

# **Five Feet High and Rising:**

## **Flooding Litigation in Texas, Today and Tomorrow**

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## **Five Feet High and Rising:** **Flooding Litigation in Texas, Today and Tomorrow**

Texas only has two kinds of water: not enough, and too much. Either circumstance, drought or flood, can lead to disputes and litigation. In recent years, there has been a noticeable uptick in litigation involving flooding, and there's good reason to believe that it will continue.

The law in Texas governing flooding cases continues to develop. The current state of the law is broadly set out in four Texas cases and one U.S. Supreme Court case:

- *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793 (Tex. 2016);
- *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004);
- *Sabine River Auth. v. Hughes*, 92 S.W.3d 640 (Tex. App.—Beaumont 2002, pet. denied);
- *City of Socorro v Campos*, 510 S.W.3d 121 (Tex. App.—El Paso 2016, pet. denied);
- *Arkansas Fish & Game Comm'n v. United States*, 568 U.S.23 (2012).

These four cases are so pivotal to the jurisprudence of flooding cases that they are often referred to in the shorthand—*Kerr*, *Gragg*, *Hughes*, *Compos* and *Arkansas Fish & Game*, respectively. From the rules laid out in those (and other) cases, cities can plot a course to minimize the likelihood of incurring liability from flooding events.

### **How are cities going to become involved in flood litigation?**

Though flooding has come to the fore in Texas following Hurricane Harvey, flood litigation is not just a coastal problem. Flood cases that have shaped the jurisprudence in Texas have come from cities far from the Texas coast, such as Dallas and El Paso.

This should come as no surprise, as cities bear significant responsibility in the management, diversion, and distribution of water. Each of these responsibilities can lead to flooding in a heavy rain. In particular, three common responsibilities of local governments have led to significant flood litigation:

#### ***Dam operations***

The most obvious way in which flooding may result in litigation against a city is through the operation of a lake or impoundment contained by a dam. Dams with floodgates necessarily involve decisions as to how much water to release and affirmative action to release, possibly resulting in liability. But even dams with fixed spillways in lieu of floodgates may cause downstream flooding for which liability may attach if the design of the spillway increases the effect of the flood.

This was the scenario in *Gragg*. The Gragg Ranch—one of the largest in East Texas—sits on over 12,000 acres of land that is primarily of the bottomland in the Trinity River’s floodplain. *Gragg*, 151 S.W.3d at 549. The river’s regular flooding contributed to the land’s fertility, which was ideal for a highly profitable cattle-ranching operation. *Id.*

Just nine miles upriver from Gragg’s verdant cattle ranch, the Tarrant Regional Water District completed construction of the Richland-Chambers Dam and Reservoir to supply water to Tarrant County and surrounding areas. Richland-Chambers Dam is an earthen embankment with a soil/cement upstream face with a 960-foot long spillway. The spillway is controlled by 24 tainter gates. Because the Richland-Chambers Reservoir is a water-supply reservoir and not a flood-control reservoir, its conservation pool elevation is only ten feet below the spillway.

In March 1990, TRWD released water through the Dam’s floodgates for the first time. *Id.* at 550. As a result, the Gragg Ranch suffered extensive flood damage for the first time. While the regular floods on the Trinity River had been lazy affairs with slow moving water depositing silt on the bottomlands, the floods released by the Dam’s spillways were radically different—sending millions of gallons of fast-moving water downstream. The resulting flood gouged large sections of land out of the Ranch’s bottomlands and destroyed several levee roads.

In the years that followed, the Ranch experienced a large number of floods of similar severity. Repeatedly TRWD released greater volumes of water from the dam than what was flowing into the reservoir at the time. The Ranch’s owners sued alleging inverse condemnation, and a jury awarded the Ranch’s owners collectively nearly \$15,000,000 in damages, while also awarding TRWD a perpetual flowage easement over the property.

