Flooding the Possibility of Recovery under a Temporary Takings Analysis: The Drowning Effects of Arkansas Game & Fish Commission v. United States

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I. INTRODUCTION

When the states ratified the Bill of Rights on December 15, 1791, the drafters of the Fifth Amendment could not have predicted the flood of varied, and at times inconsistent, jurisprudence that has since attempted to interpret the precise meaning of the amendment's final clause: "[N]or shall private property be taken for public use, without just compensation." This clause allows a landowner to bring several types of takings claims against the federal government depending on whether the deprivation of private property is physical or regulatory, permanent or temporary. If the government deprives a landowner of its property in any way, takings jurisprudence requires the government to pay just compensation to the aggrieved landowner.

A particularly severe type of governmental taking involves public works projects, specifically the construction and maintenance of dams by the Army Corps of Engineers (Corps). Landowners typically redress such takings by bringing inverse condemnation proceedings against the government after the alleged taking occurs. The landowner may institute an inverse condemnation proceeding when the government takes a flowage easement over the landowner's property and refuses payment of just compensation.

1. See U.S. Const. amend. V (articulating takings clause). For a brief discussion of general takings jurisprudence, see infra notes 65-74 and accompanying text.
2. For a brief background of the different types of takings claims, see infra notes 65-74 and accompanying text.
3. For a brief background of takings jurisprudence, see infra notes 65-74 and accompanying text.
4. For a further discussion of Corps navigational projects' takings, see generally infra notes 78-98 and accompanying text. The Corps has general jurisdiction over both the navigable waters within the United States, which includes all major bodies of water such as rivers, lakes and streams, and also the smaller bodies of water with a "significant nexus" to navigable waters. See Rapanos v. United States, 547 U.S. 715, 716-19 (2006) (describing Army Corps of Engineers' jurisdiction).
5. For a further discussion of inverse condemnation proceedings, see infra notes 72-74 and accompanying text.
6. For a further discussion of inverse condemnation proceedings, see infra notes 72-74 and accompanying text. The Corps in Little Rock, Arkansas describes flowage easements as giving the "government the perpetual right to flood privately owned land, if necessary, for operation of the project and to prohibit any struc-
The federal government’s appropriation of flowage easements over private property can have numerous environmental consequences on the landowner’s property. These effects include: timber mortality, soil erosion, invasion of new wetland species, and decreased wildlife populations. If a landowner does not receive just compensation from the government for the taking of both the property and the vegetation situated upon it, the landowner may have difficulty funding the regeneration costs necessary to restore the property to its natural ecological state.

In 2011, the United States Court of Appeals for the Federal Circuit addressed a case involving the Corps’ appropriation of a flowage easement over the Arkansas Game & Fish Commission’s (Commission) Wildlife Management Area. Arkansas Game & Fish Commission v. United States (Arkansas Game & Fish) represents the Federal Circuit’s attempt to resolve the vast jurisprudence of flowage easement takings with a focus on defining the distinction between temporary and permanent floods. This distinction is particularly significant because it dictates whether the court engages in a tort or takings analysis, as only a valid claim under a takings analysis elicits just compensation for the aggrieved landowners for human habitation.” Shoreline Management, U.S. Army Corps of Eng’rs, Little Rock Dist., http://www.swl.usace.army.mil/parks/dardanelle/shoreline.htm (last updated Mar. 2, 2010) (defining flowage easements); see also Flowage Easement, U.S. Army Corps of Eng’rs, Jim Chapman Lake/Cooper Dam, http://www.swf-wc.usace.army.mil/cooper/RealEstate/Flowage%20Easement.asp (last updated July 19, 2007) [hereinafter Flowage Easement] (defining flowage easement). The U.S. Army Corps of Engineers website states:

Flowage easement land is privately owned land on which the U.S. Army Corps of Engineers has acquired certain perpetual rights. Namely the right to flood it in connection with the operation of a reservoir; the right to prohibit construction or maintenance of any structure for human habitation; the right to approve all other structures constructed on flowage easement land, except fencing.

Flowage Easement, supra.

7. For a discussion of the adverse environmental effects of repeated governmental flooding, including timber mortality and invasion of new wetland species, see infra notes 60-62 and accompanying text.


9. For an example of the regeneration costs associated with restoring land destroyed by a flood, see infra note 62.

10. Ark. Game & Fish II, 637 F.3d at 1378-79 (holding intermittent flooding did not amount to temporary taking compensable under Fifth Amendment).

11. 637 F.3d 1366 (Fed. Cir. 2011).

12. For a further summary of the Federal Circuit’s analysis in Arkansas Game & Fish, see infra notes 128-168 and accompanying text.
owner's appropriated property. Moreover, only "intermittent" and "inevitably recurring" temporary floods are eligible for recovery under a temporary takings analysis. The determination of what qualifies as a valid and compensable taking under the Fifth Amendment, therefore, is an extremely important and delicate task.

The Federal Circuit's narrow holding in Arkansas Game & Fish ignored the longstanding precedent establishing the availability of recovery under a temporary takings analysis. Instead, the court concluded subsequent releases of water and deviations from Clearwater Dam's Water Control Manual (Manual) did not recur, and thus the floods were "only temporary." Accordingly, the Federal Circuit determined the Corps had not taken a flowage easement over the Commission's land.

