



# The Claims Adjustment Process

Preparing, Documenting,  
Coordinating, Investigating & More



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Hurricane Claims Forum  
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# INSURANCE IS A KEY COMPONENT TO DISASTER RECOVERY



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# Key Concerns after Harvey, Irma, and Maria

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- Bad conduct by insurers
- Out of date adjustment software
- Multiple storms tax insurance industry's ability to adjust because not enough trained adjusters who are well versed in local costs and building codes



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# Key Lessons Learned From Past Disasters

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- When the insurance industry faces massive losses, insureds suffer
- Clients are economically and psychologically vulnerable and want to return to normal ASAP
- Delay benefits insurers
- Bad faith damages are rare
- Insurers are professional litigants
- Proactive insured with lawyer-led team often maximizes recovery



# Delays Benefit Insurers

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“When an insurance company fails to pay claims it owes or engages in other wrongful practices, contractual damages are inadequate. It is hardly a penalty to require an insurer to pay the insured what it owed all along.”\*



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# Bad Faith Damages

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“The money-for-promise arrangement makes delay *a powerful strategic tool insurance companies can use against claimants* (emphasis added), a tool that under the prevailing application of contract damages doctrine is nearly cost free. In a state adhering to traditional insurance contract damages limitations and an intent-based bad faith standard, an insurance company with a weak, but colorable defense to a claim will almost never have to pay more in real dollars than was owed at the time the claim was presented.”



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# Puerto Rico

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- Bad Faith:
  - No specific statutory provisions, but:
  - *Event Producers Inc. v. Tyser & Company*, 854 F.Supp. 35 (D.P.R. 1993)
    - Conscious wrongdoing, reckless indifference, lack of reasonable basis
  - *Oriental Financial Group v. Federal Insurance Company*, 598 F. Supp. 2d 199 (D.P.R. 2008)
    - Civil code breach of contract, 31 L.P.R.A. § 3024; “dolo”



# Insurers are Professional Litigants

“The policyholder is likely not as familiar with litigation and claims evaluation and disposition as is the insurance company . . .  
 . . . The insurer is a professional defender of lawsuits... Unlike the insured, an [insurance company] is not a novice as to matters involving litigation.”



# Are You Making Problems Worse?

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- Agent statements?
- Random uninformed remarks made by employees?
- Unsupervised and possibly incomplete inspection by insurer?
- Problems caused by insured's public adjuster
- Lack of independent analysis



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# Differences Between Adjusters and Lawyer-Led Teams

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- Breadth of technical services and areas of expertise
- Ability to integrate legal and factual issues (adjusters can not give legal advice)
- No duty of confidentiality with adjusters
- No charge for initial recovery requiring little legal sophistication or technical expertise
- Ability to integrate wind, flood, and FEMA to insured's maximum benefit

and incentive to see case through trial if necessary to get insured's best  
possible result

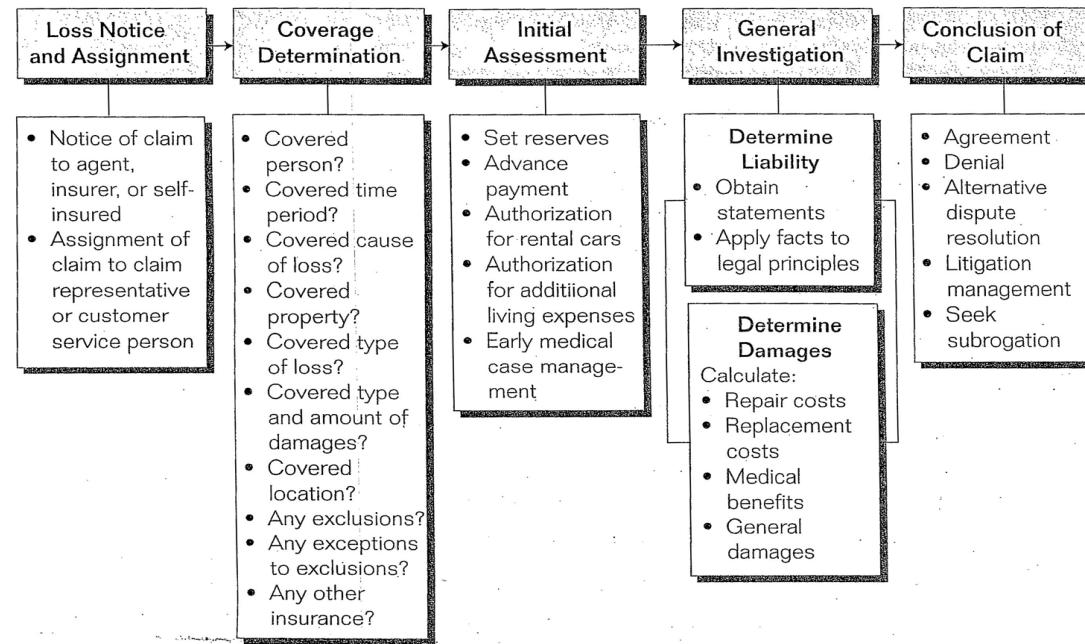
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# Claims Adjustment Process