The facts in *Gragg* are perhaps best analyzed when they are contrasted with the facts at issue in *Hughes*, in which the court found no taking as a matter of law. In *Hughes*, the summary judgment evidence demonstrated that peak flow into the Toledo Bend reservoir was 385,000 cubic feet per second, while outflow was, at its peak, only 117,644 cubic feet per second. *See Hughes*, 92 S.W.3d at 642. In other words, the dam operator never released more water than was entering the reservoir via rainfall. And the water that was released from the dam was released directly into the Sabine River—not a man-made channel.

### ***Purposeful alteration of drainage***

In dealing with run-off and drainage, cities often make conscious decisions about where water will be routed. In some circumstances, cities’ decisions on drainage will have the effect of routing floodwaters onto private property.

This was the situation in *Campos*. In the City of Socorro, the Sparks Arroyo flows southwest into the Mesa Spur Drain, which conveys the floodwaters into the Rio

Grande downstream. The arroyo formerly flowed over a nearly straight course under Interstate 10 and across Thunder Road to Mesa Spur Drain. In the early 2000's, a new development—the Valley Ridge neighborhood—was constructed directly in the path of the arroyo. During heavy rains in 2006, the Valley Ridge neighborhood flooded. *See Campos*, 510 S.W.3d at 124.

In an attempt to protect the Valley Ridge neighborhood, the City of Socorro constructed a diversion channel at the northeastern end of the Valley Ridge neighborhood. The diversion channel changed the course of the Sparks Arroyo, first taking a 90° left turn before a 90° right turn—effectively routing the arroyo around the Valley Ridge neighborhood and causing it to cross Thunder Road about 600 feet downstream of its original floodway, on the south side of the neighborhood.

In September 2013, heavy rains again fell across the El Paso area, putting the new diversion channel to the test. It worked from the standpoint that the Valley Ridge neighborhood saw no flooding from upstream. The heavy water and mud flow, however, collected on the east side of Thunder Road, which is slightly elevated, threatening to back water up into the Valley Ridge neighborhood from the downstream (i.e., southern) side. To alleviate this immediate threat, the City hurriedly built two four-foot high sand embankments to channel the floodwaters across Thunder Road toward the Mesa Spur Drain.

The narrowing of the arroyo's floodway had the unintended effect of accelerating the water and mud flow. So when it reached Mesa Spur Drain, the water and mud overflowed onto the other (i.e., western) side, into an adjoining neighborhood. Houses in that neighborhood, known as the "Patti Jo neighborhood," flooded, and the homeowners sued the City alleging an intentional taking under the Texas Constitution.

### ***Encouragement and permitting of development***

The encouragement and permitting of upstream development that increases runoff and thereby causes flooding may also lead to litigation. That is especially true where the governmental entity has plans to mitigate runoff, and for purposes of economic development ignores those plans and permits construction of impervious cover instead.

Such were the allegations in *Kerr*. In 1976, the U.S. Army Corps of Engineers prepared a report on Upper White Oak Bayou, which noted recurring flooding from the bayou and stated that the flooding was caused by "inadequate channel capacities" and was "compounded by continuing urbanization." In the wake of that report, the Harris County Flood Control District began requiring new developments in the upper Bayou watershed to provide on-site detention ponds, though it is unclear whether this requirement was adhered to.

In 1984, the District commissioned Pate Engineers to develop a flood-control plan. The Pate Plan proposed channel improvements and increased use of detention ponds. The Pate Plan proposed that developers that did not construct on-site detention ponds could pay an impact fee that would fund construction of regional detention facilities.

The Pate Plan was never fully implemented. Six years later, the District commissioned a new report from Klotz Associates. The Klotz Plan suggested different measures from the Pate Plan.

Starting with Tropical Storm Francis in 1998, 400 homes in the upper White Oak Bayou began regularly flooding. The homeowners' expert testimony argued that the flooding was due to the District's permitting of further upstream development contrary to the suggestions of the Pate Plan. Based on those allegations, the homeowners filed suit for inverse condemnation and taking by nuisance.

### **What causes of action can be asserted against a city in connection with a flood?**

Against those (and other) factual scenarios, plaintiffs have asserted a variety of legal theories, with various measures of success. These include:

#### ***Inverse condemnation (Texas law)***

Article I, section 17 of the Texas Constitution provides "No 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." Tex. Const. art. I, § 17(a). Thus, the general term "taking" is used to refer to three types of actions: taking, damaging, and destroying property.

