Arkansas Game & Fish Comm'n v. United States: When a Taking by Any Other Name Is Still a Taking: Why International Government-Induced Temporal Floods Should Be Governed by Takings Analysis

William C. Wollander
Arkansas Game & Fish Comm’n v. United States:
When a Taking by Any Other Name is Still a Taking: Why Intentional Government-Induced Temporal Floods Should be Governed by Takings Analysis

William C. Wallander

I. INTRODUCTION ........................................................... 466

II. ARKANSAS GAME & FISH COMMISSION V. UNITED STATES ........................................................... 468
   A. Jurisprudential Framework .................................. 468
   B. Prior Flooding Cases ......................................... 471
   C. Facts of the Case ............................................. 474
   D. The Court of Federal Claims Decision ............... 478
   E. The Federal Circuit’s Reversal ............................ 479
   F. The United States Supreme Court’s Reversal .... 480
   G. Decision on Remand ......................................... 481

III. FLAWS IN THE CURRENT TORT VERSUS TAKING DISTINCTION ........................................ 481
   A. The Arbitrary Tort Versus Taking Distinction Unfairly Determines Whether a Landowner Has a Cause of Action When His or Her Property is Taken by an Intentional Government-Induced Temporal Flood .......... 482
   B. Protecting the Government from Justly Compensating Landowners When its Actions Take the Landowner’s Property Creates a Dangerous Moral Hazard ........................................ 484
   C. The Current Tort Versus Taking Test is Unclear and Denies Justice in Intentional Government-Induced Flooding Cases .............. 487
      1. The Tort Versus Taking Framework used in Intentional Government-Induced Temporal Flooding Cases Fails the Armstrong Principle .......... 487

* J.D. Candidate, Spring 2015, Duquesne University School of Law; BBA, University of Michigan. A special thank you to Professor Bruce Ledewitz for his helpful suggestions.
I. INTRODUCTION

Imagine owning thousands of acres of pristine property inhabited by wildlife and valuable timber. It’s the quintessential American dream; the property is yours, privately-owned, and the timber-land is income producing. You labor many hours to attract wildlife for hunting as well as nurture the timber for future harvest. For decades you have managed this property and the hard work has paid off. Migratory birds swarm your carefully-maintained property, and in return have attracted skillful hunters. Over the decades, the timber has healthily matured and is ready for harvest. Your land has flourished.

Unfortunately, beginning in 1993, the Army Corps of Engineers (“Army Corps”) begins deviating from its flood control procedures, at a local dam located upriver from your property, to extend the harvest season for local farmers.¹ Since 1950, the Army Corps had followed its Water Release Manual (“Manual”) closely,² and since the Manual strategically manages water flow, your property has flourished. However, the Army Corps’ deviations from the Manual have resulted in more water inundating your property for longer periods of time each year.³ Although you object to the Army Corps’ deviations, they continue this plan.⁴ Only in 2001, when you allege that these deviations have damaged your valuable timber, does the Army Corps take your requests seriously and end the

---

2. Ark. Game & Fish Comm’n, 87 Fed. Cl. at 603.
3. Id. at 606.
4. Id. at 603.
deviations. For eight years the Army Corps’ deviations benefitted local farmers at the expense of your trees. Due to congressionally enacted statutes such as the Flood Control Act of 1928 and The Federal Torts Claim Act, your only chance of recovery against the government may be bringing a Fifth Amendment Takings Claim under the Tucker Act, which grants the Court of Federal Claims jurisdiction to hear constitutional cases, but not cases arising in tort. Now, stop imagining because this scenario occurs often in intentional government-induced temporal flood cases. The most recent example, as described above, involves the hunting and timberlands of the Arkansas Game and Fish Commission.

Arkansas Game & Fish Commission v. United States demonstrates the quagmire that the tort versus taking distinction has become in intentional government-induced temporal flood cases. Simply stated, in an intentional government-induced temporal flood case, the tort versus taking distinction is critical because a landowner is precluded from recovering in tort against the government, but the landowner may recover under a Takings Claim pursuant to the Tucker Act. Yet, court decisions “offer[] no guidance in resolving the difference between takings and torts.” Hence, attempts by courts to tackle the tort versus taking distinction have resulted in perplexing, inconsistent judicial opinions.

This note proposes that the tort versus taking distinction is improper in the context of intentional government-induced temporal floods. Instead, Takings Clause analysis, not tort analysis, is the proper context when dealing with intentional government-induced temporal floods. More specifically, this note suggests that all intentional government-induced temporal floods are a taking and that the proper inquiry for the courts in such cases is to determine damages. Part II of this note discusses precedential Fifth Amendment cases as well as important intentional government-induced temporal flood cases in order to show the complexities of the tort versus taking distinction in the context of intentional government-induced temporal flood cases. Additionally, Part II of this note presents the facts and rulings of the Supreme Court’s recent decision in Arkansas Game and Fish Commission v. United States.

5. Id. at 606.
6. See infra notes 127-29 and accompanying text.
Part III of this note discusses the flaws with the tort versus taking analysis currently used by the courts to decide intentional government-induced temporal flood cases. Because the application of the tort versus taking analysis in intentional government-induced temporal flood cases has become overly convoluted, this note suggests that the focus in such cases ought to be on determining damages rather than determining whether a cause of action exists based on the arbitrary distinction of tort versus taking. Finally, this note discusses the possibility of adopting the inverse ratio rule, used in intellectual property law, when litigating damages in intentional government-induced temporal flood cases.

II. ARKANSAS GAME & FISH COMMISSION V. UNITED STATES

A. Jurisprudential Framework

The Takings Clause of the Fifth Amendment states “Nor shall private property be taken for public use without just compensation.” Although the Takings Clause seems simple, its application has required extensive judicial interpretation in intentional government-induced temporal flood cases because the court must determine that a taking has occurred rather than a mere tort for a cause of action to survive, an elusive distinction. Courts struggle to apply the Takings Clause to intentional government-induced temporal flooding cases because the floods only “take” the landowner’s property temporarily before receding. However, courts have overlooked the obvious fact that these temporal floods still take private property, even if the taking is not permanent. Most recently, the Supreme Court missed an opportunity to remedy the law in Arkansas Game & Fish Commission v. United States. Ideally, in Arkansas Game, the Supreme Court should have ruled that all intentional government-induced temporal floods are tak-

8. U.S. CONST. amend. V.
9. Ark. Game & Fish Comm’n v. United States, 133 S. Ct. 511, 518 (2012) (“[N]o magic formula enables a court to judge in every case whether a given government interference with property is a taking.”).
10. See Daniel L. Siegel & Robert Meltz, Temporary Takings: Settled Principles and Unresolved Questions, 11 VT. J. ENVTL. L. 479, 482, 496 (2010) (establishing that prospectively temporary floods are meant to be temporary from the outset; whereas retrospectively temporary floods are intended to be permanent at the outset but turn out to be temporary).
ings and that the proper inquiry for the court is to determine the amount of damages. Unfortunately, due to the Supreme Court's narrower ruling, courts will continue to struggle in intentional government-induced temporal flood cases with the "incongruent distinction between permanent and temporary takings." As a result, when addressing intentional government-induced temporal flood cases, courts will be forced to continue to rely on the four precedential Supreme Court cases that set the general framework for applying Takings Clause jurisprudence.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court addressed whether the New York state government's requirement that a landlord permit the installation of cable television equipment on the roof of her apartment building constituted a compensable taking under the Takings Clause. The Court's holding in *Loretto* established one of the black-letter rules of Takings Clause jurisprudence: a permanent physical occupation of property, no matter how minor, is a taking when authorized by the government. Importantly, the permanent physical occupation need not be exclusive so long as it impedes any one of the owner's property rights. However, the Court carefully clarified that the *Loretto* per se rule does not apply to government regulations unless the landowner must forfeit property to a third party.

In *Lucas v. South Carolina Coastal Council*, the Supreme Court addressed whether the South Carolina state government's regulation forbidding construction on Lucas' beachfront parcels consti-

12. Unfortunately, the Supreme Court made a much narrower ruling: "[R]ecurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability." *Ark. Game & Fish Comm'n*, 133 S. Ct. at 515 (emphasis added).

13. See Epstein, supra note 11, at 592.


15. *Id.* at 421-22 (establishing that the cables installed on the roof were a minor encroachment, measuring only one-half inch in diameter and measuring thirty feet in length).

16. *Id.* at 426.

17. See *id.* at 435 ("[T]he government does not simply take a single 'strand' from the 'bundle' of property rights; it chops through the bundle, taking a slice of every strand.").