## THE CLAIM PROCESS



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# Wind vs. Water

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- Flood offset: when insured has both flood and wind insurance, total recovery for structural damage may not exceed total amount of insured's loss
- Anti-concurrent causation (ACC) clauses
- Prohibit recovery under wind policies where damages are caused concurrently by wind and an excluded peril (flood)



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- Efficient Proximate Cause Doctrine
  - *Fajardo Shopping Ctr., S.E. v. Sun All. Ins. Co. of Puerto Rico*, 167 F.3d 1 (1st Cir. 1999)
    - Insured need not prove wind was sole cause, only that damage would not have occurred absent wind
- Anti-Concurrent Causation Clauses
  - Generally state they will not cover damage caused directly or indirectly by a certain factor, regardless of contribution
  - PR courts have not addressed whether or not enforceable
  - In jurisdictions that recognize, these provisions override the efficient proximate cause doctrine

# Thank you!

Allan Kanner

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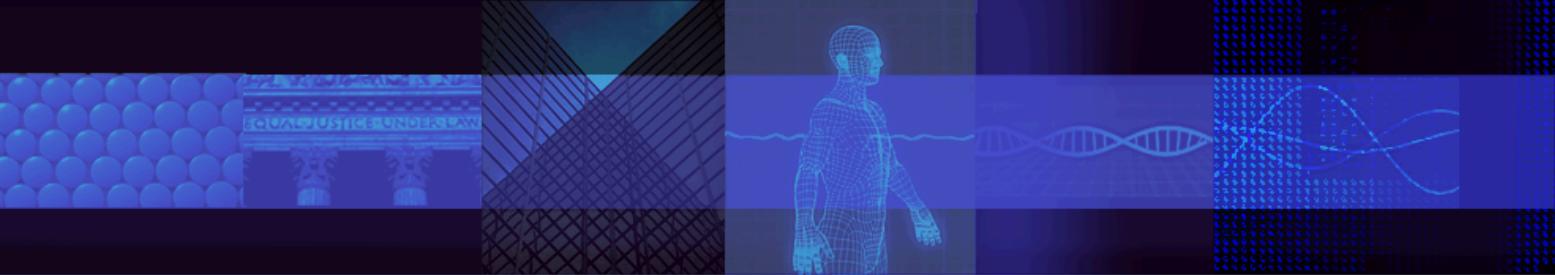
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# CLAIM PREP

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“Builders risk policies have been and will continue to be some of the most controversial and confusing policies to interpret and adjust.”

- Anonymous insurance company defense lawyer



# Claim Prep

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## Claim Preparation Best Practices

- Develop a pre loss and post loss plan
- Communicate Often and Positively
- Get Outside Help
- Get an Advance
- Gather Documentation in Real Time
- Use your Accounting System to Capture Extra Costs
- Use your Schedule to Capture Delays Specific to the Loss
- Check policy for Claim Prep Clauses

# Claim Prep

## Steps and procedures necessary in the pre and post claim process

### Pre Loss

- Develop a post-loss claim management plan and team to ensure preliminary information required is easily accessible and necessary processes/procedures are in place to track data requested/provided in order to maximize recovery
- Develop policies and procedures to capture costs and delays in real time immediately after the loss
- Identify and contract with clean-up and/or salvage companies
- Identifying business interruption exposures based on original source documents, current business continuity plans, disaster recovery plans, and consultations with financial and operational personnel