To state a claim for a taking without adequate compensation under this constitutional provision, a plaintiff must plead and prove the following elements:

#### **1. The governmental entity took affirmative action (as opposed to a failure to act);**

The requirement of an affirmative action was an important element in *Kerr*. As the Court stated in that case, "[w]e have not recognized a takings claim for nonfeasance." *Kerr*, 499 S.W.3d at 800. Accordingly, "[a] government cannot be liable for a taking if it committed no intentional acts." *Kerr*, 499 S.W.3d at 800 (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997)).

Based on these concepts, the *Kerr* Court concluded that "[b]ecause inaction cannot give rise to a taking, we cannot consider any alleged failure to take further steps to control flooding, such as the failure to complete the Pate Plan." *Kerr*, 499 S.W.3d at 805.

**2. The governmental entity’s affirmative action that caused the flooding was intentional;**

The action taken by the governmental entity must be intentional, and not merely negligent or reckless. “When damage is merely the accidental result of the government’s act, there can be no benefit and the property cannot be said to be ‘taken or damaged *for public use.*” *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004) (quoting *Texas Highway Dep’t v. Weber*, 219 S.W.2d 70, 71 (Tex. 1949).)

The facts underlying the *Gragg* decision reflect the type of evidence that will establish intent. The “reservoir’s construction and operation changed the *character* of that flooding—the water arrived sooner, flowed faster, and was more forceful, deeper, and longer-lasting.” *Gragg*, 151 S.W.3d at 555. That change in the character of the flooding came as the result of both the design of the reservoir and the decisions made by the District in operating the floodgates. *Id.* at 552, 555-56.

**3. Flooding of the specific property must be substantially certain to result from the intentional affirmative action;**

“[W]hen a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under Article I, Section 17 if it (1) knows that a specific act is causing identifiable harm; or (2) knows that a specific property damage is substantially certain to result from an authorized government action—that is, that the damage is necessarily an incident to, or necessarily a consequential result of the government’s action.” *Jennings*, 142 S.W.3d at 314 (quoting *Weber*, 219 S.W.2d at 71).

The requirement of specificity came into play in *Kerr*. Though the homeowners could allege that “the County was substantially certain that its actions in approving unmitigated development would result in flooding in the vicinity of [their] properties,” they could not adduce any evidence that the County intended to flood *their* property (or even knew that their specific property was likely to flood). *Kerr*, 499 S.W.3d at 805. Moreover, the homeowners provided no evidence that “approval of unmitigated development in one defined area, such as a specific block or neighborhood, was substantially likely to cause flooding in another specifically defined area of the White Oak Bayou watershed that included the homeowners’ properties.” *Kerr*, 499 S.W.3d at 805. In the absence of such evidence, the *Kerr* Court found that no taking had occurred as a matter of law.

**4. The governmental entity knows, or is substantially certain, that its act will damage the specific property;**

As a sub-element of the element of intent, a plaintiff must show that the governmental entity knew that flooding was substantially certain. *Campos*, 510

S.W.3d at 130-31. The governmental entity's knowledge is measured at the time of the action; hindsight (though 20/20) is irrelevant. *Gragg*, 151 S.W.3d at 555.

This element was of critical importance in *Jennings*, which arose from the flooding of a residence with sewage after an unclogging operation caused a backup. The plaintiffs, however, were unable to present any "evidence that the City knew, when it unclogged the sewer line, that any flooding damage would occur." *Jennings*, 142 S.W.3d at 315. Under such circumstance, the court was unwilling to find the requisite intent.

"In the case of flood-water impacts, recurrence 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." *Gragg*, 151 S.W.3d at 555. The result of that rule is that "[w]hile nonrecurring flooding may cause damage, a single flood event does not generally rise to the level of a taking." *Id.*

Stated more succinctly, the first flood is generally free (but not always).