This Note examines the Federal Circuit's analysis in Arkansas Game & Fish in light of the long-standing governmental takings jurisprudence and predicts the effect of its inconsistent holding on future flowage easement cases. Part II summarizes the facts of Arkansas Game & Fish. Part III outlines the evolution of Fifth Amendment takings jurisprudence with a focus on inverse condemnation cases arising from aqueous governmental takings of property. Part IV examines the legal analysis utilized by the Federal

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13. For a further examination of the tort and takings distinction, see infra notes 99-118 and accompanying text.
14. Ark. Game & Fish II, 637 F.3d at 1376 (quoting Ridge Line Inc. v. United States, 946 F.3d 1346, 1357 (Fed. Cir. 2003)) (describing types of flooding eligible for recovery under temporary takings theory). For a further discourse of intermittent and inevitably recurring floods, see infra notes 75-87 and accompanying text.
15. For an analysis of the inconsistent interpretations of what qualifies as a Fifth Amendment taking, see infra notes 79-124 and accompanying text.
16. For a further summary of the Federal Circuit's analysis, see infra notes 128-162 and accompanying text.
18. Id. at 1379 (holding Corps did not take compensable flowage easement over Commission's land).
19. For a narrative analysis of Arkansas Game & Fish, see infra notes 126-168 and accompanying text. For a critical analysis of the court's holding in Arkansas Game & Fish, see infra notes 169-216 and accompanying text. For an exploration of the potential impact Arkansas Game & Fish will have on subsequent takings jurisprudence, see infra notes 217-246 and accompanying text.
20. For a discussion of the relevant facts of Arkansas Game & Fish, see infra notes 25-64 and accompanying text.
21. For a discussion of relevant background material pertaining to Fifth Amendment takings analysis and inverse condemnation cases arising from governmental takings of flowage easements, see infra notes 65-125 and accompanying text.
Circuit to reach its holding. Part V compares the Federal Circuit’s rationale and procedure to prior Federal Circuit decisions. Finally, Part VI considers the impact of *Arkansas Game & Fish* on future inverse condemnation takings cases.

II. FACTS

In *Arkansas Game & Fish*, the Federal Circuit considered whether the Corps took a temporary flowage easement over the Commission’s property, thereby entitling the Commission to just compensation from the federal government. The controversy arose from a Corps-approved, seven-year period of interim deviations from Clearwater Dam’s established water release rates. The deviations caused extensive flooding and timber mortality throughout the Commission’s Dave Donaldson Black River Wildlife Management Area (Management Area). The Commission acquired the Management Area in 1957. It encompasses 23,000 acres devoted to wildlife preservation, hunting, and timber harvesting along the Black River in northeast Arkansas. The Commission preserves the Management Area in order to maintain a diverse bottomland...

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22. For a narrative analysis of the court’s decision in *Arkansas Game & Fish*, see infra notes 126-168 and accompanying text.
23. For a critical analysis of the Federal Circuit’s holding in *Arkansas Game & Fish*, see infra notes 169-216 and accompanying text.
24. For a discussion of the impact of the Federal Circuit’s holding in *Arkansas Game & Fish*, see infra notes 217-246 and accompanying text.
25. See Ark. Game & Fish II, 637 F.3d 1366, 1367 (Fed. Cir. 2011) (describing central issue of case). “The Claims court concluded [ ] the United States had taken a temporary flowage easement over the Commission’s property and awarded a total of $5,778,757.90 in damages.” Id. “The United States appealed, contending that no taking had occurred, and that if it had, the damages were overstated.” Id. at 1374. The Commission cross-appealed, claiming they were entitled to additional damages for timber regeneration costs. Id.
26. See id. at 1367 (revealing Corps’ deviation from Water Control Manual). The Clearwater Dam is “located in southeast Missouri approximately 115 miles upstream of the Commission’s Management Area,” which is located in northeast Arkansas. Id.
27. See id. at 1367-68, 1372-73 (describing Corps’ deviations from Manual and subsequent flooding of Management Area). The deviations began in 1993 and ended in 2000, when the Corps resumed the release rates set forth in the original 1953 Clearwater Lake Water Control Manual. Id. at 1371.
29. See Ark. Game & Fish II, 637 F.3d at 1367 (characterizing Management Area).
hardwood timber resource and to attract migratory waterfowl for recreational activities.\(^{30}\)

The Commission manages the forest within the Management Area in part to provide food essential to the migratory waterfowl’s diet.\(^{31}\) During the primary tree-growing season between April and October, the water levels within the Management Area must be minimal to prevent tree roots from weakening.\(^{32}\) To further promote tree growth and guide future tree management, the Commission selectively thins and clear-cuts existing trees, removes undesirable species, and studies timber surveys conducted within the Management Area.\(^{33}\)

Clearwater Lake and Dam lie on the Black River in southeastern Missouri, approximately 115 miles north of the Management Area.\(^{34}\) The Corps completed the Clearwater Dam (Dam) in 1948, and has since controlled the release of water from the Dam to regulate the Black River’s water levels and reduce floods affecting the

\(^{30}\) WMA Details, supra note 28 (elaborating on history, purpose, and practices within management area); see also Ark. Game & Fish Comm’n v. United States (Ark. Game & Fish I), 87 Fed. Cl. 594, 601 (Fed. Cl. 2009) (describing purpose of Management Area), rev’d, 637 F.3d 1366 (Fed. Cir. 2011). The Management Area contains a significant portion of the “remaining bottomland hardwood habitat in eastern Arkansas,” which includes tree species such as “nuttall oak, overcup oak, pin oak[,] and water oak.” WMA Details, supra note 28. The Management Area “provide[s] top-quality waterfowl hunting[,] . . . [and] includes some of the finest greentree reservoir duck habitat in Arkansas.” Id. The migratory waterfowl found in the Management Area depends upon the Commission’s carefully maintained hardwood and greentree areas during the winter migration months. Id. The Commission engages in “systematic harvests of mature oak and subsequent reforestation to maintain a healthy regenerating forest.” Ark. Game and Fish I, 87 Fed. Cl. at 601.