18. *Id.* at 440 (explaining that states may still "require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building [s]o long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party").
tuted a compensable taking.\textsuperscript{19} The Court’s holding in \textit{Lucas} established another black-letter rule of Takings Clause jurisprudence: government regulations that result in the loss of all economically viable use of one’s property require just compensation.\textsuperscript{20} There is an exception to the \textit{Lucas} rule: government regulations that prevent public nuisances are outside Takings Clause jurisprudence.\textsuperscript{21}

In \textit{Penn Central Transportation Co. v. City of New York}, the Court addressed whether New York’s Landmarks Preservation Law which denied Penn Central the ability to build in the airspace above its Grand Central Terminal amounted to a compensable taking.\textsuperscript{22} The Court’s decision in \textit{Penn Central} recognized that courts interpret Takings Clause jurisprudence by looking at the parcel as a whole.\textsuperscript{23} Therefore, the Court established a balancing test, which in turn requires courts to consider the following factors when dealing with government regulations that impair some, but not all, of the economically viable use of property: (1) “the economic impact of the regulation” on the property owner, (2) “the extent to which the regulation has interfered with distinct investment-backed expectations” of the property owner, and (3) the “character of the government action.”\textsuperscript{24} Applying this balancing approach, the Court concluded that Penn Central had not suffered a taking because the Landmark Preservation Law “permit[s] reasonable beneficial use of the [Grand Central Terminal].”\textsuperscript{25}

In \textit{Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency}, the Court addressed whether a thirty-two

\begin{itemize}
\item \textsuperscript{19} Lucas, 505 U.S. at 1007.
\item \textsuperscript{20} Id. at 1019 (“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”).
\item \textsuperscript{21} Id. at 1022-23. See generally Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 590 (1962) (town ordinance forbidding pit excavation within its limits); Miller v. Schoene, 276 U.S. 272, 277 (1928) (state law permitting cutting down cedar trees to prevent spread of blight to apple orchard); Hadacheck v. Sebastian, 239 U.S. 394, 404 (1915) (municipal ordinance prohibiting brick manufacturing in residential community); Reinman v. City of Little Rock, 237 U.S. 171, 172 (1915) (city law prohibiting livery stables within city limits); Mugler v. Kansas, 123 U.S. 623, 623 (1887) (state law declaring all breweries as public nuisances).
\item \textsuperscript{23} Id. at 130-31 (“Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated... (This Court focuses... on the character... nature and extent of the interference with rights in the parcel as a whole.”).
\item \textsuperscript{24} Id. at 124 (explaining that physical invasions are more likely to result in takings “than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good”).
\item \textsuperscript{25} Id. at 138.
\end{itemize}
month moratorium which forbade development while a land-use plan for the region was formulated constituted a compensable tak-
ing.\textsuperscript{26} The Court reasoned that "the property will recover value as soon as the prohibition is lifted."\textsuperscript{27} However, the Court seemed genuinely concerned that long moratorium may result in a tak-
ing.\textsuperscript{28} Therefore, the Court decided that temporary regulatory tak-
ing claims, such as moratorium, should be evaluated using the Penn Central test.\textsuperscript{29}

B. Prior Flooding Cases

Flooding cases often present the courts with complex Takings Clause problems that require courts to consider both general Tak-
ings Clause jurisprudence,\textsuperscript{30} as well as the Takings Clause juris-
prudence of historic flooding cases.\textsuperscript{31} Indeed, when the govern-
ment permanently invades one's land with flood-induced water, the courts will always find a taking.\textsuperscript{32} On the other hand, for cases involving intentional government-induced temporal flooding, courts exert considerable effort attempting to balance the land-
owner's property rights with the government's interference with those rights.\textsuperscript{33} In intentional government-induced temporal flood-
ing cases, courts struggle to define a taking because, on the one hand, the government interferes with the landowner's right to ex-
clude others from his property, but, on the other hand, the land-
owner's dispossession is only temporary.\textsuperscript{34} Moreover, there is no bright line between a permanent occupation versus a temporary invasion.\textsuperscript{35} The effect of this lack of total dispossession of the landowner's property rights coupled with a questionable boundary between permanent occupation and temporary invasion becomes


\textsuperscript{27} Id. at 332.

\textsuperscript{28} Id. at 341 ("[M]oratorium that last more than one year should be viewed with spe-
cial skepticism.").

\textsuperscript{29} Id. at 342. See supra note 24 and accompanying text.

\textsuperscript{30} See supra notes 14-29 and accompanying text.

\textsuperscript{31} See infra notes 36-53 and accompanying text.

\textsuperscript{32} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982) (collect-
ing cases); Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166, 181 (1871) ("Where real 
estate is actually invaded by superinduced additions of water . . . so as to effectually de-
stroy or impair its usefulness, it is a taking.").

\textsuperscript{33} See infra notes 94-121 and accompanying text.

\textsuperscript{34} Loretto, 458 U.S. at 435 n.12 ("[I]ntermittent flooding . . . [does] not absolutely 
dispossess the owner of his right to use, and exclude others from, his property.").

\textsuperscript{35} See id. at 447-48.
evident when reading the inconsistent, and sometimes untenable, judicial decisions in intentional government-induced temporal flooding cases.

In *United States v. Cress*, the government's construction of a dam resulted in frequent overflows of water onto the landowner's property.\textsuperscript{36} The Court determined that the frequent overflows attributable to the dam constituted a permanent condition for which the landowner was entitled to just compensation.\textsuperscript{37} Seven years later, in *Sanguinetti v. United States*, the government's construction of a canal again resulted in recurrent flooding of a landowner's property.\textsuperscript{38} Although the land had experienced flooding prior to the construction of the canal, the Court recognized that the flooding after the canal's completion may have caused greater damage to the land due to increased flooding.\textsuperscript{39} The Court stated that for the government to be held liable for a taking a plaintiff must show that the government's project directly resulted in a permanent invasion of the plaintiff's land resulting in an appropriation.\textsuperscript{40} Because the landowner could still use his property, the Court found no taking occurred in *Sanguinetti*\textsuperscript{41}

In *United States v. Dickinson*, a government dam resulted in the permanent flooding of some of the landowner's property as well as intermittent flooding of other portions of his property.\textsuperscript{42} Ultimately, the landowner reclaimed much of his land that had been taken by flooding by using rock fill.\textsuperscript{43} Nonetheless, the Court held that Dickinson's land had been taken and that subsequent actions by Dickinson did not affect the takings analysis.\textsuperscript{44} In *Barnes v. Unit-
ed States, government releases of water from a dam resulted in the flooding of the landowner's property from 1969 to 1973.\textsuperscript{45} However, the court determined that the government only took the landowner's property in 1973.\textsuperscript{46} Essentially, the Barnes decision established that the government gets several “free” flood years before a landowner can claim that intermittent flooding is foreseeable.\textsuperscript{47}

In summary, Loretto and Pumpelly illustrate that courts will construe permanent flooding invasions of a landowner's property as a taking.\textsuperscript{48} Moreover, Lucas suggests that any government flooding regulation that extinguishes all economically viable uses of property will be a taking.\textsuperscript{49} Furthermore, Cress supports the proposition that intermittent inevitably recurring floods also constitute a taking.\textsuperscript{50} Unfortunately, flooding cases that fall outside the bright line rules associated with permanently flooded property, inevitably recurring flooding, and flooding that destroys all economically viable use of property are subject to uncertain judicial discretion.

Sanguinetti, Dickinson, and Barnes show that if a flood is not permanent, inevitably recurring, or does not destroy all economically viable uses of property then it is difficult to predict how courts will rule.\textsuperscript{51} Penn Central and Tahoe-Sierra demonstrate that balancing tests inevitably favor the government; however, this provides little certainty or guidance to landowners considering a takings claim and governments dealing with flooding decisions.\textsuperscript{52} It is indisputable that more certainty is needed for intentional government-induced temporal flooding cases, and the recent Supreme Court decision of Arkansas Game & Fish Commission v. United States evidences this need.\textsuperscript{53} As described immediately below, Arkansas Game questions “whether a taking may occur, within the meaning of the Takings Clause, when government-induced flooding invasions, although repetitive, are temporary.”\textsuperscript{54}

\textsuperscript{45} 538 F.2d 865, 872-73 (Ct. Cl. 1976).
\textsuperscript{46} Id. at 873-74.
\textsuperscript{47} Id. at 873 (“[T]he date the [government complete[s] taking its flowage easement cannot be prior to when . . . the permanent character of intermittent flooding could fairly be perceived.”).
\textsuperscript{48} See supra notes 15-17 and 32 and accompanying text.
\textsuperscript{49} See supra notes 19-21 and accompanying text.
\textsuperscript{50} See supra notes 36-37 and accompanying text.
\textsuperscript{51} See supra notes 38-47 and accompanying text.
\textsuperscript{52} See supra notes 22-29 and accompanying text.
\textsuperscript{53} 133 S. Ct. 511 (2012).
\textsuperscript{54} Id. at 515. See infra notes 56-93 and accompanying text.
C. Facts of the Case

The Arkansas Game and Fish Commission ("Commission") owns and operates the Dave Donaldson Black River Wildlife Management Area ("Management Area"). The Management Area consists of 23,000 acres of land, adjacent to the Black River, which the Commission maintains for hunting and wildlife. Within the Management Area, hardwood bottomland timber provides a natural habitat for the wildlife and serves as a valuable source of income to the Commission, and therefore, the Commission takes great efforts to preserve the timber for regular harvests.