That being said, the requirement of multiple flooding events caused by the same, repeated act in order to establish intent is not ironclad. As the El Paso Court of Appeals stated in *Campos*, "multiple similar floods caused by the same governmental actions lend much more credence to proof of the required intent. But we cannot say it is the only means to establish such intent." *Campos*, 510 S.W.3d at 130. Multiple floods thus need not be pleaded, but from an evidentiary standpoint is often a necessity. See *Toomey v. Texas Dep't of Transp.*, No. 01-05-00749-CV, 2007 WL 1153035 (Tex. App.—Houston [1st Dist.] Apr. 19, 2007, no pet.); *Evatt v. Texas Dep't of Transp.*, No. 11-05-00031-CV, 2006 WL 1349352 (Tex. App.—Eastland May 18, 2006, pet. denied).

## **5. The governmental entity's damage to or destruction of the property was for a public use.**

The plaintiff must also prove that the taking was for a public use. As the Supreme Court expressed in *Jennings*, "[t]here may well be times when a governmental entity is aware that its action will necessarily cause physical damage to certain private property, and yet determines that the benefit to the public outweighs the harm caused to that property. In such a situation, the property may be damaged for public use." *Jennings*, 142 S.W.3d at 314.

### ***Inverse condemnation (federal law)***

*Arkansas Game & Fish* revealed that there is no significant difference between federal law and Texas law in the area of inverse condemnation by flooding. As the Supreme Court held in *Arkansas Game & Fish*, intent and foreseeability are critical elements in a federal takings action, just the same as in a Texas state claim. See *Arkansas Game & Fish*, 568 U.S. at 39. Moreover, the flooding need not be permanent

to be compensable by the federal government under the Fifth Amendment—a temporary flooding may be compensable under certain circumstances. *See id.* at 34.

### ***Taking by nuisance***

When flooding results from a city’s act in pursuit of its governmental functions, nuisance itself is not a viable claim unless it can fit into a “takings” rubric or leads to a waiver of governmental immunity under the Texas Tort Claims Act (“TTCA”).

In performing its governmental functions, a city is immune from suit absent a waiver of its governmental immunity. *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995). There is no specific legislative waiver of immunity to claims of nuisance. However, in some cases the TTCA may waive immunity to certain nuisance claims. Alternatively, a city may be liable if the nuisance rises to the level of a constitutional taking. *City of Dallas v. Jennings*, 142 S.W.3d 310, 316 (Tex. 2004).

Of course, when a city floods property in the pursuit of its proprietary functions, it does not enjoy governmental immunity and may be sued for nuisance (and any other cause of action) just as would any other person. *City of Friendswood v. Horn*, 489 S.W.3d 515, 523 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

### ***Negligence***

Cities’ governmental immunity is waived for negligence under the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code ch. 101. The waiver is limited, however, to claims arising “from the operation or use of a motor-driven vehicle or motor-driven equipment.” Tex. Civ. Prac. & Rem. Code § 101.021(1)(A); *City of Corpus Christi v. Aguirre Props., Inc.*, No. 13-13-00314-CV, 2013 WL 6730052, at \*8-9 (Tex. App.—Corpus Christi Dec. 19, 2013, no pet.) (finding immunity waived in case in which plaintiff alleged negligence arising from operation of motor-driven pumps causing sewage back-up and flooding).

It is important to note that “motor-driven equipment” ***does not include*** “equipment used in connection with the operation of floodgates or water release equipment *by river authorities* created under the laws of this state.” Tex. Civ. Prac. & Rem. Code § 101.001(4)(A) (emphasis added). The fact that this exception to the waiver applies only to river authorities indicates that cities’ immunity ***is waived*** for property damages arising from the operation of motor-driven flood gates or water release equipment.

Cities’ liability to claim for negligence, however, is limited to \$100,000 for each occurrence for property damage (and \$500,000 per occurrence for personal injury). Tex. Civ. Prac. & Rem. Code § 101.023(c).

As with nuisance, however, a city is not immune to suit or liability when exercising its proprietary functions.

## **What does a city need to do to avoid taking property via flooding?**

From the cases and fact patterns set forth in the cases discussed—in particular *Hughes*, *Gragg*, *Kerr*, and *Campos*—a number of “dos” and “don’ts” can be identified to protect flooding liability:

### ***Planning:***

*Kerr* largely closes the door on the theory of “taking by permitting upstream development” theory of liability. But does it close it entirely? To the extent there may be a crack in the door, it may come from waivers or selective enforcement of existing impervious-cover restrictions.