\(^{31}\) Ark. Game & Fish I, 87 Fed. Cl. at 601 (explaining primary concerns of Management Area). Maintaining the oak trees is particularly important because they provide food for the migratory birds. Id. Each year the Commission artificially floods the Green Tree Reservoirs in the Management Area to attract migratory waterfowl and to provide an enhanced recreational opportunity for waterfowl hunters. Id.

\(^{32}\) Ark. Game & Fish II, 637 F.3d at 1369, 1372 (stating duration of tree growing season and describing effects of standing water on tree growth). “The presence of standing water or saturated soil during tree growing season can weaken the roots of the multiple species of oak trees . . . which can also render the oaks more susceptible to drought conditions.” Id. During the non-growing season, the Commission partakes in “seasonal flooding of about 7,000 acres of green timber to attract waterfowl.” WMA Details, supra note 28.

\(^{33}\) Ark. Game & Fish I, 87 Fed. Cl. at 602 (describing tree management processes). Thinning the trees creates competition between the more mature trees, allows sunlight to reach the younger trees and seedlings, and stimulates the growth of non-wooded plants, which provide cover and food for wildlife. Id.

\(^{34}\) Ark. Game & Fish II, 637 F.3d at 1367 (describing Clearwater Dam); see also Ark. Game & Fish I, 87 Fed. Cl. at 602 (characterizing Clearwater Lake and Dam).
agricultural lands along the river. Before the Manual was published in 1953, the release rates at Poplar Bluff, a water-level measuring gauge, were 12 feet during the tree-growing season and 14 feet during the non-growing season. The Corps noticed these high releases adversely affected many downstream regions, and thus experimented for several years with the water levels in the Black River to mitigate such consequences. Finally, the Corps published the Manual and set the maximum release level to 10.5 feet during the tree-growing season and 11.5 feet during the non-growing season.

The Manual permitted deviations from the established maximum release rates for three purposes: emergencies; unplanned minor deviations such as construction or maintenance; and planned deviations requested for agriculture, recreation or other purposes. In 1993, the Corps approved a planned deviation to lower the maximum release level of the Dam to six feet for seventy-five days "to 'allow farmers more time to harvest their crops.'" In the

35. See Ark. Game & Fish I, 87 Fed. Cl. at 602 (chronicling history of Dam); Flood Control Act of 1938, Pub.L. No. 75-761, 52 Stat. 1215, 1218 (1938) (providing fiscal allocations for flood management). In 1938, Congress passed the Flood Control Act, "which approved flood control projects for regions of the country" prone to damaging floods. Ark. Game & Fish I, 87 Fed. Cl. at 602. The Corps are responsible for the operation of dams built as flood control projects. Id.

36. Ark. Game & Fish II, 637 F.3d at 1368 (recounting historical water heights at Clearwater Dam prior to publication of Manual). Poplar Bluff is located on the Black River between the Dam and the Management Area, at which the maximum water height of water is measured. Id.

37. Id. (describing Corps' experimentation with water release levels). Lower water release rates yield a decreased flood level height and an increased flood period duration, whereas higher water release rates yield an increased flood level height and a decreased flood period duration. Id. While agricultural interests favor a lower release rate, the Commission and residents located near Clearwater Lake prefer a higher rate of release so water levels return to normal more quickly after the initial release of water. Id.

38. Id. (describing process leading to publication of Manual). Before publishing the Manual, the Corps experimented with the water release levels by measuring "the maximum height of water at the Poplar Bluff Gauge in the Black River," located between the Dam and the Management Area. Id. at 1368. The Manual states, "[T]he primary purpose of Clearwater Dam is to provide flood protection below the dam and to maintain a permanent conservation pool for recreation, fish and wildlife, and other incidental uses." Ark. Game & Fish I, 87 Fed. Cl. at 603 (quoting Clearwater Lake Manual).

39. Ark. Game & Fish II, 637 F.3d at 1368 (outlining permitted deviations). Any "planned deviations had to be approved by the Corps' Southwestern Division, which was required to consider 'flood potential'" and any possible alternative measures. Id. (quoting Clearwater Lake Manual). Additionally, the Manual specified that any requested deviations were to last only for limited periods of time. Id. at 1369.

40. Id. at 1369 (describing deviations at issue commencing in 1993). The Corps approved a temporary deviation in 1993 to last from September 29, 1993 to
same year, the Corps partnered with private parties and public agencies to create the White River Ad Hoc Work Group (White River Group), a group interested in regulating river water levels. The White River Group’s purpose was “to propose permanent changes to approved plans, including the Clearwater Lake Water Control Manual.” The Commission, a member of the White River Group, objected to any deviations lowering the maximum release levels below the levels delineated in the Manual because such decreases would prolong the flooding in the Management Area.

The White River Group could not recommend permanent revisions to the Manual’s release plan after one year, and instead proposed an “interim operating plan” with scheduled temporary deviations during an eight-month period. The Corps approved the interim plan, which set the maximum water levels at 11.5 feet for the first two weeks in April, 8 feet for the next four weeks, and 6 feet from mid-May until November. Upon the conclusion of the eight-month interim plan period, the White River Group again could not propose permanent revisions to the Manual. Accordingly, the Corps extended the interim operating plan for an additional twelve months.