In 1948, the U.S. Army Corps of Engineers ("Army Corps") completed construction of the Clearwater Dam ("Dam") 115 miles


56. Ark. Game & Fish Comm’n, 133 S. Ct. at 515.


58. Ark. Game & Fish Comm’n, 133 S. Ct. at 515-16. The dominant species of hardwood timber are nuttall oak, overcup oak, pin oak, and water oak. Wildlife Management Area Details, ARK. GAME & FISH COMM’N, http://www.agfc.com/hunting/Pages/wmaDetails.aspx?show=170 (last visited Feb. 7, 2014). The Commission strategically floods the hardwood timber to provide waterfowl habitat, and the Commission also selectively thins trees to “stimulate the growth of new timber, to provide a diverse habitat type and to remove unhealthy or unproductive trees from the forest.” Id.

upstream from the Management Area. As a flood control project, responsibility for maintenance and operation of the Dam belongs to the Army Corps. In 1950, the Army Corps implemented a water control plan, and in 1953, published The Clearwater Lake Water Control Manual ("Manual"). Initially, when implementing its plan and determining water release rates, the Army Corps considered the agricultural growing season which roughly coincided with the hardwood timber growing season, and the Army Corps attempted to release water in a controlled manner in order to avoid interfering with growing season. The Army Corps routinely followed the Manual's water release rates until 1993 when it began deviating from the Manual's water release rates at the request of farmers.

The Commission observed that after the Army Corps implemented the deviations, the Management Area began experiencing flooding above historical norms. Most concerning, these floods occurred during the hardwood timber's growing season. The Commission voiced concerns that the deviations from the water release rates in the Manual, which the Army Corps had followed for decades, may negatively impact the hardwood bottomland timber. The Commission pleaded for the Army Corps to cease the

---

60. Ark. Game & Fish Comm'n, 133 S. Ct. at 516.
61. Ark. Game & Fish Comm'n, 87 Fed. Cl. at 602.
62. Id. at 603 (the Manual states the Dam's primary purpose as "provid[ing] flood protection below the dam and to maintain a permanent conservation pool for recreation, fish and wildlife, and other incidental uses").
63. Id. at 602 (the growing season for hardwood timber occurs roughly between April and November).
64. Id. The planned deviations were implemented to provide farmers, located downriver, with a longer harvest period. Ark. Game & Fish Comm'n, 133 S. Ct. at 516. To achieve these longer harvest periods, the Army Corps released water from the Dam at a slower rate than called for by the Manual. Id. As a result, water levels in the Dam rose and the Army Corps released the water for longer periods of time. Id.
65. Id.
66. Ark. Game & Fish Comm'n, 87 Fed. Cl. at 603.
67. Id. at 603-04 (various other groups voiced concerns as well, including: the Commission, the United States Fish and Wildlife Service, the Missouri Conservation Department, dock owners and campsite owners, and the drainage district). The Commission's main concern was that "a much longer duration of stagnant water being held on the biologically and economically valuable hard mast bearing species of trees," may have negative consequences. Id. at 604.
deviations and reestablish the water release rates called for by the Manual; however, the deviations continued into the late 1990s. 68

In 1999, the Army Corps considered revising the Manual to make the deviations permanent. 69  Again, the Commission expressed its disapproval and concerns that the deviations negatively impair its hardwood timber. 70  Unfortunately for the Commission, the Army Corps contended that the effects from any deviations from the Manual ceased in Missouri, long before reaching the Management Area. 71  In fact, after conducting an environmental research assessment, the Army Corps concluded that making the water release deviations permanent would be of little or no consequence. 72  Once more, the Commission disputed the Army Corps’ findings that the deviations resulted in little consequence. 73

By July 1999, the Commission noticed a dramatic increase in hardwood timber mortality in the Management Area. 74  The Commission contended that the Army Corps deviations from the Manual caused this increased timber mortality. 75  The Army Corps reiterated its view that deviations from the Manual did not cause the increased timber mortality in the Management Area because the effects from the deviations ceased at the Missouri/Arkansas border. 76  Despite its disbelief, the Army Corps conducted water-stage testing and found that the deviations did, in fact, result in water from the Dam reaching the Management Area. 77  Further-

68. Id. The flooding that occurred in the Management Area when the Army Corps followed the release rates dictated by the Manual resulted in “short-term waves of flooding which . . . receded quickly.” Ark. Game & Fish Comm’n, 133 S. Ct. at 516.
69. Ark. Game & Fish Comm’n, 87 Fed. Cl. at 604.
70. Id.
71. Id. ("[T]he effect of Clearwater Dam diminishes at approximately the Missouri/Arkansas state line . . . due to the increased size of the watershed.").
72. Id. (a draft environment assessment prepared by the Army Corps described the effects of making the deviations permanent as a “Finding of No Significant Impact”).
73. Id. at 604-05 (the Commission had a “significant problem” with the new plan to make the deviations permanent). Additionally, the U.S Fish and Wildlife Service claimed that the Army Corps provided insufficient evidence to conclude that the effects of the planned deviations end at the Missouri/Arkansas border. Id.
74. Id. at 601, 605 (Martin Blaney, the Statewide Habitat Coordinator for the Commission, testified that in 1999 “a massive die-off of oak timber” occurred that was “a stark contrast from the healthy forest that [he had] seen before”).
75. Id. at 606 (Robert Zachary, Wildlife Supervisor for the Commission, contributed this damage to “stress caused by . . . stagnant water being in the [Management] [A]rea during the growing season for consecutive years . . . that led to a . . . gradual decline, and then finally a drastic change due to conditions in 1999”).
76. Id. at 606 (Mike Hendricks, local Chief of Reservoir Control for the Army Corps opined that the Commission’s claim was “unfounded”).
77. Id. (the Army Corps found that permanent deviations would “inundate[] the roots of the hardwood trees in the wildlife management area”).
more, the Army Corps finally acknowledged that the deviations may impact the hardwood timber in the Management Area.\textsuperscript{78} As a result, in April 2001, the Army Corps ceased all deviations from the Manual and abandoned plans to make the deviations permanent.\textsuperscript{79}

In 2005, the Commission sued the Army Corps claiming that the deviations from the Manual resulted in a compensable taking under the Fifth Amendment.\textsuperscript{80} The Commission relied on Dr. Mickey Heitmeyer, a wetland ecologist, to establish that the deviations resulted in water inundating the Management Area for greater lengths of time compared to the time period prior to the deviations.\textsuperscript{81} Dr. Heitmeyer’s report established that the deviations resulted in over fifty percent of the nuttall oaks being inundated by water for, on average, forty-seven percent longer per year than prior to the commencement of the deviations.\textsuperscript{82} Furthermore, Dr. Heitmeyer noted that in 1997, part of the Management Area was flooded for 166 days, ninety-five days longer than it had flooded on average prior to the deviations.\textsuperscript{83} The Army Corps used a computerized model to analyze the impact of the Dam on the Management Area, both with and without the deviations.\textsuperscript{84} Even without the deviations, the Army Corps’ expert concluded that the Management Area would have experienced greater than average flooding during the time period in question.\textsuperscript{85} In fact, the Army Corps contended that, even without deviations, the Management Area would have remained flooded for the majority of the hardwood timber growing season during the years in question.\textsuperscript{86}

Moreover, both the Commission and the Army Corps relied on timber consultants for expert reports.\textsuperscript{87} The Commission’s timber experts analyzed the hardwood timber from regions of the Man-