# Claim Prep

## Post Loss

- Simplify the claim process so the client can focus on returning to normal day-to-day business activities
- Quantify the loss amounts and gathering supporting documents
- Minimize the overall disruption to business operations by obtaining cash advances
- Preparing and submitting the claim on the client's behalf in a format familiar to insurers
- Participate in meetings, explaining methodology in loss calculations and responding to requests for additional documentation
- In the event that a dispute goes to litigation, provide expert witness testimony related to the methodology and calculations performed

# Claim Prep

## Steps construction companies should take re: builders risk etc

### Builder's Risk

- Understanding your policy:
  - what is covered...and what is not
  - the period of time will the policy cover for business income losses; Period of Indemnity
- Prepare pre event to minimize down time and monetary damages
  - Ensure that the project schedule is properly updated and reasonable to analyze delay
  - Procedures in place to track hard and soft costs

# Claim Prep

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## Business Interruption

Most common of several so-called time element coverages designed to respond to a disruption of business activities.

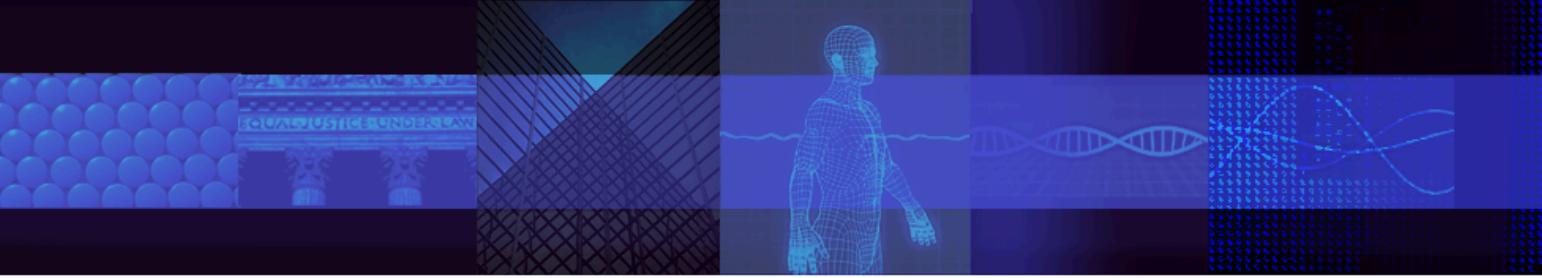
- To recover under the business interruption policy, a claimant must prove
  - that there was an actual loss of business income during the period of time necessary to restore the business and that the loss of income was caused by the interruption of the business and not by some other factor or factors.
- Establishing accurate BI values is a vital step in calculating exposure to loss for any client
  - There are three important reasons: To ensure adequate limits, to understand the exposure, and the specific terms and conditions of how the policy will apply.

# Claim Prep

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## **Personal experience of what I see fall through the cracks**

- No pre loss plan
- Incomplete or non-existent project schedules
- Lack of understanding of a schedule delay analysis
- Retaining a consultant too long after the loss occurs
- Poor contemporaneous document collection
- Lack of understanding of importance of organizing and structuring the claim and support documents
- Minimal communication with adjuster
- Not asking for an advance



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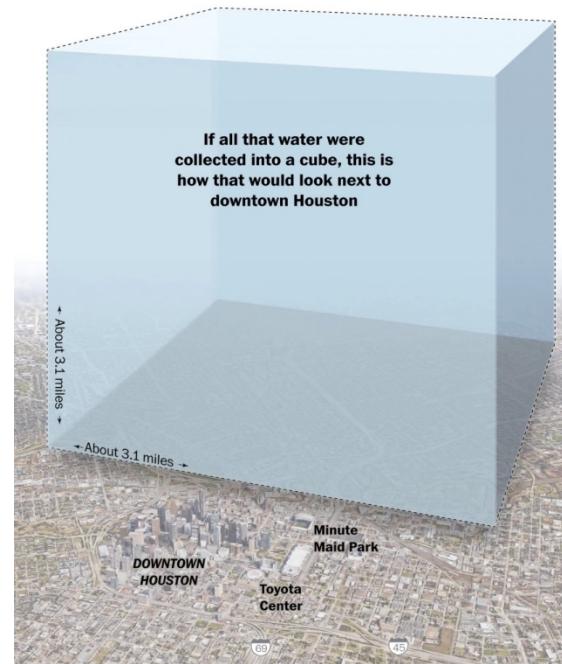
# INVERSE CONDEMNATION