In February 1996, the White River Group formed a Black River subsidiary (Black River Group), which included the Commission, to aid in creating a permanent release plan for the Dam. The Black River Group was unable to develop a new plan, however, so the Corps approved another interim deviation plan to last through

41. Id. (describing formation of White River Group). Other participants in the White River Group included: “private recreational, agricultural, navigation, and hydropower interests, as well as state and federal agencies.” Id.
42. Id. (alteration in original) (conveying White River Group’s purpose).
43. Id. (noting Commission’s participation in White River Group). The Commission disfavored lower release rates from the Dam because they would cause consistent downstream flooding in the Management Area during the tree-growing season. Id.
44. Ark. Game & Fish II, 637 F.3d at 1369-70 (internal quotation marks omitted) (addressing deviations proposed by White River Group in 1994). The Management Area was concerned that the trees’ roots would become over-saturated if a lower release rate, and consequently prolonged period of flooding, occurred during the April to October tree-growing season. Id. at 1369.
45. Id. at 1370 (describing approved deviations).
46. Id. at 1369 (explaining White River Group’s subsequent inability to propose final plan).
47. Id. at 1370 (stating Corps’ extension of interim operating plan to April 1996).
48. Id. (describing formation of Black River Group).
April of 1997. Thereafter, the 1953 Manual’s release rates governed from April 1997 through November 1998 because no long-term interim plan was in place. In September of 1998, the Black River Group proposed a thirteen-month temporary deviation plan, which the Corps approved, to last from December 1, 1998, until December 31, 1999. This plan set the maximum water release level at four feet from mid-May through November.

The Corps prepared an Environmental Assessment in 1999 in order to finally adopt a permanent revised release Manual for the Dam. The Corps concurrently approved a continuation of the 1998-99 temporary deviations through December 1, 2000. In response to the need for an Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA), the Corps and Commission conducted tests in the Management Area to determine the environmental effects of various water release levels. The tests, however, confirmed the proposed plan’s release rates would flood tree roots. Thus, the Corps halted its efforts to permanently revise the 1953 Manual and returned to the Manual's

49. Ark. Game & Fish II, 637 F.3d at 1370 (describing 1996-1997 interim operating plan). The new interim operating plan “set the release rate at [six] feet in June and at [five] feet from July through November.” Id.

50. Id. (describing release rates from April 1997 to December 1998). The Corps approved two planned temporary deviations from April 1997 through December 1998: one from June 3 to July 5, 1997, and another from June 11 to November 30, 1998. Id. These were approved to prevent possible flooding and address a request from agricultural interests. Id.

51. Id. (describing 1998-1999 interim operating plan). The White River Group disbanded in 1997, leaving the Black River Group to work on a final operating plan. Id. The Black River Group recommended a temporary deviation to begin on December 1, 1998 and last until December 31, 1999. Id. The temporary deviation allowed maximum release levels to increase “if the lake behind Clearwater Dam filled to a certain volume.” Id.

52. Id. (providing maximum release levels during 1998-1999 interim operating plan).

53. Id. (describing Corps’ preparation for final release plan). “An [Environmental Assessment] is a brief report . . . indicating possible environmental consequences that can help determine whether a more extensive Environmental Impact Statement (“EIS”) is necessary . . . .” Id. Due in part to the Commission’s objections to a revised release plan, the Corps agreed an Environmental Impact Statement was necessary. Id.


55. Id. at 1370 (discussing requirements of Environmental Impact Statement). The National Environmental Policy Act (NEPA) requires an Environmental Impact Statement when “there is a possibility of significant environmental impacts.” Id.

56. Id. (stating water release level test results as conducted by Commission and Corps). Flooded tree roots “could potentially damage or destroy the trees.” Id. at 1371.
original release rate schedule.\textsuperscript{57} In 1999 and 2000, after six years of flooding weakened the trees’ roots, the region suffered a moderate drought causing extensive timber mortality throughout the Management Area.\textsuperscript{58}

In 2005, the Commission instituted an action against the United States under the Tucker Act, claiming the Corps took a flowage easement over the Commission’s property from 1993-2000 during the temporary release rate deviations.\textsuperscript{59} The Commission alleged the Management Area experienced flooding regularly during the seven-year period; on average, flooding occurred 29 more days per year during the interim deviation period, of which 8.5 days were during the critical tree growth period.\textsuperscript{60} Moreover, the Commission attributed the extensive Management Area tree mortality to the weakening of the trees’ roots caused by the Corps’ repeated flooding.\textsuperscript{61}

The Commission sought just compensation for the alleged flowage easement taken by the United States, the destroyed timber, and the requisite regeneration costs to restore areas inundated by invasions of new wetland vegetation.\textsuperscript{62} The United States argued the increased flooding was intermittent and temporary, constituting

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\textsuperscript{57} Id. at 1371 (describing Corps’ reaction to test results).
\textsuperscript{58} Id. at 1373 (noting effects of drought). “The Commission’s expert testified that half of the damaged trees would die within five years and the living damaged trees were worth half of their original value.” Id. Dr. James Baker, an employee of Kingwood Forestry Services, characterized “the affected parts of the Management Areas as ‘a bottomland hardwood ecosystem in a state of collapse.’” Ark. Game & Fish I, 87 Fed. Cl. 594, 610 (Fed. Cl. 2009). Dr. Baker concluded, “Most of the nuttall oak, most of the red oaks were dead or dying. Many of the white oaks were dead or dying. Most of the sweetgum were dead or dying.” Id. He further described “the change in the ecosystem as a transition from a ‘riverine, bottomland hardwood community’ towards a ‘headwater swamp’ condition.” Id.

\textsuperscript{59} Ark. Game & Fish II, 637 F.3d at 1372 (stating Commission’s cause of action against United States in response to Corps’ actions); see also 28 U.S.C. § 1491(a)(1) (2011) (giving United States Court of Federal Claims jurisdiction over claims founded upon Constitution and brought against the United States). The Tucker Act permits various claims against the government, including claims for damages arising under the Constitution, such as takings claims under the Fifth Amendment. 28 U.S.C. § 1491(a)(1) (2011). Claims brought under the Tucker Act give exclusive jurisdiction to the Court of Federal Claims. Id.