\textsuperscript{78} Id. (the district engineer for the Army Corps acknowledged that the deviations “unacceptably extend[ed] the duration of water inundation on bottomland hardwoods”).
\textsuperscript{79} Id. (the Army Corps acknowledged that it ceased the deviations due to concerns about the effects the deviations had on bottomland timber in the Management Area).
\textsuperscript{80} Ark. Game & Fish Comm’n v. United States, 133 S. Ct. 511, 516 (2012).
\textsuperscript{81} Ark. Game & Fish Comm’n, 87 Fed. Cl. at 600, 608.
\textsuperscript{82} Id. at 608 (Heitmeyer used available water-gauge data collected by the Commission to determine that prior to the deviations, from 1949 to 1992, fifty percent of the nuttall oaks flooded on average 62.16 days/year; whereas, after the deviations commenced, from 1993-1999, fifty percent of the nuttall oaks flooded on average 91.14 days/year).
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 608-09.
\textsuperscript{85} Id. at 609.
\textsuperscript{86} Id. (“[T]he modeling predicted that there would have been flooding in the Management Area for 72.8% of the days during the growing seasons from 1994 to 1999.”).
\textsuperscript{87} Id. at 609-12.
agement Area which had experienced increased flooding ("Low Regions") as well as control regions located at higher elevations that had not experienced flooding ("High Regions") resulting from the Army Corp's deviations. Due to the healthy nature of the hardwood timber in the High Regions, the Commission's timber consultants believed that flooding caused the demise of the hardwood timber in the Low Regions. Thus, the Commission's timber experts concluded that the deviations caused the increased mortality of the hardwood timber. The Army Corps' timber expert analyzed the trees in both High and Low Regions and rejected the Commission's timber expert's finding mainly because he could not identify any sign of flood stress in the tree rings extracted from the hardwood timber cores.

The Court of Federal Claims faced a difficult factual and legal analysis to determine whether the Commission had established a compensable Fifth Amendment Claim due to the temporal nature of the intentional government-induced flooding.

D. The Court of Federal Claims Decision

The Court of Federal Claims ("COFC") held that the Commission was entitled to just compensation from the government for the taking of its interest in the bottomland hardwood timber. The COFC found that the Army Corps' deviations resulted in regular flooding of the Management Area from 1993 to 1998. Moreover, the COFC determined that, with a reasonable investigation,

---

88. Id. at 609.
89. See id. at 610 ("If the ten thousand red oaks analyzed in the two [High Regions], no trees were dead and only 150 trees were in a declining state.").
90. Id. at 609-10 (the hardwood timber mortality rate in the Low Regions ranged between nine percent to fifty-nine percent per year and thirty to forty percent of these trees exhibited a declining state of health).
91. Id. at 610 ("The prolonged growing season flooding (June-August) that occurred in 1994-1998 undoubtedly resulted in saturated soils, inadequate oxygen levels in the water and the soil, increased root respiration, and significant root mortality and die-back in many of the less water tolerant trees."). As further evidence of saturated soils, the timber experts noted the invasion of wetland species, which thrive in saturated soil, into the Low Regions of the Management Area. Id. at 613.
92. Id. at 611-12.
93. 28 U.S.C. § 2503(c) (2012) (the Court of Federal Claims does not offer the right to a jury: "The judges of the Court of Federal Claims shall fix times for trials, administer oaths or affirmations, examine witnesses, receive evidence, and enter dispositive judgments").
95. Id. at 618-19.
the Army Corps would have been capable of predicting the impact of the deviations on the Management Area. Additionally, the COFC rejected the Army Corps’ claim that the summer droughts of 1999 and 2000 were intervening causes in the destruction of the Commission’s timber. Furthermore, the COFC concluded that the Commission’s expert testimony sufficiently linked the deviations to the flooding of the Management Area which, in turn, caused the timber mortality. In summary, the COFC found that the Commission met its burden of establishing that the Army Corps’ deviations from the Manual resulted in the destruction of the Commission’s timber, a compensable taking under the Fifth Amendment.

E. The Federal Circuit’s Reversal

The Federal Circuit held that no taking had occurred and reversed the COFC’s decision. In reaching its holding, the Federal Circuit did not address whether the flooding of the Management Area was predictable and sufficiently substantial to arise to a taking. Consequently, the Federal Circuit decided that, as a matter of law, temporary floods do not constitute a taking unless the flooding is permanent or inevitably recurring. Because the Army Corps never implemented permanent deviations from the Manual, and because the deviations only lasted between 1993 and 2000, the deviations were “inherently temporary.” Relying on

96. Id. at 623 (“Indeed, the Corps had available to it a computerized modeling system that could have been used to evaluate potential hydrological effects of its deviations from the water control plan. . . . In short, the effect of deviations in the Management Area was predictable, using readily available resources and hydrological skills.”).

97. Id. at 623-24 (“[T]he fact that there was some later incident that may have ‘tilted the scale’ . . . does not break the chain of foreseeable results of the government’s authorized action.”).

98. Id. at 629-32 (expert reports demonstrating “the increased frequency and uniquely sustained pattern of flooding in the Management Area during [the deviations],” as well as the once “very healthy condition” of the timber were crucial to the COFC’s finding).

99. Id. at 634 (“The government’s temporary taking of a flowage easement over the Management Area resulted in a permanent taking of timber from that property.”).


101. Ark. Game & Fish Comm’n, 637 F.3d at 1376 (“[W]e need not decide whether the flooding on the Management Area was ‘sufficiently substantial to justify a takings remedy’ or ‘the predictable result of the government’s action.’”) (quoting Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003)).

102. Id. at 1378 (“[T]he Commission has] not met [its] burden to prove that the increased flooding would be ‘inevitably recurring’ because the deviations were explicitly temporary.”).

103. Id. at 1378-79.
prior case law, The Federal Circuit concluded "flooding must be a permanent or inevitably recurring condition, rather than an inherently temporary situation, to constitute the taking of a flowage easement."\textsuperscript{104}

Circuit Judge Pauline Newman, the lone dissenter, would have affirmed the COFC's finding of a taking.\textsuperscript{105} Judge Newman reasoned that permanent or inevitably recurring flooding is not required for one to claim just compensation under the Fifth Amendment.\textsuperscript{106} Moreover, Judge Newman recognized that "flooding-induced destruction of timber is permanent injury, and is compensable within the meaning of the Fifth Amendment."\textsuperscript{107} Judge Newman believed that the majority erred by focusing on whether the Army Corps' deviation policy was permanent or temporary.\textsuperscript{108} Judge Newman contended that the proper takings analysis focuses on whether the flooding caused substantial damage before the Army Corps ended the deviations.\textsuperscript{109}

\textbf{F. The United States Supreme Court's Reversal}

The United States Supreme Court unanimously\textsuperscript{110} reversed the Federal Circuit's holding that a flood must be permanent or inevitably recurring to constitute a taking and remanded the case for further proceedings.\textsuperscript{111} Delivering the opinion of the Court, Justice Ginsburg framed the issue to be decided as "whether a taking may occur, within the meaning of the Takings Clause, when gov-

\begin{footnotes}
\item[104.] \textit{Id. at 1378}.
\item[105.] \textit{Id. at 1383} (Newman, J., dissenting).
\item[106.] \textit{Id. at 1381} (Newman, J., dissenting) ("Precedent does not require constant or permanent flooding, and eventual abatement of the flooding does not defeat entitlement to just compensation. . .").
\item[107.] \textit{Id. at 1382} (Newman, J., dissenting) (relying on \textit{Cooper v. United States}, 827 F.2d 762, 763-64 (Fed. Cir. 1987)).
\item[108.] \textit{Id.} (Newman, J., dissenting) ("My colleagues err . . . incorrectly holding that the issue is solely whether the injurious flooding was eventually ended. My colleagues err in ruling that: 'we do not focus on a structure and its consequence. Rather we must focus on whether the government flood control policy was a permanent or temporary policy.'").
\item[109.] \textit{Id. at 1383} (Newman, J., dissenting) ("The question is . . . whether the increased flooding caused significant injury before the flooding was abated, such that, on balance, the Fifth Amendment requires just compensation.'").
\item[111.] \textit{Id. at 522} ("We rule today, simply and only, that government-induced flooding temporary in duration \textit{gains no automatic exemption} from Takings Clause inspection.") (emphasis added). The Supreme Court's ruling only eliminates the absolute bar to Takings Clause analysis in temporal flood cases; it is important to note that the tort versus taking analysis survives in temporal flood cases. \textit{See infra} notes 165-69 and accompanying text.
\end{footnotes}
ernment-induced flood invasions, although repetitive, are temporary." The Court recognized that most takings cases require fact-intensive inquiries. Furthermore, the Court specified that its precedent would not require that the Army Corps' deviations be permanent in order to qualify as a taking. The Court expressed its view that to evaluate a temporary physical invasion of private property by the government, a court should consider factors including: (1) duration, (2) the intent or foreseeability of the government action, (3) the "reasonable investment-backed expectations" of the land's use, and (4) the severity of the interference. After concluding that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability," the Court remanded the case so that the Federal Circuit could consider whether the predictability and severity of the flooding preclude takings liability.