But any time intent is an element of a cause of action, obtaining knowledge can lead to liability down the road. A cynic might take that fact and say “ignorance is bliss,” but ignorance rarely leads to good government. And since cities are in the business of government, ignorance may not be an attractive option, even when it may forestall possible liability.

Each planning situation is different, and cities must weigh their unique policy needs and the needs of their constituents in light of their present circumstances. But in the course of evaluating their planning objectives in the light of exposure for inverse-condemnation claims arising from flooding, cities may want to consider the following possibilities:

- **Enforce impervious-cover restrictions evenly:** Impervious-cover restrictions should be enforced consistent with the written policies in place. *Kerr* indicates that not having such restrictions will not lead to liability. It does not indicate, however, that a city that has such policies, but only selectively enforces them, will escape liability.
- **If waivers are granted, consider whether applicants should be required to model downstream effects:** As part of any waiver application and dependent on the specific circumstances, it may be advisable to require the applicant to submit modeling from a licensed hydrologist showing the effects of the increased run-off downstream. Such a demonstration on the part of the applicant will likely remove the elements of intent and substantial certainty from any future takings claim, should the applicant’s modeling prove incorrect.
- **Determine whether the run-off can be mitigated:** If, for example, the run-off goes directly into an existing waterway (e.g., the Mesa Spur Drain in *Campos*), can the effects of the increased run-off be mitigated with, for example, higher embankments on the waterway? And if so, can the applicant pay an impact fee to offset the cost of those mitigating measures?

### ***Diversion:***

Diverting storm runoff is a key function of every city, and cities must be mindful of where that runoff is going to go. Though it remains an ongoing case, the facts at issue in *Campos* provide some guidance to other cities:

- Permitting construction in known existing floodways should be avoided, or should include measures to mitigate any alteration to drainage: Zoning regulations often account for existing floodways. Where they don't, care should be taken by city planners not to permit development in known existing floodways (to the extent possible within existing regulations).

To the extent new development is permitting in existing known floodways, the developer will presumably take steps to alter the course of the floodway away from the development. In such instances, the city may wish to consider the suggestions outlined above.

- Altering drainage around new development should be met with caution: If such development is permitted, the city may want to commission (or require) a hydrological study to ensure that any diversion conducted or created by the city will not flood other property. After all, if no diversion is constructed, the city will not be responsible for a taking because a constitutional taking requires an affirmative act.
- Prepare for contingencies before the flood: Part of the issue faced in *Campos* was the unexpected inundation from the south, which compelled the city to construct a (possibly temporary) earthen embankment in an attempt to contain the flooding. Without time to do proper hydrological studies, it is difficult to foresee the effects of such construction downstream. And while negligence in this regard won't result in a taking, the use of motor-driven equipment to divert floodwaters may result in a waiver of immunity under the TTCA.
- A city that does take action to alter drainage may want to consider the effect on downstream bodies of water: Ultimately, the problem in *Campos* wasn't that the drainage aimed runoff at the Patti Jo neighborhood; it's that it aimed runoff at the Mesa Spur Drain, which couldn't handle all the water. Drainage operates as a system, and should be treated as such—new drainage patterns affect drainage flows both downstream and upstream. Hydrological studies should consider all of these effects.

### ***Water/sewer line maintenance and failures:***

As expressed in *Jennings* and other cases, water/sewer line maintenance and failures will rarely result in a constitutional taking. Thus, the primary concern for cities in such cases is avoiding liability under the Texas Tort Claims Act.

- Extra care should be taken when utilizing motor-driven equipment: As the waiver of immunity is limited under the TTCA, extra care should be taken when using motor-driven equipment, which is one of the mechanisms that can invoke the waiver.

### ***Dam operations:***

*Gragg* and *Hughes* leave us with some idea as to how a dam operator may avoid liability in a takings claim, both in the design of a reservoir and in the operation of floodgates.