\textsuperscript{60} Ark. Game & Fish II, 637 F.3d at 1572-73 (describing flooding frequency in Management Area). The Commission’s experts testified the Management Area flooded when the Corning water gauge, located downstream from the Poplar Bluff gauge, measured over five feet. Id.

\textsuperscript{61} See id. at 1373 (discussing tree mortality within Management Area); see also supra note 58 (giving more detailed synopsis of Management Area tree mortality).

\textsuperscript{62} Ark. Game & Fish II, 637 F.3d at 1372-73 (stating compensation sought by Commission). The United States Court of Federal Claims awarded $5,602,529.56 in damages for the dead or dying timber and $176,428.34 in damages for regeneration costs. Id. at 1374.
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a tort rather than a taking. Additionally, the United States maintained the damage did not amount to a takings claim and the effects of the flooding were unpredictable.

III. BACKGROUND

Varying analyses of potential takings under per se, physical, or regulatory takings frameworks have resulted in diverse and complicated property takings jurisprudence. The Fifth Amendment states, "[N]o person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The federal government's power to exercise eminent domain lies dormant in the legislature and can only be exercised on terms delegated in a statute because this power is considered an "inherent attribute of sovereignty."

63. Id. at 1372 (noting United States' argument that flooding resulted in tort claim, not taking claim).

64. Id. (expanding upon United States' argument). Ultimately, the Court of Appeals for the Federal Circuit agreed with the Department of Justice and determined the release deviations from the 1953 plan were temporary in nature and did not amount to a taking—at most the deviations created tort liability. Id. at 1378-79. Thus, the Federal Circuit "reverse[d] the Claims Court's decision that the United States had taken a flowage easement on the Commission's land without just compensation." Id. at 1379. On November 9, 2011, the Commission filed a Petition for a Writ of Certiorari to the United States Supreme Court. Ark. Game & Fish Comm'n v. United States, No. 11-597, 2011 WL 5593237 (U.S. Nov. 9, 2011) (seeking appeal). On March 1, 2012, the United States filed a brief in opposition of the Commission's Petition for Writ of Certiorari. Ark. Game & Fish Comm'n v. United States, No. 11-597, 2012 WL 691652 (U.S. Mar. 1, 2012) (responding to Petition for Writ of Certiorari).

65. See Daniel L. Siegel & Robert Meltz, Temporary Takings: Settled Principles and Unresolved Questions, 11 Vt. J. Envtl. L. 479, 480 (2010) (describing uncertainties of takings jurisprudence). Beyond core principles of takings jurisprudence, the specific type of governmental action to result in a temporary taking is uncertain. Id.


67. See Eden Memorial Park Ass'n v. Superior Court In & For Los Angeles Cnty., 11 Cal. Rptr. 189, 192 (Cal. Dist. Ct. App. 1961) (discussing derivation of government's eminent domain power). Though there are no constitutional provisions which grant the government the power of eminent domain, the Fifth Amendment is an explicit limitation upon the government's sovereign right of condemnation with just compensation. Id.
The exercise of eminent domain can take on several forms. First, takings can be either physical or regulatory. Physical takings are invariably qualified as per se takings; any physical occupation by the government, no matter how minute the intrusion, requires just compensation. Regulatory takings, on the other hand, require more “complex factual assessments of the purposes and economic effects of government actions” to determine compensation.

The government generally has a right to acquire a flowage easement over private property in return for just compensation when a potential takings action involves flooding. If the government fails to acquire a flowage easement and prolonged flooding occurs on a landowner’s property, the property owner may seek compensation through inverse condemnation proceedings. The Tucker Act permits aggrieved landowners to commence inverse condemnation actions based on an alleged uncompensated taking of property in the United States Court of Federal Claims.

68. See James H. Davenport & Craig Bell, Governmental Interference with the Use of Water: When Do Unconstitutional “Takings” Occur?, 9 U. Denver Water L. Rev. 1, 15 (2005) (describing division of “takings” cases into two distinct categories). In a physical taking, “the government takes title to or physically occupies property.” Id. In a regulatory taking, the government regulates the use of property to an extent that “deprives the owner of the economic use of the property.” Id. at 14.

69. See id. at 13-14 (explaining difference between physical and regulatory takings).


71. See Davenport, supra note 68, at 14 (discussing regulatory takings analysis).

72. See generally Loesch v. United States, 645 F.2d 905, 920-22 (Ct. Cl. 1981) (discussing Corps obtaining flowage easements from landowners through warranty deed). “[P]rivate property ‘for purposes of the Fifth Amendment . . . includes ‘property [that] has been dedicated by the State to public use.’” Ark. Game & Fish I, 87 Fed. Cl. 594, 616 (Fed. Cl. 2009) (defining private property). Thus, there is no separate analysis for takings cases involving land taken by the federal government from a state government. Id. “[I]t is uncontested that the Commission, an entity of the State of Arkansas, held a valid property interest in the Management Area, including timber on that land, at the time of the alleged taking.” Id.

73. See generally United States v. Cress, 243 U.S. 316, 328-30 (1917) (explaining landowner retains fee in land subject to United States’ easement to flood land when floods are intermittent).