# BRIEF BACKGROUND

- Hurricane Harvey made landfall in Texas on August 25, 2017. Over the next four days Harvey dumped more than 33 trillion gallons of rainwater on the city of Houston.
- In an attempt to manage flood levels, the U.S. Army Corps of Engineers (the “Corps”) began controlled water releases on August 28, 2017, from two reservoirs located west of Houston, and one north of Houston.
- Over the next 72-hours this water flowed out of the reservoirs into the network of bayous which breached their banks and began flooding surrounding neighborhoods.

## What would 33 trillion gallons of water look like?

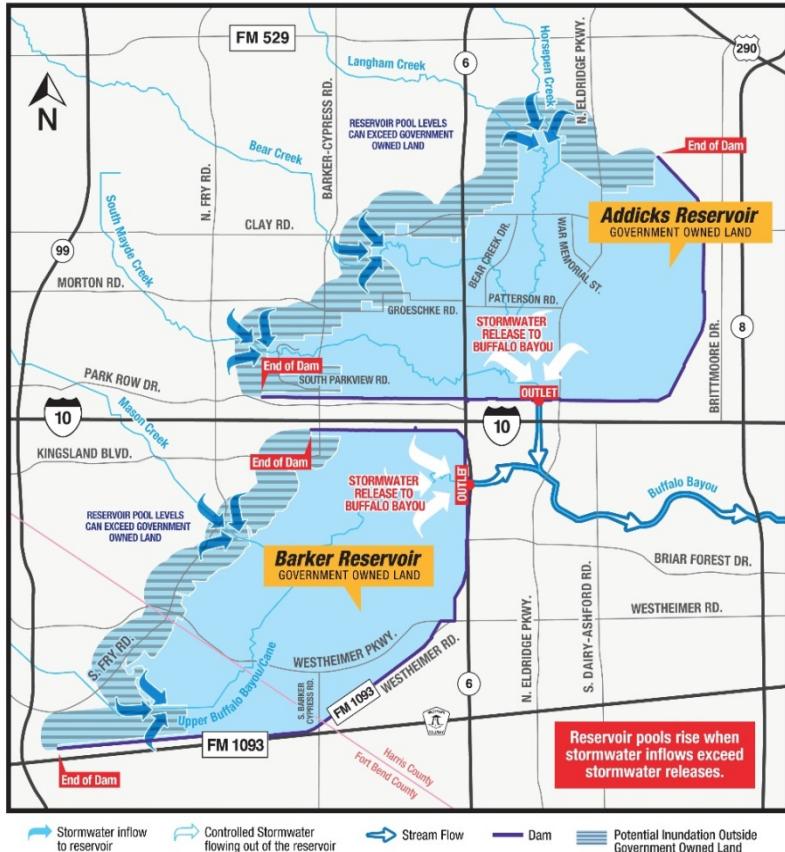
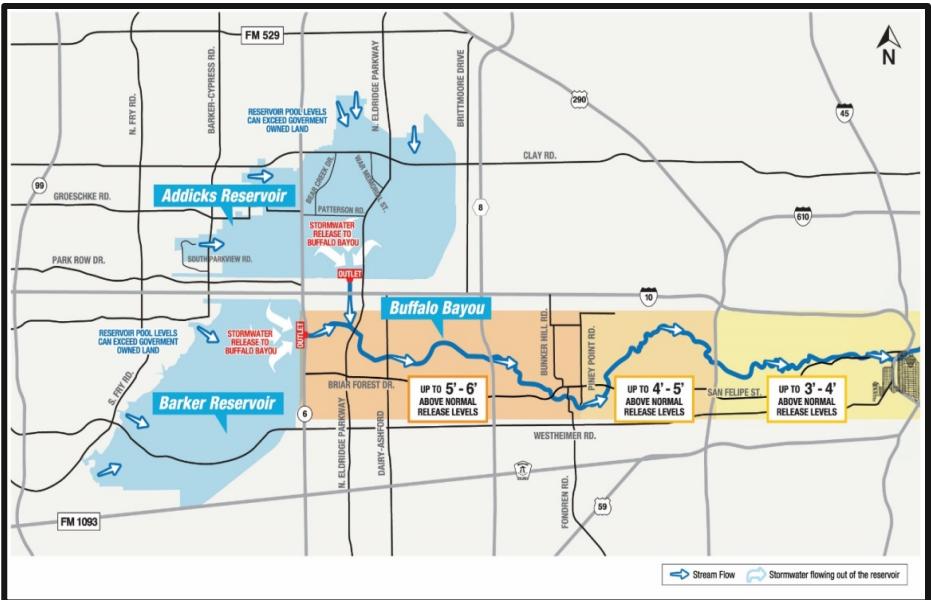
As of Saturday, Sep. 1, about 33 trillion gallons of rain have fallen along the Gulf of Mexico.