- Design reservoirs with some storage capacity: Neither Richland-Chambers Reservoir—i.e., the reservoir at issue in *Gragg*—nor Toledo Bend—i.e., the reservoir at issue in *Hughes*—are designed as flood-control reservoirs. Toledo Bend, however, has significantly more freeboard capacity than does Richland-Chambers. That gives the operator more flexibility to reduce the outflow from the dam and ensure that the peak outflow never exceeds the peak inflow.
- If the reservoir will have a limited storage capacity, perhaps consider a spillway rather than operable floodgates: Even with its limited storage capacity, the Richland-Chambers Reservoir at issue in *Gragg* could have been designed to avoid the possibility of committing a constitutional taking. Were the dam equipped with a spillway, rather than floodgates, its peak outflow would never exceed its peak inflow, which would eliminate the intent element of a takings claim.
- If the dam does have floodgates, “catch the flood:” The determinative fact in *Hughes* was that the peak outflow of water from the dam never exceeded the peak inflow, so the dam did not worsen the flood that was occurring as a result of heavy rainfall (and in fact mitigated the flooding). A dam operator should thus ensure that its peak outflow remains less than its peak inflow at any given time.

That does raise the question: how does the operator know the rate of inflow? Some bodies of water may have existing USGS gages<sup>1</sup> on which the operator can rely. But in the absence of such existing equipment, the dam operator may consider installing flow meters on all waterways flowing into a reservoir.

Moreover, that all presumes that the floodgates/spillway does not concentrate the flow, as happened in *Gragg*. If the reservoir’s design leads to such a change in the character of the flow, the operator’s options may be limited.

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<sup>1</sup> The USGS (somewhat idiosyncratically) uses the spelling “gage” rather than “gauge.” See UNITED STATES GEOLOGICAL SERV., *Why does the USGS use the spelling “gage” instead of “gauge”* (2018), [https://www.usgs.gov/faqs/why-does-usgs-use-spelling-gage-instead-gauge?qt-news\\_science\\_products=0#qt-news\\_science\\_products](https://www.usgs.gov/faqs/why-does-usgs-use-spelling-gage-instead-gauge?qt-news_science_products=0#qt-news_science_products)

- Maybe the easiest way to operate floodgates is to disable them: Due to the high maintenance cost, the City of Austin rarely uses the floodgates on Longhorn Dam, which impounds Lady Bird Lake. While not the primary motivation, this action has the added benefit of ensuring that peak outflow will not exceed peak inflow, which should thereby immunize the City from possible flooding claims by downstream property owners.

### **If a lawsuit does ensue, how is litigation of a taking-by flood claim conducted?**

The litigation of a taking-by-flood claim is unique in that there are multiple stages at which the governmental entity can challenge the merits of the case. At each stage, the challenge to the plaintiff's case is really a challenge to the jurisdiction of the court, because if the governmental entity did not commit a taking, then the court lacks jurisdiction by operation of governmental immunity.

Hence, there are multiple opportunities for a city to assert a jurisdictional defense and if necessary, take an interlocutory appeal and invoke the automatic-stay provision of Section 51.014 of the Civil Practice and Remedies Code. But that is not to say that multiple appeals should be taken at different stages of the case. A city should be judicious in picking the opportunity with the greatest likelihood of success.

Moreover, if it decides to take an interlocutory appeal at any stage of the case, the city should be conscious of the effect on the litigation should the appellate courts remand the case for trial. Among other things, that means that evidence should be identified and testimony should be preserved. Trials may take place many years after the flooding because of the delay of interlocutory appeals, and the city should take steps to preserve its evidence.

- Pleadings and Motion to Dismiss: As set forth above, the elements of a takings-by-flood claim will be hard to meet. And at the pleadings stage, the plaintiff bears the burden to plead facts sufficient to affirmatively demonstrate the trial court's jurisdiction. *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). So something more than the traditional "notice pleading" is required.

A governmental entity may use either special exceptions or a motion to dismiss under Rule 91a if the plaintiff's petition fails to allege facts sufficient to state a valid takings claim. Because of the requirement that the court rule within 45 days of filing, a motion to dismiss may be a more attractive option. That speedy resolution of the pleadings may allow for an evidentiary challenge to the plaintiff's case within the 180-day limit of Section 51.014 (even absent a scheduling order setting a later date).

