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One year later: Hurricane Harvey in the Courts

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In the year since Hurricane Harvey, the Texas and Federal court systems have been flooded, saturated, engulfed (pick the Harvey related adjective of your choosing) with filings related to the damages caused by the rain-heavy storm. One of the bigger pieces in this pool of litigation concerns the federally built and maintained Addicks and Barker Flood Control Reservoirs/Dams, located in west Houston.

Before the waters could fully recede, the first complaint relating to the Addicks and Barker Dams rolled in. The numerous filings since that point were consolidated and then split into two separate dockets—one concerning claims upstream from the dams (*In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Master Docket No. 17-9001L) and one concerning the downstream cases (*In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Master Docket No. 17-9002L).

While both dockets are still making their way through the United States Court of Federal Claims, the ultimate holding of these cases may impact numerous areas of law, including practice areas that relate to construction and engineering.

In May of this year, the Court of Federal Claims, in addressing a motion to dismiss brought by the Government regarding the upstream claims, delivered seven holdings:

- (1) The owners' claims were not time barred. The court reasoned the six (6) year statute of limitations applicable to takings began to run when the claim accrued, likely no earlier than 2016.
- (2) The owners' claims were properly based on government action, rather than inaction. The court reasoned it was the action of building the dams, not the inaction of buying enough reservoir land that formed the basis of the claims.
- (3) The owners plausibly alleged a valid property interest under Texas law. The court addressed the complexity of Texas water law (diffuse surface waters vs. flood waters of a river, anyone?) and reasoned that losing land to a flooding reservoir may well be a valid property interest.
- (4) The owners plausibly alleged that they had reasonable investment-backed expectations in their property. The court addressed the argument that the owners could have no takings claim because the dams were present prior to the owners purchase of their properties, and reasoned that to make this holding would be to strip property owners of the ability to transfer a land interest.
- (5) The government's police power did not limit owners' property rights. In addressing the Government's position

that Harvey was an emergency that justified the flooding of private land, the court disagreed and reasoned that the dams were the stimulus for the flooding, and not Harvey.

(6) The owners sufficiently identified personal property that had been destroyed or damaged. The court reasoned that at this stage of the proceedings, there was no need to separately identify each item harmed by the flood waters.

(7) Fact issues warranted deferral of the motion to dismiss until trial. Addressing the Government's final argument that the claims were torts—not takings, the court devoted a full two pages of its opinion to addressing the law, but ultimately held that “due to the fact intensive nature of takings cases” the court would not resolve this issue on a motion to dismiss. *In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs*, No. 17-9001L, 2018 WL 2354924, at *12 (Fed. Cl. May 24, 2018).

Although much of the Houston area has recovered since Harvey (but not all), and although many displaced homeowners have returned to their properties (though not nearly enough), Hurricane Harvey associated claims making their way through the courts are a reminder that while progress is certainly being made, much more time is needed before Harvey related issues are resolved for many Houstonians.