Sources: Ryan Maue, Capital Weather Gang, Google Earth

THE WASHINGTON POST

# MAP OF FLOODING



# INVERSE CONDEMNATION UNDER THE 5<sup>TH</sup> AMENDMENT TAKINGS CLAUSE

- “The Takings Clause of the Fifth Amendment to the United States Constitution prohibits state and federal governments from taking private property for public use without just compensation.” 10 A.L.R. Fed. 2d 231.
- “The guarantee of the Takings Clause was designed to bar the government from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole.” *Id.*
- Eminent Domain occurs when the government exercises its constitutional powers to take private property for public use.
- Inverse condemnation occurs when government action results in substantial or complete loss of value to private property, but without the exercise of formal eminent domain powers (*i.e.* regulations and/or flooding).
- The elements of an inverse condemnation claim are typically defined by state law. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

# ELEMENTS OF AN INVERSE CONDEMNATION CLAIM - FLORIDA

- Plaintiffs alleging an inverse condemnation claim in Florida must demonstrate either:
  1. a continuing physical invasion of the property, *or*
  2. a substantial ouster and deprivation of all beneficial use of the property.

Hadar v. Broward County, 15-CV-61845, 2016 WL 4503343, at \*4 (S.D. Fla. June 16, 2016), aff'd, 692 Fed. Appx. 618 (11th Cir. 2017).

# ELEMENTS OF AN INVERSE CONDEMNATION CLAIM - TEXAS

- In Texas the elements of an inverse condemnation claim are:
  1. the governmental entity intentionally performed an act in the exercise of its lawful authority,
  2. that resulted in the taking, damaging, or destruction of the claimant's property,
  3. for public use.

Walton v. City of Midland, 409 S.W.3d 926, 930 (Tex. App.—Eastland 2013, pet. denied).

# EXAMPLES OF INVERSE CONDEMNATION CLAIMS

## Quebedeaux v. United States 112 Fed. Cl. 317 (Aug. 20, 2013)

- "The determination of whether a flood results in a taking is a case-specific, factual inquiry."
- "Flooding cases, like other takings cases, should be assessed with reference to the particular circumstances of each case, and not by resorting to blanket exclusionary rules."



# EXAMPLES OF INVERSE CONDEMNATION CLAIMS

**Quebedeaux v. United States**  
112 Fed. Cl. 317 (Aug. 20, 2013)

- The Quebedeaux Court identified a series of factors relevant to the inquiry:
  1. The duration of the flooding.
  2. Whether the invasion is intended or the foreseeable result of authorized government action.
  3. The character of the land at issue and the owner's reasonable investment backed expectations regarding the land's use.
  4. The severity of the interference.

# EXAMPLES OF INVERSE CONDEMNATION CLAIMS

## **St. Bernard Parish Government v. United States** 121 Fed. Cl. 687 (2015)

- “Army Corps of Engineers effected temporary taking of... property by constructing, expanding, operating, and failing to maintain Mississippi River Gulf Outlet (MRGO) that significantly increased storm surge and caused flooding on... property during hurricanes and severe storms.”
- Bottom line – Actions taken by the Corps over the course of many years can give rise to a takings claim where those actions result in damage to private property.

# AFFIRMATIVE DEFENSES

- The Public Necessity/Emergency Exception Doctrine
- The Flood Control Acts of 1928 and 1936
- Challenges to Jurisdiction
- 5<sup>th</sup> Amendment taking or federal tort claim?