Irrespective of the vehicle used, however, the plaintiff will generally be given an opportunity to replead, unless the facts alleged affirmatively demonstrate that the court lacks jurisdiction.

- Evidentiary Plea to the Jurisdiction: If the pleadings state sufficient facts to allege a valid takings claim, then the parties can conduct discovery under the Rules. At any time, however, the governmental entity may file a plea to the jurisdiction challenging the plaintiff's claim on the merits.

A plea to the jurisdiction at this stage is more akin to a motion for traditional summary judgment, as the plaintiff has the burden only to create a genuine issue of material fact as to whether a taking occurred. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004).

- Bifurcation: Whether a taking occurred—and hence, whether the court has jurisdiction—is a question of law to be resolved by the trial court. But if a taking did occur, then the valuation of the property taken (and hence the amount to be paid in compensation to the plaintiff) is a question for the jury. This separation of issues between those that are for the court and those that are for the jury's determination can lead to bifurcation.

A court can order a separate trial of issues in a case in the interest of convenience or to avoid prejudice. *See* Tex. R. Civ. P. 174(b). The decision whether to bifurcate a trial is within the discretion of the district court. *See Gragg*, 151 S.W.3d at 557.

Nonetheless, in a taking-by-flood case, bifurcation “is often preferable or even necessary . . . so that takings issues are tried to the bench before damages issues are submitted to the jury.” *Id.* Moreover, with a scheduling order that identifies the first stage of the trial as a “trial and hearing on the merits of the defendant's plea to the jurisdiction”—making clear that the predicate jurisdictional question asserted by the plea to the jurisdiction is what is being decided—the governmental entity may be able to invoke the interlocutory-appeal and automatic-stay provisions of Section 51.014 should the court rule against it (and should the scheduling order allow).

- Trial on damages: Of course, damages are generally decided by a jury. Typically, damages should be awarded in the amount of the difference between the property's value before the flooding vis-à-vis after the flooding. However, if the taking is only temporary in nature, then the damages will be the cost of repair. *See Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 104 (Tex. 1961) (evaluating the damages caused by the flooding of the city's water disposal plant).

## How have those concepts been applied in recent cases?

Over the last several years, the Texas courts of appeals have had numerous opportunities to apply these concepts in various flooding-related and other relevant takings scenarios:

***City of Colony v. Rygh*, No. 02-17-00080-CV, 2017 WL 6377435 (Tex. App.—Fort Worth Dec. 14, 2017, no pet.):** This was a sewer back-up flooding case in which plaintiff asserted a TTCA claim based on the city’s use of motor-driven equipment to clear sewer lines. The Court found that the flow was directed downstream only (and not upstream towards plaintiff’s house), and thus there was no causation.

Takeaway: Examine causation carefully, including in a TTCA “motor-driven equipment” claim.

***City of Rollingwood v. Brainard*, No. 03-17-00077-CV, 2017 WL 2417388 (Tex. App.—Austin May 31, 2017, no pet.):** This was a case arose from an altered curb. With evidence that the city had altered the curb, as well as an engineering report provided to the city beforehand that concluded that water would flow to plaintiff’s property, the court found a fact issue with respect to both the elements of an affirmative act and the city’s intent/knowledge.

Takeaway: When there is an engineer’s reports that states that flooding is likely to occur under certain conditions, intent and knowledge may be established without a previous flooding incident.

***Sloan Creek II, L.L.C. v. North Tex. Tollway Auth.*, 472 S.W.3d 906 (Tex. App.—Dallas 2015, pet. denied):** Plaintiff alleged that design and construction of the Sam Rayburn Tollway, which led to discharge of runoff into a creek, constituted a taking. The Court found otherwise, based on the fact that discharge into a creek, without causing flooding, did not constitute a taking, and the entity’s reliance on engineering analysis that construction would not cause downstream flooding negated the knowledge element.

Takeaway: Reliance on expert/engineering analysis concluding that an action will not cause flooding is likely to negate the knowledge/substantial certainty element of a takings claim.