G. Decision on Remand

On remand, the Federal Circuit decided that (1) a physical taking occurred despite the fact that the government-induced floods were only temporary, (2) sufficient evidence established that the Army Corps' deviations from the Manual damaged trees, (3) sufficient evidence established that it was foreseeable that deviation from the Manual would damage trees, and (4) the intrusion was severe enough to constitute a taking. As such, the decision of the COFC was affirmed.

III. FLAWS IN THE CURRENT TORT VERSUS TAKING DISTINCTION

In Arkansas Game and Fish Commission v. United States, the Supreme Court reached the proper conclusion that temporary

112. Id. at 515.
113. Id. at 518 (there are some bright line rules, but "most takings claims turn on situation-specific factual inquiries").
114. Id. at 519 ("We have rejected the argument that government action must be permanent to qualify as a taking.").
115. Id. at 522 (internal citations omitted).
116. Id. at 515, 523 ("Because the Federal Circuit rested its decision entirely on the temporary duration of the flooding, it did not address [the causation, foreseeability, substantiality, and amount of damages].").
118. Id. at 1372.
119. Id. at 1374.
120. Id. at 1375.
121. Id. at 1367.
floodings is not automatically barred from the Takings Clause protection guaranteed by the Fifth Amendment to the United States Constitution. However, the Supreme Court ruled too narrowly and missed an opportunity to remedy the law in the unique realm of intentional government-induced temporal flood cases. Lawyers, landowners, government agencies, and planning commissions will continue to struggle with temporary flooding decisions. This analysis section first addresses the flaws with the tort versus taking analysis currently used by courts to decide intentional government-induced temporal flood cases. Then, this analysis section suggests that because the application of the tort versus taking analysis has become elusive in intentional government-induced temporal flood cases, courts deciding such cases ought to focus on litigating damages rather than determining whether a cause of action exists based on the arbitrary and elusive distinction between torts and takings. Finally, this analysis section discusses the possibility of adopting the inverse ratio rule, used in intellectual property law, when litigating damages in intentional government-induced temporal flooding cases.

A. The Arbitrary Tort Versus Taking Distinction Unfairly Determines Whether a Landowner Has a Cause of Action When His or Her Property is Taken by an Intentional Government-Induced Temporal Flood

The practical importance of the tort versus taking distinction is that it determines (1) whether the plaintiff has a cause of action against the government for the intentional government-induced

123. Temporary flooding cases are unique because a flood can affect property both when the flood waters are present and long after such flood waters have receded. The flood not only limits the landowner’s use of his or her land for a set period of time (a temporal component), but floods often have lasting effects that survive after the flood waters have receded (a lasting component). For instance, in Arkansas Game & Fish Commission v. United States, the Commission’s use of the Management Area was limited by flood waters caused by the Dam (the temporal component). See 87 Fed. Cl. 594, 603 (2009), rev’d, 637 F.3d 1366 (Fed. Cir. 2011), rev’d and remanded, 133 S. Ct. 511 (2012), aff’d, 736 F.3d 1364 (Fed. Cir. 2013). But even after they receded, the flood waters’ lasting effects in the Management Area continued to impact the hardwood timberland mortality (the lasting component). See id. at 610.
124. See generally Daniel L. Siegel, The Impact of Tahoe-Sierra on Temporary Regulatory Takings Law, 23 UCLA J. ENVTL. L. & POL’Y 273, 274 (2005) (“Planners operate under the fear that a court may find that their decision constitute[s] a taking.”).
125. See Marbury v. Madison, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury.”); see also Epstein, supra note 11, at 592.
temporal flood, (2) which court has jurisdiction over the cause of action, and (3) what is the relevant statute of limitations to initiate the cause of action. First, the importance of the tort versus taking distinction in deciding whether the plaintiff has a cause of action against the government in intentional government-induced temporal flooding cases can be traced back to the 1920s, when the federal government authorized the Army Corps to undertake flood control projects.\textsuperscript{126} Congress passed the Flood Control Act of 1928, which immunized the government from tort liability resulting from government flood control projects.\textsuperscript{127} Therefore, a landowner whose property attains damage from a government flood control project may not sue the government in tort.\textsuperscript{128} As a result, the landowner’s only remedy is to sue the government under the Takings Clause.\textsuperscript{129}

Next, the tort versus taking distinction determines in which court the plaintiff may bring his or her cause of action against the government. The Court of Federal Claims has jurisdiction over takings claims,\textsuperscript{130} but not tort claims\textsuperscript{131} filed against the government. Furthermore, the United States District Courts cannot hear takings claims of more than $10,000.\textsuperscript{132} Finally, as for the relevant statute of limitations, tort claims must be brought before

\begin{itemize}
\item \textsuperscript{126} See supra note 59 and accompanying text.
\item \textsuperscript{127} The Flood Control Act of 1928, 33 U.S.C. § 702(c) (2006) ("No 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.").
\item \textsuperscript{128} See id.
\item \textsuperscript{129} Although 33 U.S.C. § 702(c) states that governments shall face "no liability," the courts have interpreted the "no liability" language liberally; otherwise the statute may be found unconstitutional for violating the Fifth Amendment. Turner v. United States, 17 Cl. Ct. 832, 834-35 (1989), rev’d on other grounds by 901 F.2d 1093 (Fed. Cir. 1990) (holding that 33 U.S.C. § 702(c) is subject to the limitations imposed by the Fifth Amendment); see also Transcript of Oral Argument at 39, Ark. Game & Fish Comm’n v. United States, 133 S. Ct. 511 (2012) (No. 11-597) (Edwin Kneedler, attorney for the United States, stated “the Flood Control Act of 1928 . . . says that the Government shall not be liable for any damage to any property at any place resulting from floods or flood waters.” Justice Scalia answered, “[o]f course, that can’t overrule the Takings Clause, can it? I mean, that’s nice that Congress doesn’t want to be liable.”).
\item \textsuperscript{130} 28 U.S.C. § 1491(a)(1) (2012) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution. . . .").
\item \textsuperscript{131} Id. § 1346(b)(1) (2012) (giving U.S. District Courts exclusive jurisdiction over loss of property claims against the United States caused by the negligent act of any employee of the government).
\item \textsuperscript{132} Id. § 1346(a)(2) (2012).  
\end{itemize}
the United States District Courts within two years, whereas takings claims can be filed with the United States Court of Federal Claims for up to six years after the cause of action accrues.

Hence, the practical implications of the tort versus taking distinction are profound. If the court determines that the intentional government-induced temporal flood damages occurred in tort, then the landowner has no cause of action against the government, and the questions of which court has jurisdiction and what is the relevant statute of limitations become moot. Thus, the tort versus taking distinction is unfair and improper in intentional government-induced temporal flooding cases because an arbitrary line determines whether a cause of action exists. Courts ought to focus on litigating damages rather than determining whether a cause of action exists based on the arbitrary and elusive distinction between torts and takings.

B. Protecting the Government from Justly Compensating Landowners When its Actions Take the Landowner's Property Creates a Dangerous Moral Hazard

Congress passed the 1928 Flood Control Act to protect the government from liability arising from government flood control projects. Among Congress' chief purposes in passing the 1928 Flood Control Act was to enable the Army Corps to manage flood control projects without the fear of facing litigation. A recurring anxiety of the government in temporal flooding cases is that awarding damages for takings against the government risks disruption of flood control projects. The government fears that "[e]very passing flood attributable to the government's operation of a flood-control project, no matter how brief," may qualify as a compensable taking. The Supreme Court observed in Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 521 (2012).