# THE PUBLIC NECESSITY/EMERGENCY EXCEPTION DOCTRINE

- The general rule is that “[t]he emergency exception to the just compensation requirement in inverse condemnation cases arises when damage to private property is inflicted by government under the pressure of public necessity and to avert impending peril.” 32 Am. Jur. Proof of Facts 3d 405.
- The Public Necessity doctrine almost always arises under state law, and is always a fact-specific analysis.
- At least one Florida court held that “[r]egardless of the legitimacy of county's actions in diverting water across property owner's land under its police power, property owner was entitled to compensation for the taking, and county did not enjoy statutory immunity during an emergency so as to preclude property owner's takings claim.” Drake v. Walton County, 6 So. 3d 717 (Fla. Dist. Ct. App. 2009).
- Keep an eye on *Trin-Co Investment v. United States* currently before the US Court of Federal Claims. 130 Fed. Cl. 592 (2017).



# THE FLOOD CONTROL ACT OF 1928 (FCA 1928)

- The FCA 1928 was passed in response to the Great Mississippi Flood of 1927, and authorized the Corps to design and construct projects for flood control along the Mississippi River, as well as the Sacramento River in California.
- Section 702c of the Act states “[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place[.]” 33 U.S.C. § 702c.
- The Courts have routinely held that FCA 1928 immunizes the federal government from liability in tort, and is not be a barrier to a 5<sup>th</sup> Amendment takings claims.
- “[G]overnment-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.” Arkansas Game & Fish Com'n v. United States, 568 U.S. 23 (2012).

# THE FLOOD CONTROL ACT OF 1928 (FCA 1928)

- Subsequent decisions have clarified that “tort actions are maintainable against the government under the provisions of the Federal Tort Claims Act... and that... the Flood Control Act of 1928, 33 U.S.C. 702c, does not necessarily override the Federal Tort Claims Act's waiver of immunity in the particular circumstances of this case. Graci v. United States, 301 F. Supp. 947, 950–51 (E.D. La. 1969), aff'd and remanded, 456 F.2d 20 (5th Cir. 1971).

# JURISDICTION FOR TAKINGS CLAIMS

- The United States Court of Federal Claims which has exclusive jurisdiction over claims for monetary damages arising from the U.S. Constitution.
- Plaintiffs alleging inverse condemnation should seek jurisdiction under the Tucker Act (28 U.S.C. § 1491) “to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”
- Homeowners' claim for Fifth Amendment taking of their homes was not ripe for review in federal court, where homeowners had pending under state law inverse condemnation action. Miller v. Campbell County, 945 F.2d 348 (10th Cir. 1991).

# 5<sup>TH</sup> AMENDMENT TAKING OR FEDERAL TORT CLAIM?

- “When the Government challenges this court's jurisdiction over a plaintiff's inverse condemnation claim, arguing that it is merely a tort and therefore outside this court's jurisdiction, the Federal Circuit requires that the trial court conduct a two-part inquiry to determine whether the alleged inverse condemnation claim is subject to the requirements of the Just Compensation Clause and within the court's jurisdiction.” Tommaseo v. United States, 75 Fed. Cl. 799, 804 (2007).

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Tommaseo v. United States, 75 Fed. Cl. 799, 804 (2007).



# 5<sup>TH</sup> AMENDMENT TAKING OR FEDERAL TORT CLAIM?

- **Part 1:** The federal government “intends to invade a protected property interest *or* the asserted invasion is the ‘direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.’” Tommaseo v. United States, 75 Fed. Cl. 799, 804 (2007).
- **Part 2:** The plaintiff must establish that the invasion “appropriate[s] a benefit to the government at the expense of the property owner, *or* at least preempt[s] the owner's right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.” Tommaseo v. United States, 75 Fed. Cl. 799, 804 (2007).

# CLASS ACTIONS OR INDIVIDUAL SUITS?

- Class actions in the Court of Federal Claims are substantially different than typical class actions. In the class action context, the Court of Federal Claims uses CFC Rule 23 which only allows “opt-in” classes, as opposed to the traditional opt-out class actions.
- Additionally, class certification must satisfy the elements of Rule 23 of the Federal Rules of Civil Procedure:
  - (1) the class is so numerous that joinder of all members is impracticable;
  - (2) there are questions of law or fact common to the class;
  - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
  - (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23.