The line of takings cases concerning flooding and flowage easements began in 1871, when the United States Supreme Court held, "where real estate is [ ] invaded by superinduced additions of water . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."\(^7\) Several years later, the Court articulated various conditions necessary for a party to recover under a Fifth Amendment takings claim.\(^6\) The Court required the flooding result from government action and an appropriation of land amounting to more than a mere consequential injury.\(^7\)

In *United States v. Dickinson* (*Dickinson*),\(^7\) the Supreme Court significantly altered the flooding takings jurisprudence.\(^9\) Congress authorized the construction of a dam in South Charleston, South Carolina, which later flooded the plaintiffs' land.\(^8\) Though the landowners eventually reclaimed most of the land taken by the governmental flooding, it did not "change[ ] the fact that the land was taken when it was taken and an obligation to pay for it then..."

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\(^7\) Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, 181 (1871) (holding taking occurs when use of property is destroyed or impaired by superinduced additions of water). The Court's holding in *Pumpelly* narrowly applies to situations where land is permanently flooded and all beneficial uses of the land are effectively destroyed. *Id.* The Merriam-Webster dictionary defines "superinduce" as "to introduce as an addition over or above something already existing." MERRIAM-WEBSTER, www.meriam-webster.com/dictionary/superinduce (last visited Jun. 6, 2012).

\(^6\) Sanguinetti v. United States, 264 U.S. 146, 149-50 (1924) (holding flooding of plaintiff's property which would have occurred absent government-constructed dam was insufficient to justify takings claim).

\(^7\) See *Id.* (articulating required elements of flowage easement taking claim). "[I]n order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." *Id.* at 149.

\(^8\) 331 U.S. 745 (1947) (holding intermittent flooding of land was compensable as taking under Fifth Amendment).

\(^9\) *Id.* at 751 (holding intermittent flooding of land above permanent flooding level was compensable by value of easements as assessed). The Court of Appeals for the Federal Circuit later interpreted the Supreme Court's holding in *Dickinson* to mean "property need not suffer an effectual destruction or a permanent and exclusive occupation by government runoff for a taking claim based on a flowage easement." Ridge Line, Inc. v. United States, 346 F.3d 1346, 1358 (Fed. Cir. 2003).

\(^8\) *Dickinson*, 331 U.S. at 746-47 (stating facts of case). In addition to flooding plaintiffs' land, there was significant erosion "attributable to the improvement." *Id.* at 747.
arose." The Court, therefore, held intermittent, temporary flooding compensable under the Fifth Amendment.

Several decades later, the United States Court of Claims defined the necessary duration of flooding to amount to a taking under the Fifth Amendment in *Fromme v. United States & Victoria County Navigation District (Fromme)*. In *Fromme*, the Corps consistently flooded the plaintiff’s land for three years during the construction of the Victoria Channel near the Gulf Intracoastal Waterway in Texas. Referencing the Supreme Court’s holding in *United States v. Cress (Cress)*, the *Fromme* court reasoned the three-year period of flooding “represented a temporary situation which ceased to exist upon completion of the Victoria Channel.” Therefore, floods not “inevitably recurring” are not compensable as physical takings under the Fifth Amendment.

In *Barnes v. United States (Barnes)*, the Court of Claims decided another case similar to *Fromme*. In *Barnes*, the court barred the plaintiffs from recovering damages for flooding that occurred before “the permanent character of intermittent flooding could fairly be perceived.” Though the intermittent water releases from

81. *Id.* at 751 (holding plaintiff’s flooded property became part of river when flooded by United States). Judgment was awarded to the plaintiffs for the government’s taking of an easement for intermittent flooding. *Id.*

82. See *id.* at 751 (holding plaintiff was still entitled to relief despite re-claiming most land originally taken by government).

83. 412 F.2d 1192, 1196-97 (Ct. Cl. 1969) (holding one or two floods do not constitute taking of permanent interest in affected land); see also *United States v. Cress*, 243 U.S. 316, 328 (1917) (holding there is no difference in kind between permanent flooding and permanent liability to intermittent but inevitably recurring flooding).

84. *Fromme*, 412 F.2d at 1194-96 (stating facts of case).

85. 243 U.S. 316 (1917).

86. *Fromme*, 412 F.2d at 1196-97 (applying legal analysis to facts of case). The temporary nature of the flooding, therefore, “lack[ed] the element of inevitably recurring floodings which the Supreme Court stressed in holding that the Government had taken a flowage easement over the land involved in the Cress case [ ].” *Id.* at 1197.

87. See *id.* at 1197 (stressing importance of inevitably recurring flood element to takings claim).

88. 538 F.2d 865, 870 (Ct. Cl. 1976) (holding recovery for property takings is unavailable before it is obvious releases and flooding would be permanent and frequent). “Government-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort. In such cases recovery is not authorized in this court.” *Id.*

89. For a further discussion of *Fromme*, see *supra* notes 83-87 and accompanying text.

90. *Barnes*, 538 F.2d at 873 (discussing facts of case). In *Barnes*, intermittent releases of water from a dam damaged the crops. *Id.* The plaintiffs, however, could not recover damages for flooding occurring between 1969 and 1973 because
the dam caused four years of crop damage, the plaintiffs could only recover for the damage sustained in the last year because the court determined it was only at that point the flooding would inevitably recur. 91

The United States Court of Appeals for the Federal Circuit decided a case remarkably similar to Arkansas Game & Fish in 1987. 92 In Cooper v. United States (Cooper), 93 the Corps constructed the Tennessee-Tombigbee Waterway, which blocked part of the Tombigbee River and caused over 200 acres of the plaintiff’s farm to flood. 94 A five-year period of excessive flooding ensued, causing stress to the farm’s trees. 95 By the time the Corps completed construction of the Waterway, almost 50% of the trees on the 200-acre parcel died. 96 As a result, the plaintiff sought compensation for a taking of the timber destroyed by the flooding, not for a taking of a flowage easement. 97 The Federal Circuit recognized many prior cases deemed the destruction of property a compensable taking under the Fifth Amendment; thus, the court held the plaintiff landowner was “entitled to compensation for the value of the timber destroyed.” 98

