewer line, his grinder pump burned out in 72 hours, causing backup sewage. Carrasco discovered the sewer line gravity flowed towards his house, not away from it. This resulted in sewage from the subdivision accumulating on Carrasco's property. Plaintiff immediately contacted the El Paso Water Utilities ("EPWU") to report the problem. The sewage problems persisted, and in mid-2013, Plaintiff re-connected to the sewer system and his grinder pump again burned out. Plaintiff reported the problem to EPWU for a second time. Plaintiff was told the burn-out of his grinder pump was his responsibility. In late 2015, Plaintiff again reported the problem to EPWU and was told there was nothing that could be done as it was his responsibility. In April 2016, Plaintiff met with EPWU employees and alleges EPWU stated they were aware of his sewer problem, confirmed ownership of the main sewer line, admitted the sewer line was poorly designed, and stated a study by an engineering firm would be conducted to remedy the problem. Alleging he was never re-contacted by EPWU, Plaintiff met with an El Paso City Councilmember, but was told nothing could be done. Carrasco sued the City for damages, alleging liability under the Texas Tort Claims Act and for inverse condemnation. The City filed a plea to the jurisdiction, alleging governmental immunity that was granted by the trial court. Carrasco appealed, and the Court of Appeals affirmed the dismissal.

On the inverse condemnation claim, the Court characterized the City's failure to "fix" the sewer problem as a failure to act from which no liability arises, citing *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793 (Tex. 2016). Plaintiff argued that he sufficiently alleged the construction of the sewer system itself, which is owned by the City, is what caused his specific act of identifiable harm. However, relevant to the court's analysis is that the City did not design or install the sewer system at issue and did not take responsibility from the private lot owners to operate and maintain their onsite sewer system. Rather, by conveyance in 2007, the City agreed only to operate and maintain the already existing sewer mains installed within the streets—not the individual private lots—along with the discharge pipeline from the sewer mains to the isolation valve next to each lot. The Court held that Plaintiff failed to establish a specific, intentional act to plead a viable takings claim that would constitute waiver of the City's immunity.

***City of El Paso v. Ramirez*, 633 S.W.3d 246 (Tex.App.—El Paso 2021, pet. filed)**

The City owns and operates the Clint Landfill, a solid waste disposal site located within a mile of Ramirez's property. After a series of rainstorms, the City and surrounding areas experienced extensive flooding. Retention ponds at the Clint Landfill overflowed and caused significant

damage to Ramirez's property. Ms. Ramirez (and other property owners) sued the City, alleging numerous claims including inverse condemnation. After an initial plea to the jurisdiction followed by an interlocutory appeal and remand, the City filed a second plea to the jurisdiction regarding the inverse claim. The second plea to the jurisdiction was denied and the City appealed. The trial court's denial was affirmed on appeal, and the case was remanded. Following a bifurcated bench trial on the issue of liability, the trial court found the City knew, after 2002, that property damage was substantially certain to result from its continued operation and maintenance of the landfill because of its history of wash-out, runoff and drainage problems. The City again appealed.

On appeal, the City claims Ramirez did not prove the City knew its continued operation and maintenance of the Landfill was substantially certain to flood the properties, and that Ramirez failed to establish that the City's operation and maintenance of the Landfill proximately caused damage to Appellees' properties. This was a challenge to the required elements of proximate cause and intent.

As to proximate causation, the City challenged the testimony of Plaintiffs' expert witness, asserting that the opinion evidence failed to establish causation when the expert did no quantitative analysis to show the amount of water from the Landfill that flowed onto Plaintiffs' properties. The Plaintiffs' expert, Dr. Walton, testified the continued operation of the Landfill increased damage to Plaintiffs' properties over what would be anticipated in the absence of the Landfill. He also concluded "the presence" of the Landfill was the primary causative factor in the erosion, sediment transport, and deposition of waste onto their properties. On cross-examination, Dr. Walton clarified that the "operation and maintenance" of the Landfill was implied by his use of the word "presence." Based on his experience and education, Dr. Walton indicated he had based his conclusions on his observations after physically walking the grounds of the Landfill and his analysis of all the data. He asserted that any reasonable and prudent engineer who observed the site would reach the same conclusions. The Court found this to be sufficient evidence to support a causation finding. The Court also noted that the City did not present conclusive evidence to establish the amount of water, trash, and sand that originated from somewhere other than the Landfill.

On intent, the affirmative conduct asserted by Plaintiffs was the City's continuous operation of the Landfill—that is, the continuous depositing of solid waste and other refuse on the site—even as it grew closer to capacity, thereby causing escalated damage to Plaintiffs' properties following a series of three floods over four years. Plaintiffs presented evidence to establish that the City continued to pile trash on the Landfill with the knowledge that runoff containing Landfill trash, polluted water, and sediment would leave the Landfill to the Plaintiffs' properties during a flood. Further, the City had built ponds on the Landfill that Plaintiffs alleged were not within proper standards.

The Court made a "confined" holding that there was evidence in this case to support the trial court's findings that the damage Plaintiffs endured was the inevitable result of the City's continued operation and maintenance of the Landfill and the trial court's conclusion that the City's actions resulted in a taking under the Texas Constitution.