133. Id. § 2401(b) (2012) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ").
134. Id. § 2501 (2012) ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition is filed within six years after such claim first accrues.").
135. See supra notes 127-29 and accompanying text.
136. See supra note 127 and accompanying text.
138. Id.
139. Id. ("To reject a categorical bar to temporary-flooding takings claims, however, is scarcely to credit all or even many such claims.").
Moreover, even if there is some merit to the government's fear that allowing a cause of action against the government may impede flood control projects, it does not follow that takings claims should be barred against the government merely because the claims arise in tort. 140 Barring takings actions merely because the cause of action arises in tort greatly increases the government's power and control over people's property, and history is ripe with doctrines meant to limit the government's power. 141 In fact, The Fifth Amendment’s Takings Clause is meant to protect a landowner from the government’s overreaching power to take his or her property. 142

In Romeo & Juliet, Shakespeare quipped “What's in a name? That which we call a rose by any other name would smell as sweet.” 143 Similarly, whether called a tort or a taking, intentional government-induced temporal floods may cause damage to a landowner's property for which the landowner is entitled to a remedy. The unfair consequence of the tort versus taking distinction is to bar the landowner's remedy should the flood be called a tort. Moreover, it has been suggested that “torts against property are takings under the Fifth Amendment.” 144 Hence, if a tort against property is a taking, then there is no need to distinguish torts and takings in the realm of intentional government-induced temporal floods in the first place.

140. Id. (flooding cases should not be assessed “by resorting to blanket exclusionary rules”); See Marzulla, supra note 7, at 5 (“Temporary takings are now part of established jurisprudence. There is no logical reason to exclude flooding cases from general takings law.”); Daniel T. Smith, Note, Draining the Backwater: The Normalization of Temporary Floodwater Takings Law in Arkansas Game and Fish Commission v. United States, 101 GEO L. J. ONLINE 57, 69 (2013), available at http://georgetownlawjournal.org/ipsa-loquitur-issue/101 (the Ark. Game & Fish Comm’n decision diminishes arguments both for and against bright-line rules in Takings cases).

141. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .”); See generally MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 405 (4th ed. 2011) (“The principle that law should protect the rights of individuals against the abuses of governments can at least be dated back to John Locke’s Two Treatises of Government published in 1690. Locke believed that human rights, not governments, came first in the natural order of things.”).

142. See U.S. CONST. amend. V.

143. WILLIAM SHAKESPEARE, ROMEO & JULIET 22 (London, Macmillan 1839).

Indeed, to avoid a moral hazard, a government must be held responsible for the negative consequences of its actions. In the temporary takings realm, history demonstrates that the government acts differently when it must face the detrimental consequences of its actions. For example, after the Supreme Court found a taking in *Lucas v. South Carolina Coastal Council*, South Carolina promptly settled the case, lifted the regulation forbidding development, and sold the property to developers who built homes on the very lots that Lucas had been forbidden from developing. Similarly, in *Arkansas Game*, only the looming threat of litigation resulted in the Army Corps ending the deviations from the Manual that were causing the hardwood timber damage in the Management Area.

The corollary to holding the government responsible for the negative consequences of its actions is that the government will fear that its actions may result in liability, hence hindering government efficiency. However, fear is necessary to motivate the government to take precautions to try to avoid liability in the first place. Without fear and the threat of takings liability, the government has little motivation to consider the landowner's best interest. More importantly, landowners have little remedy when the government temporarily takes, or even destroys, their property, thus resulting in "an unstable system of recovery for individuals whose property is destroyed by the government."

A proponent for the tort versus taking distinction may argue that while the government may not be legally obligated to compensate landowners if the flooding is found to be a tort, the gov-

---


147. Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches — A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837, 867 n.116 (1998) ("The state regulators' environmental zeal thus lasted only as long as they thought they could stick Lucas with the cost of the proverbial free lunch. But when faced with the tab themselves, preservation of Lucas' lots suddenly ceased being environmentally important.").

148. See supra notes 77-79 and accompanying text.

149. See Siegel, supra note 124, at 274.

government still has a moral obligation to compensate. Although this doctrine of public necessity may be true, its application to the government may be limited by government immunity, and landowners waiting on the government to act based upon a moral obligation will often be disappointed. In any event, regardless of whether there is a moral obligation for the government to pay for damages resulting from its attempts to improve flooding conditions, the better method is to hold the government to its constitutional duty to justly compensate for a taking.\footnote{153}{See generally RESTATEMENT (SECOND) OF TORTS § 196 (1965).}

C. The Current Tort Versus Taking Test is Unclear and Denies Justice in Intentional Government-Induced Flooding Cases

1. The Tort Versus Taking Framework used in Intentional Government-Induced Temporal Flooding Cases Fails the Armstrong Principle

The quintessential problem with the current tort versus taking framework used in intentional government-induced temporal flooding cases is that it too often fails to protect individual landowners from the government’s flooding choices. By amending the United States Constitution to add the Fifth Amendment’s Takings Clause, Congress intended to protect landowners from the omnipotent government by providing landowners with just compensation should the government take the landowner’s private property (the “Armstrong principle”). However, the current state of intentional government-induced temporal flooding jurisprudence fails to protect landowners from the government.\footnote{154}{See ARMSTRONG v. UNITED STATES, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed 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.”).}

\footnote{155}{See generally RESTATEMENT (SECOND) OF TORTS § 196 (1965).}
\footnote{156}{See id. at cmt. h (1965); cf. Catanzaro, supra note 150, at 31 (explaining that Congress acted to compensate oyster farmers despite a finding by the Federal Circuit that no taking had occurred) (citing Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996)).}
\footnote{157}{See Catanzaro, supra note 150, at 31 (explaining that Congress acted to compensate oyster farmers despite a finding by the Federal Circuit that no taking had occurred) (citing Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996)).}
\footnote{158}{See, e.g., Sanguinetti v. United States, 264 U.S. 146, 148-50 (1924) (no taking); Big Oak Farms, Inc. v. United States, 105 Fed. Cl. 48, 59 (2012) (no taking); Barnes v. United States, 538 F.2d 865, 873 (Cl. Ct. 1976) (no taking for several floods); Hartwig v. United States, 485 F.2d 615, 617 (Cl. Ct. 1973) (no taking); Fromme v. United States, 412 F.2d 1192, 1194-1195 (Cl. Ct. 1969) (no taking).}
\footnote{159}{See, e.g., Sanguinetti v. United States, 264 U.S. 146, 148-50 (1924) (no taking); Big Oak Farms, Inc. v. United States, 105 Fed. Cl. 48, 59 (2012) (no taking); Barnes v. United States, 538 F.2d 865, 873 (Cl. Ct. 1976) (no taking for several floods); Hartwig v. United States, 485 F.2d 615, 617 (Cl. Ct. 1973) (no taking); Fromme v. United States, 412 F.2d 1192, 1194-1195 (Cl. Ct. 1969) (no taking).}
Even after the Supreme Court's holding in *Arkansas Game*, courts continue to give the federal government too much deference in intentional government-induced temporal flooding cases, essentially allowing the government to temporarily take private property without providing the landowner with just compensation.

Most recently, the United States Court of Federal Claims ("COFC") gave the federal government great deference by dismissing an intentional government-induced temporal flood takings claim in *Big Oak Farms, Inc. v. United States.* In *Big Oak Farms*, many landowners alleged that the Army Corps violated the Takings Clause by taking their property without providing just compensation. The Army Corps exploded the levee that protected the landowners' property, releasing flood waters that damaged the landowners' property, crops, equipment, and infrastructure. In addition, the flood left sand and gravel deposits strewn across the landowners' property. The COFC relied on the Federal Circuit's opinion in *Arkansas Game* and held that no taking had occurred because "[r]eleases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring." Following the Supreme Court's reversal of the Federal Circuit in *Arkansas Game*, the COFC instructed both parties to address the effects of the reversal on the COFC's earlier decision denying a takings claim. The COFC declined to reconsider its earlier decision. The COFC reasoned that reconsideration was unnecessary because "*Arkansas Game* addressed simply and only whether 'repeated' government-induced flooding, if temporary in nature, was exempt from the Takings Clause. The Supreme Court

---

*United States*, 23 VILL. ENVTL. L. J. 211, 245 (2012) (recognizing that in temporal flooding cases, courts give "the government unprecedented power to occupy private property without just compensation," and further recognizing that the courts permit the federal government to "disregard . . . the environmental destruction caused by such a taking").