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91. Id. (exploring facts and justifications of holding).
92. See Cooper v. United States, 827 F.2d 762, 762-63 (Fed. Cir. 1987) (relaying facts of case). Just as in Arkansas Game & Fish, the plaintiff in Cooper sought compensation for the destruction of valuable timberland caused by excessive flooding due to Corps activity on waterway. See id. at 763. For a detailed summary of the facts in Arkansas Game & Fish, see supra notes 25-64 and accompanying text.
93. Cooper, 827 F.2d at 763-64 (holding flooding of plaintiff’s land caused by Corps waterway construction was compensable taking of timber under Fifth Amendment).
94. Id. at 762 (describing events that resulted in flooding).
95. Id. (describing situation leading to mortality of trees).
96. Id. at 762-63 (describing mortality rate of trees).
97. Id. at 763 (describing procedural history of case). The trial court disagreed with the claim brought by the plaintiff and viewed the taking at issue as a taking of a temporary flowage easement, not as a taking of trees. Id. Because the landowner did not own the property when the Corps first took the flowage easement, the court held that Cooper was not entitled to compensation. Id.
98. Cooper, 827 F.2d at 764 (holding compensation is available for destroyed property interest in lieu of appropriated land under temporary takings theory); see also McDonald v. United States, 37 Fed.Cl. 110, 115 (Fed. Cl. 1997) (applying Cooper and allowing compensation for value of timber taken by flooding independent of land appropriated by flood waters). The Federal Circuit recognized in Cooper that “damages may be awarded under the Fifth Amendment for injuries from a temporary taking where the same injuries would not be compensable if a permanent taking had occurred.” Cooper, 827 F.2d at 763. Thus, destruction of property during a temporary taking could require just compensation even if a remedy for the destruction of the same property interest was not available had the taking been of a permanent nature. See id.
The Federal Circuit finally articulated a test distinguishing between potential physical takings and possible torts in 2003 when it decided *Ridge Line, Inc. v. United States* (*Ridge Line*).99 In *Ridge Line*, the plaintiff sued the federal government for the construction of a United States Postal Service building uphill from the company's property, which caused excessive drainage runoff onto its property.100 Though the Federal Circuit acknowledged the lower court's ruling that "no taking occurred due to permanent and exclusive physical occupation by the government," it classified the taking as a flowage easement by inverse condemnation.101

To distinguish physical takings from torts, the *Ridge Line* court developed a two-part test, consisting of a causation prong and an appropriation prong.102 The causation prong requires the plaintiff to demonstrate the government intentionally invaded the landowner's protected property interest, or the government's invasion was the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action."103 The appropriation prong demands the government invasion "appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his

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100. *Ridge Line, Inc.* 346 F.3d at 1351 (relaying facts of case). *Ridge Line, Inc.* owned part of a hollow that captured storm water from *Ridge Line, Inc.* and the Postal Service's property. *Id.* The construction of impervious surfaces on much of the Postal Service's land caused a 70-150% increase in excess storm runoff. *Id.* *Ridge Line, Inc.* built water detention facilities along the hollow to capture the excess storm water, but the government refused to share in the cost of the construction. *Id.* Thus, *Ridge Line, Inc.* sought to recover the costs incurred in constructing the water detention facilities due to the influx of storm water originating from the Postal Service's property. *Id.*

101. *Id.* at 1355 (analyzing trial court's decision). *Ridge Line* argued a two-part analysis was needed for inverse condemnation claims. *Id.* First, analysis under takings law as opposed to tort law must be warranted by the facts of the case. *Id.* Second, if a court finds a takings remedy is potentially available, the plaintiff must show it has "a protectable property interest" in the property allegedly taken by the government. *Id.*

102. *Id.* (describing two-part test).

103. *Id.* at 1355 (articulating first prong of test). The first prong requires analysis of whether the invasion was the foreseeable and/or predictable result of the government action. *Id.* at 1356.
property for an extended period of time, rather than merely inflict an injury that reduces its value."104

Recently, the Federal Circuit applied the *Ridge Line* test to several cases further clarifying whether the alleged governmental appropriation of land was compensable under a takings or torts analysis.105 In *Moden v. United States* (*Moden*),106 the parties disagreed as to the interpretation of the *Ridge Line* causation prong.107 The government argued "the resulting injury must be foreseeable from the authorized [ ] act," while the plaintiffs countered that the "act need only be the 'cause-in-fact' of the resulting injury."108 The Federal Circuit adhered to the government's interpretation and stated that although "issues surrounding causation are [not] irrelevant," the plaintiff "must prove that the government should have predicted or foreseen the resulting injury."109

The United States Court of Claims attempted to reconcile the muddled history surrounding the torts versus takings jurisprudence in *Hansen v. United States* (*Hansen*).110 The court first recognized the Federal Circuit's general takings analysis as a two-part prima facie test requiring a relevant property interest and governmental action that results in a taking.111 To distinguish between torts and

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104. *Id.* at 1356 (articulating second prong of test). The second prong requires analysis of whether the government’s interference "was substantial and frequent enough to rise to the level of a taking." *Id.* at 1357. Intermittent, but inevitably recurring inundation is substantial and frequent enough to result in a taking. *Id.* (quoting *Barnes v. United States*, 538 F.2d 865, 870 (Ct. Cl. 1976)).