***Mims v. City of Seguin*, 2021 WL 3057506 (Tex.App.--San Antonio July 21, 2021, pet. filed)**

The City constructed a sewer project near Plaintiffs' homes. A sewer trench was built as part of the project and, due to the uniform-sized gravel, the sewer trench channeled groundwater to the Plaintiffs' properties, causing significant damage. Plaintiffs made the following allegations:

1. Defendant City participated in the design, construction, installation, and operation of the pertinent sewer system.
2. As part of the project, the City constructed a sewer trench that doubled as a 2.5-mile French drain that erupted as artesian springs at five points in and adjacent to the Plaintiffs' properties.
3. There was significant water flow onto Plaintiffs' properties that caused blocking of the Plaintiffs' septic leach fields and creation of a swamp that has killed more than 60 trees. Plaintiffs had to vacate their homes on many occasions to stay in hotels and allege that their properties are essentially uninhabitable. They also allege cracking and foundation problems.
4. Defendant City received numerous specific warnings about the potential groundwater problems from its project. Many of those warnings came from Plaintiff Forrest Mims, a highly respected and recognized scientist and environmental expert.
5. The City's design engineers, TRC Engineers, Inc., sent correspondence to the City dated January 9, 2012 – before construction – that put the City on notice of the potential for groundwater seepage as actually occurred in this case.

After filing an answer, the City filed a plea to the jurisdiction. The City argued the Plaintiffs' allegations failed to allege sufficient facts showing a waiver of governmental immunity because the alleged facts, if true, did not amount to inverse condemnation or actionable nuisance. The trial court signed a judgment granting the City's plea and dismissing the Homeowners' claims with prejudice.

Procedurally, the City elected to proceed only by challenging the sufficiency of the Plaintiffs' pleadings and did not present evidence to negate the existence of the jurisdictional facts alleged by the Homeowners. The trial court, after deciding the pleadings failed to state a cause of action, did not allow the Plaintiffs to cure any deficiencies as required by *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007). Under these circumstances, the proper standard of review permits the Court of Appeals to affirm only if the Plaintiffs' pleadings affirmatively and incurably negated the trial court's subject matter jurisdiction. The Court of Appeals held that the Plaintiffs' pleadings did not affirmatively and incurably negate the trial court's subject matter jurisdiction. The Court of Appeals then reversed and remanded for further proceedings.

WATER INFRASTRUCTURE ON THE SURFACE CONSTITUTED A TAKING

***Canadian River Municipal Water Authority v. Hayhook, Ltd.*, 2021 WL 1202346 (Tex.App. – Amarillo, March 30, 2021, no pet.) (unpublished)**

Uncontested findings of fact issued by the trial court in this case were as follows: 1) prior owners of the Hayhook Ranch conveyed all the water rights under the Ranch to Southwestern Public Service in 1976; 2) Canadian became the successor to those rights in 1996; 3) Hayhook came to own the surface estate of the Ranch in 2004; 4) per the conveyance, Canadian acquired all of the underground water and rights to it beneath the Ranch, including easements for underground pipelines reasonably necessary and desirable to permit full and complete use of the water rights; 5) in 1999, Canadian began developing a water well field under the Ranch, which resulted in litigation with the then-surface estate owners; 6) the litigation was ended via execution, in March of 2000, of an “Agreement Concerning Installation and Operation of a Water Well Field” (the 2000 Agreement); 7) due to a drought, Canadian decided to construct a 54” pipeline in 2008 to carry water produced from locations other than the Ranch to a pumping station on the Ranch; 8) Canadian also tendered an agreement to Hayhook allowing the former to install the pipeline in return for payment of \$85,320; 9) Hayhook declined to execute the 2008 agreement; 10) Canadian nevertheless commenced installation by clearing a 120’ right-of-way across the eastern portion of the Ranch, excavating a ditch 10 to 12 feet deep and wide, and over 2.6 miles long; 11) the project, completed in March of 2010, “disturbed” approximately 38.78 acres of Hayhook, Ltd. land; and 12) since completion, Canadian only used the pipeline to transport water pumped from locales other than from beneath the Ranch to the pump station on the Ranch. No wells or pipelines drawing water from under the Ranch were connected to its 54” pipeline. The trial court also found that transporting “off-site” water across the Ranch “was not reasonably necessary and desirable to permit the full and complete utilization of the water rights in and under the Ranch”; “nor was it reasonably necessary to produce and remove groundwater from the Ranch.” The trial court found a taking by Canadian, and the Court of Appeals affirmed.

The Court of Appeals reasoned that Canadian’s construction of the pipeline was for the transport of water produced off the Hayhook property, and, thus, unrelated to Canadian’s production of water from the Hayhook Property (for which there would be some implied right to use the surface absent a contractual agreement to the contrary). The court further pointed out that the previous settlement agreement between the parties regarding the placement of certain infrastructure on the Hayhook property specifically excluded any infrastructure related to the production of water off the Hayhook property. Accordingly, the court determined that Canadian’s action was not done under the color of title from the previous settlement agreement and thus constituted an intentional physical taking of the Hayhook property in violation of Article 1 §17 of the Texas Constitution.