157. 105 Fed. Cl. at 59.
158. Id. at 50.
159. Id.
160. Id.
161. Id. at 55-56 (quoting Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1377 (Fed. Cir. 2011), rev'd and remanded, 133 S. Ct. 511 (2012)).
163. The COFC ruled on May 4, 2012 that no taking had occurred in *Big Oak Farms*, 7 months prior to the Supreme Court's December 4, 2012 holding in *Arkansas Game*. *Big Oak Farms, Inc.*, 105 Fed. Cl. at 48.
164. Order Following *Arkansas Game* at 2, Big Oak Farms, Inc. v. United States, No. 11-275L (Fed. Cl. 2012), ECF No. 54.
165. See id. at 3.
did not address whether a single flood can give rise to a claim for a taking as opposed to a tort.”\(^\text{166}\) Essentially, the COFC continues to hold that a single flood can never rise to the level of a taking, and, therefore, in all cases, the government is entitled to freely flood one’s property at least one time.\(^\text{167}\) Thus, the most recent intentional government-induced temporal flooding case indicates that the COFC continues to struggle interpreting the tort versus taking distinction and improperly takes the easy road by categorically exempting a landowner’s one-time flood claim from ever succeeding with a Takings Clause cause of action.\(^\text{168}\) Because the government exploded the levee in *Big Oak Farms* to protect some landowners in Cairo, Illinois,\(^\text{169}\) it clearly follows that the court failed to satisfy the *Armstrong* principle when it forced other landowners to suffer the brunt of the resultant intentional government-induced temporal flooding damage while also withholding just compensation.\(^\text{170}\) Therefore, in intentional government-induced temporal flood cases, courts ought to focus on litigating damages rather than determining whether a cause of action exists based on the arbitrary and elusive distinction between torts and takings. By following such a procedure, the *Armstrong* principle is more easily satisfied.

2. *It is Unclear How Many Intentional Government-Induced Temporal Floods Turn a Mere Tort into a Taking*

The frequency of flooding required to rise to the level of a taking has created a judicial quagmire resulting in decisions inconsistent with general takings jurisprudence. For example, the courts consistently hold that one flood does not rise to the level of a taking.\(^\text{171}\) However, holding that one flood does not rise to the level of a taking is inconsistent with earlier general takings cases where the

\(^{166}\) See id.

\(^{167}\) In reality, the government flooded the landowner’s property twice; however, the COFC says that the two floods are too remote to be considered recurring floods. *Big Oak Farms, Inc.*, 105 Fed. Cl. at 56.

\(^{168}\) Smith, *supra* note 140, at 68-69 (“In spite of the Supreme Court’s doctrinal move away from per se rules that invalidate takings claims, the *Big Oak Farms* court’s decision not to reconsider the case suggests lower courts may continue to treat factors such as substantiality and frequency as dispositive, limiting the practical effects of the *Arkansas* decision.”).

\(^{169}\) 105 Fed. Cl. at 50.

\(^{170}\) See *supra* note 155 and accompanying text.

\(^{171}\) See, e.g., *Big Oak Farms*, 105 Fed. Cl. at 56; Hartwig v. United States, 485 F.2d 615, 620 (Cl. Cl. 1973); Fromme v. United States, 412 F.2d 1192, 1196 (Ct. Cl. 1969).
courts decided that the government must pay just compensation for a single physical temporary taking.\textsuperscript{172} Furthermore, an absolute bar on one flood constituting a taking is inconsistent with the Supreme Court's recent decisions which aim to avoid per se rules invalidating takings claims.\textsuperscript{173}

Besides, if one flood cannot constitute a taking then how many floods must a landowner suffer before his claim rises to the level of a taking rather than a mere consequential tort? Unfortunately, the court has not clearly answered this question.\textsuperscript{174} Rather, one is left to decipher unclear rules. For example, "[g]overnment-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort."\textsuperscript{175} Although at first glance this rule seems adequate, no clear guidelines mark the boundary between inevitably recurring floods which face liability for government takings and occasional floods which evade any government liability, making the rule difficult to apply.\textsuperscript{176}

Additionally, the durational uncertainty required to find a taking, as opposed to a mere tort, is exacerbated by the Federal Circuit's inconsistent decisions in cases with nearly identical facts. For example, in \textit{Arkansas Game},\textsuperscript{177} the Federal Circuit's majority opinion failed to discuss \textit{Cooper v. United States},\textsuperscript{178} a case directly on point; however, in her dissenting opinion, Justice Newman addressed the case.\textsuperscript{179} In \textit{Cooper}, the Army Corps project blocked a river which caused Cooper's farm to flood for five consecutive years.\textsuperscript{180} Consequently, the standing water stressed Cooper's timber during the growing season and Cooper's trees began to die.\textsuperscript{181} The Federal Circuit found that a taking of Cooper's timber had

\footnotesize


\textsuperscript{173} Smith, supra note 140, at 68.

\textsuperscript{174} Three floods may not be a taking. \textit{See supra} notes 45-47 and accompanying text. Two floods may not constitute a taking. \textit{See supra} note 167 and accompanying text.

\textsuperscript{175} Barnes v. United States, 538 F.2d 865, 870 (Ct. Cl. 1976).

\textsuperscript{176} Nat'l By-Prosds., Inc. v. United States, 405 F.2d 1256, 1273 (Ct. Cl. 1969) ("The distinction between 'permanent liability to intermittent but inevitably recurring overflows', and occasional floods induced by governmental projects, which we have held not to be takings, is, of course, not a clear and definite guideline.").

\textsuperscript{177} Ark. Game \& Fish Comm'n v. United States, 637 F.3d 1366 (Fed. Cir. 2011), rev'd and remanded, 133 S. Ct. 511 (2012).

\textsuperscript{178} 827 F.2d 762 (Fed. Cir. 1987).

\textsuperscript{179} Ark. Game \& Fish Comm'n, 637 F.3d at 1382 (Newman, J., dissenting).

\textsuperscript{180} Cooper, 827 F.2d at 762.

\textsuperscript{181} Id.
occurred.\textsuperscript{182} Considering the court’s holding in Cooper, it is unclear how the Federal Circuit could conclude, in Arkansas Game, that flooding from 1993 through 2001 that destroyed the Commission’s timber did not also amount to a taking.\textsuperscript{183} Therefore, in intentional government-induced temporal flood cases, courts ought to focus on litigating damages rather than trying to decipher the arbitrary line transforming the flood from a mere tort to a taking.

3. \textit{It is Unclear What Level of Intent/Foreseeability Turns a Mere Tort into a Taking}

Clearly, for a court to award damages in a tort or takings action against the government, the plaintiff must show the government caused the damages. Although this principle seems simple, the tort versus taking distinction makes it quite confusing for the courts.

In Ridge Line, Inc. \textit{v. United States}, the court described the two-part test to distinguish physical takings from torts.\textsuperscript{184} First, a taking requires that the government “intends to invade a protected property interest or the asserted invasion is the ‘direct, natural, or probable result of an authorized activity . . . .”\textsuperscript{185} Second, the court must consider whether the government’s interference with property rights was “substantial and frequent enough to rise to the level of a taking.”\textsuperscript{186} Essentially, the first prong requires the court to determine if the harm “[was] the predictable result of the government’s action, and whether the government’s actions were sufficiently substantial to justify a takings remedy.”\textsuperscript{187}

The courts have experienced great difficulty determining whether harm is predictable and what is the relevant standard of predictability. In Moden \textit{v. United States}, addressing the causation prong of the Ridge Line test, the Federal Circuit stated that a “plaintiff must prove that the government \textit{should} have predicted or foreseen the resulting injury.”\textsuperscript{188} Four days earlier, in Hansen

\textsuperscript{182} \textit{Id.} at 763-64.

\textsuperscript{183} \textit{Ark. Game \& Fish Comm’n}, 637 F.3d at 1382 (Newman, J., dissenting) (“The floods in Cooper and the government activity that caused them were no less ‘inherently temporary,’ the words by which the majority characterizes the flooding, than the recurring releases here.”).

\textsuperscript{184} 346 F.3d 1346, 1355 (Fed. Cir. 2003).

\textsuperscript{185} \textit{Id.} (internal citation omitted).

\textsuperscript{186} \textit{Id.} at 1357.

\textsuperscript{187} \textit{Id.} at 1355.

\textsuperscript{188} 404 F.3d 1335, 1343 (Fed. Cir. 2005) (emphasis added).
v. United States, addressing the causation prong of the Ridge Line test, the COFC stated that the proper inquiry was if “the harm could have been foreseen...”\textsuperscript{189}

Although the difference between “could have been foreseen” and “should have been foreseen” seems minor, this determination can be dispositive of the tort versus taking distinction. For example, in Moden, the plaintiffs needed to prove that it should have been foreseen that chemical solvents, used by the Air Force base, would be released into the groundwater.\textsuperscript{190} Although an Air Force engineer testified “underground leaks in drainage systems are possible,” the court found that, at most, this merely indicated the cause-in-fact of the claimed injury.\textsuperscript{191} Despite the fact that the engineer’s testimony showed that the Air Force “could have foreseen” the chemical solvent entering the groundwater, the Federal Circuit determined that this did not mean that the injury should have been foreseen.\textsuperscript{192} Therefore, the Modens failed to satisfy the first prong of the Ridge Line test required to find a taking. \textit{Moden} demonstrates the importance of having a causation standard that is understood and applied uniformly by the courts, especially when that determination is dispositive of the tort versus taking distinction. By focusing on damages, rather than the tort versus taking distinction, the court could eliminate the possibility of barring recovery based on an unclear factor.