***City of El Paso v. Ramirez*, 431 S.W.3d 630, 638 (Tex. App.—El Paso 2014, pet. denied):** Plaintiffs alleged that continued operation and maintenance of municipal landfill caused recurrent flooding of downstream properties. The allegation of continuing, new affirmative acts (that is, the continued, daily operation of the landfill) sufficiently pleaded the “affirmative act” element of the takings claim so as to survive a plea to the jurisdiction.

Takeaway: Creative pleading of additional/ongoing acts may survive the pleading standard with respect to the “affirmative act” element. However, examine each alleged new affirmative act with respect to the knowledge and causation elements.

***Cenizo Corp. v. City of Donna*, No. 13-12-00308-CV, 2013 WL 1800270 (Tex. App.—Corpus Christi Apr. 25, 2013, no pet.):** City blocked drains so as to protect a downstream neighborhood, resulting in inundation of an upstream soybean field for a lengthy period, damaging the crop. After trial, the court of appeals noted that even though the act was clearly intentional, and the city knew that some flooding of the field would occur, the City did not know how long the field would be under water or whether damage would result. Because the city did not know that blocking the drain would cause identifiable harm or that damage to the crop was substantially certain, the defense verdict was affirmed.

Takeaway: The knowledge of specific effects and damage at the time that the action was taken is relevant and important in considering the knowledge/substantial certainty element of a takings claim.

***City of El Paso v. Mazie's L.P.*, 408 S.W.3d 13 (Tex. App.—El Paso 2012, pet. denied):** The city constructed, maintained, and operated a diversion dam and drainage system that failed, flooding downstream properties. The pleadings alleged that the city knew that the system was inadequate, but continued to divert additional drainage into the system as nearby areas were developed. That allegation was sufficient to survive a plea to the jurisdiction.

Takeaway: The complexities of designing a drainage network, combined with the possibility of some party providing prior notice of the impact of a poor design, creates risk when engaged in drainage design and construction. Careful consideration of available information is important.

***AN Collision Ctr. Of Addison, Inc. v. Town of Addison*, 310 S.W.3d 191 (Tex. App.—Dallas 2010, no pet.):** An airport previously constructed and operated by a third party was acquired by Addison. Plaintiff alleged that runoff from the airport

was substantially certain to flood its adjacent property unless Addison took action to fix the runoff. Because the flooding was caused not by continued operation of the airport, but rather by the manner of construction of the airport, Plaintiff's allegation was based on a failure to act, which could not support a takings claim.

Takeaway: Flooding caused by initial construction, without intent or knowledge of the city, will generally not give rise to a takings claim. Some additional causative act is required. Contrast with *Ramirez*, above.

***City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009)**: Plaintiffs complained that emission of noxious gases from an adjacent closed landfill effected a taking of their property. But the fact that migration of gases is possible does not mean that it will necessarily occur, and the entity's intent and knowledge must be established at the time of the affirmative act, not by hindsight. Thus, Plaintiffs failed to establish a valid takings claim.

Takeaway: General knowledge of the risks of an activity will usually not establish the specific advance knowledge required for a valid takings claim. Also, the entity's knowledge at the time of the affirmative act is the relevant fact.

## Conclusion

Cities in Texas have to deal with the unique climatology of the state, which suffers from regular periods of drought and floods (and often in quick succession to one another). These variations hinder statewide, regional, and city planning.

Such planning, however, benefits the public at large. And as the Supreme Court has noted, the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Arkansas Game & Fish*, 568 U.S. at 31 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

What flooding claims are really about, then, is expenditure of public money for the public good. And, as always, decisions about what constitutes the public good and how public money should be spent is fact-specific and broadly political in nature. It follows that when citizens believe that they are bearing the burden of acts taken for the public good and for which they are not being compensated, litigation ensues. This paper will hopefully aid decision-makers and their legal counsel in focusing their thought processes as they consider those questions, evaluate the risks to individual citizens and the public fisc, and try to balance them all. And, as for the authors, we'll continue to hope that every year is a perfect "Goldilocks" year: not too little rain, and not too much.