\textbf{D. A Better Method for Resolving Temporal Flooding Cases}

As demonstrated above, what constitutes a taking, as opposed to a tort, is not a question to which there is likely to be agreement across temporal flooding cases.\textsuperscript{193} Under the current law, intentional government-induced temporal flooding cases turn on whether the plaintiff’s claim rises to a taking because 33 U.S.C. § 702(c) precludes liability against the government in tort.\textsuperscript{194} Therefore, in an intentional government-induced temporal flooding case, the plaintiff’s taking claim must satisfy a set of unclear balancing factors before the plaintiff can establish any liability. Basing takings liability on the tort versus taking distinction is fundamental-

\textsuperscript{189} 65 Fed. Cl. 76, 97 (2005) (emphasis added).
\textsuperscript{190} 404 F.3d at 1344.
\textsuperscript{191} Id. at 1345.
\textsuperscript{192} See id.
\textsuperscript{193} See Epstein, supra note 11, at 604.
\textsuperscript{194} See supra notes 127-29 and accompanying text.
ly flawed because "torts against property are takings under the Fifth Amendment." Hence, a more practical approach in temporal flooding cases would focus on litigating damages rather than litigating whether an intentional government-induced temporal flood crosses the arbitrary, imaginary line that delineates a tort from a taking.

Of course, by focusing on damages in an intentional government-induced temporal flooding case, the question shifts to causation. If the landowner can prove that the government flood control project caused the damages to the landowner's property, a tort has occurred; because a tort against property is a taking, by logical deduction a taking has occurred. Once a taking is found there are many possible options for calculating damages.

Applying a takings analysis in intentional government-induced temporal flood cases resolves many issues currently plaguing the intentional government-induced temporal flooding jurisprudence. First, if the landowner can establish that a tort to his property resulted from the intentional government-induced temporal flood, then the landowner will experience the fairness and justice called for by the Armstrong principle because his cause of action no longer depends on the arbitrary line delineating torts from takings.

When applying a tort versus taking distinction in an intentional government-induced temporal flood case, a landowner whose claim sounded in tort forfeited his chance at collecting damages because he failed to have a cause of action against the government. However, by applying a takings analysis in intentional government-induced flood cases, if the landowner can establish that the government flooded his property, he gets his day in court to litigate damages. As such, by simply applying a takings analysis the landowner may litigate damages and will not be forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Furthermore, applying a takings analysis in intentional government-induced temporal flood cases is a logical extension of the

---

195. See Sura, supra note 144, at 1753.
196. See Epstein, supra note 11, at 600 (calling for "liability by rule, damages by degree").
197. See Sura, supra note 144, at 1753.
198. See Siegel & Meltz, supra note 10, at 513-23.
200. See supra notes 127-29 and accompanying text.
201. See Armstrong, 364 U.S. at 49.
Supreme Court's "doctrinal move away from per se rules that invalidate takings claims ...." Under current law, because the case of an individual flood sounds in tort, it can never amount to a taking. Although recurrent flooding was at issue in Arkansas Game rather than a single flood, the Supreme Court's holding that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability," illustrates a desire to avoid rules that categorically bar takings actions. Moreover, the Court addressed that "most takings claims turn on situation-specific factual inquiries." By utilizing a takings analysis in a single flood case, courts could simply apply the situation specific factual inquiry to litigating damages rather than barring the action entirely. Holding that a single flood can never amount to a taking clearly fails the Armstrong principle as well. Thus, the move to avoid categorical exemptions from Takings Clause liability supports the idea of applying a takings analysis in intentional government-induced temporal flooding cases.

Moreover, applying a takings analysis in intentional government-induced temporal flood cases avoids the difficulties associated with the Ridge Line test. Instead of trying to apply the abstract Ridge Line test to determine if a cause of action exists, the court is left to litigate what level of damages the flooding warrants. As such, the landowner's burden shifts to proving what level of just compensation the government owes for its temporary use of the landowner's private property. Although a landowner's and court's opinion of what constitutes just compensation may differ, receiving less just compensation is more just and fair than barring a cause of action based on the arbitrary tort versus taking distinction.

Also, applying a takings analysis in intentional government-induced temporal flood cases will not result in the government owing substantial just compensation in all cases. In some cases the government may owe nominal or small amounts of just compensation. Because in temporal flooding cases, "torts against

---

202. Smith, supra note 140, at 68.
205. Id. at 518 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).
206. See supra notes 184-92 and accompanying text.
property are takings under the Fifth Amendment," the government may limit the just compensation due by proving that the intentional government-induced temporal flood did not proximately cause the landowner’s damage or that a concurrent cause existed. For example, if the Army Corps could prove that a landowner’s trees suffered from blight before the temporal flooding began, then the Army Corps could limit the just compensation due. More importantly, the Army Corps may only owe nominal damages if the landowner’s property produced no income and the flooding caused no property damage. For example, if the Army Corps merely flooded an empty field or a forest, where the landowner does not harvest timber, then the landowner would fail to prove anything more than nominal damages. Hence, applying a takings analysis in intentional government-induced temporal flood cases will not result in the government owing substantial just compensation in all cases. Furthermore, judicial activism is a possibility, and it is plausible that judges may find ways to mitigate or award nominal damages in close cases. The government may still receive some deference in intentional government-induced temporal flood cases, and if such is the case, only landowners with very strong claims will succeed.

E. An Inverse Ratio Rule

A difficult conundrum in intentional government-induced temporal flooding cases is that the government could be held liable for remote flood damages. To limit damages in scenarios involving very remote flooding, courts could adopt the inverse ratio rule from intellectual property law. In the context of damages in a government-induced temporal flooding case, the inverse ratio rule would require a lesser showing of intent or knowledge that the plaintiff’s land would flood if there is a strong showing that a good faith effort at computer modeling would have predicted the flooding of the plaintiff’s land. Stated differently, landowners adjacent to or in close proximity to the dam should almost always be

207. Sura, supra note 144, at 1753.
208. See, e.g., Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000) (establishing that in copyright infringement cases where there is weak proof of access to the copyrighted material and only circumstantial evidence establishes substantial similarity the court applies an inverse ratio test, which requires a lesser showing of substantial similarity if there is a strong showing of access).
209. Computer modeling is already used in the context of intentional government-induced temporal floods. See supra note 96 and accompanying text.
justly compensated with their full amount of proven damages. If a more remote landowner, whose property is located further from the dam, can show that good faith computer modeling would have predicted that his or her property would flood, then this landowner should also be justly compensated his or her full amount of proven damages. If a remote landowner, whose property is located further from the dam, cannot show that good faith computer modeling would have predicted the flooding of his or her property, then the court is left to determine what compensation is owed to the landowner. Using an inverse ratio test would result in the government owing just compensation for government-induced temporal floods, but in remote flood cases the court may exercise more judicial discretion in determining the amount of just compensation due to the landowner.

IV. CONCLUSION

Intentional government-induced temporal floods are a taking and the proper inquiry for the court is to determine the amount of damages. When a lay person is asked whether the government ought to be held liable for intentional government-induced temporal flooding of one's property, the common sense answer dictates that the government ought to be held liable. Yet, the unclear nature of the Takings Clause's application to intentional government-induced temporal flooding cases often results in no liability due to statutes such as the Flood Control Act of 1928 as well as arbitrary court decisions premised on the tort versus taking distinction. The Arkansas Game and Fish Commission spent nine years as a party in the court system to be justly compensated for government-induced floods that destroyed its timber. The Arkansas Game and Fish Commission's ordeal illustrates the need for a simpler application of takings claims in the intentional government-induced temporal flooding context. Accordingly, because torts against property are takings, intentional government-induced temporal flooding cases should focus on damages to determine liability instead of attempting to apply an unclear and arbitrary tort versus taking analysis.

210. Even located 115 miles from the dam, a good faith effort at computer modeling would have predicted the flooding of the Management Area. See supra notes 60 and 96 and accompanying text.