105. *See generally Moden v. United States*, 404 F.3d 1335, 1346 (Fed. Cir. 2005) (holding environmental contamination of landowners' property was not direct, natural, or probable result of government’s use of trichloroethylene at Air Force base); *Cary v. United States*, 552 F.3d 1375, 1379 (Fed. Cir. 2009) (holding fire spread to landowners' property was not direct, natural, or probable result of U.S. Forest Service's alteration of "fire ecology" in forest). "For an injury to be a compensable taking, the court must determine no break in the chain of causation existed between the suspected government authorized action and the injury." *Cary*, 552 F.3d at 1380.

106. 404 F.3d 1335 (Fed. Cir. 2005).

107. For a discussion of different interpretations of the *Ridge Line* causation prong, see infra note 108 and accompanying text.

108. *Moden*, 404 F.3d at 1343 (describing parties’ different interpretations of *Ridge Line* test’s first prong). "[T]he government’s interpretation requires that the injury was the likely result of the act, whereas the Modens’ interpretation requires only that the act was the likely cause of the injury." *Id.*

109. *Id.* (interpreting *Ridge Line* test’s first prong).

110. *Hansen v. United States*, 65 Fed. Cl. 76, 95-123 (Fed. Cl. 2005) (providing overview of tort-taking distinction). In *Hansen*, the landowner brought a takings action against the government alleging the Forest Service contaminated the groundwater under his property by burying cans of pesticide on its own property. *Id.* at 81.

111. *Id.* at 95 (explaining Federal Circuit’s tort-taking distinction).
FLOODING THE POSSIBILITY OF RECOVERY

The court summarized the intent versus causation test developed in Ridge Line: first, a taking occurs if the plaintiff proves "the government's subjective or specific intent to appropriate the owner's property;" or, second, a taking occurs if the harm was proximately related to the government's actions through an objective causation analysis.112

The Court of Claims determined in Hansen that the Ridge Line test resolved the tension between the two approaches to recovery and thus harmonized decades worth of takings jurisprudence.113 Most importantly, the court expounded upon the Federal Circuit's interpretation of foreseeability in Moden.114 The Court of Claims decided, "instead of focusing on whether the harm should have been foreseen," as the Moden court did, the correct interpretation of Ridge Line would objectively focus on if the harm could be foreseen.115

The Court of Claims additionally declared, "The real key to the distinction between mere torts and takings by the government is the substantiality of the harm, not the nature of the actions leading

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112. Id. at 96 (articulating two distinctive approaches to tort-taking distinction). The causation approach method minimized the burden that an absolute requirement of government intent for takings liability would have caused, because the Fifth Amendment's takings clause does not have a state of mind requirement. Id. at 97. "In [the objective causation] analysis, the need for proof of the government's intent was obviated; indeed, the causation analysis subsumed any showing of subjective intent." Id. at 96.

113. Id. at 97, 116 (discussing importance of Ridge Line). The court recognized that the Federal Circuit summarized the tort-taking distinction test in Ridge Line as occurring:

when the 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.' . . . 'Second, the nature and magnitude of the government action must be considered.'

Id. at 117 (emphasis added) (citation omitted) (quoting Ridge Line, Inc. v. United States, 346 F.3d 1346 (Fed. Cir. 2003)). In Hansen, the court found it notable the Federal Circuit "employed the disjunctive ('or') rather than the conjunctive ('and') to relate the sub-parts of the first prong," because it meant intent or causation were "each sufficient grounds upon which to predicate a takings claim." Id.

114. Id. at 97 (discussing Court of Federal Claim's misapplication of Ridge Line test in Moden).

115. Hansen, 65 Fed. Cl. at 97 (discussing proper application of Ridge Line test). The court explained that the Moden court "relied on a causation analysis to determine whether a taking occurred," which should have triggered the inquiry as to "whether it was objectively foreseeable that the government's actions could have resulted in the alleged harm." Id. Rather, the Moden court decided there was no taking because the government "had no reasonable cause to anticipate or foresee the particular harm of which plaintiff complained." Id.
to that harm." Judge Newman's dissent in *Arkansas Game & Fish* echoed this notion when she declared "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.'" Instead of focusing on the nature of the *cause* of the damage, the Federal Circuit decided "the location and permanence of the *effect* of the government action causing the damage [ ] is the proper focus of the takings analysis."

**B. Destruction of Property as a Compensable Taking**

The Supreme Court's decisions and several Federal Circuit decisions hold "the destruction of a property interest is a compensable taking within the meaning of the Fifth Amendment." In *Murray v. United States*, the Internal Revenue Service (IRS) destroyed a couple's mortgage interest by refusing to let the couple redeem the property, which the Federal Circuit deemed a compensable taking. The Federal Circuit relied upon this line of property destruction decisions in *Cooper* to hold a property owner is entitled to compensation for the value of trees damaged by the government's flooding. The Federal Circuit further recognized "damages may be awarded under the Fifth Amendment for injuries from a temporary taking where the same injuries would not be compensable if a permanent taking had occurred." Essentially, *Cooper* permits compensation for a property interest destroyed by

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116. *Id.* at 101 (quoting United States v. Causby, 328 U.S. 256 (1946)) (articulating importance of substantiality of harm imposed by government). "It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id.* (quoting *Causby*, 328 U.S. at 266).

117. *Ark. Game & Fish II*, 637 F.3d 1366, 1382 (Fed. Cir. 2011) (dissenting opinion) (emphasizing importance of finding permanent injury).

118. *Id.* at 1382-83 (quoting *Owen v. United States*, 851 F.2d 1404, 1412 (Fed. Cir. 1988)) (requiring focus on effect rather than cause).

119. *Cooper v. United States*, 827 F.2d 762, 763 (Fed. Cir. 1987) (listing cases that held destruction of property is compensable under Fifth Amendment).

120. 817 F.2d 1580, 1583 (Fed. Cir. 1987).

121. *Id.* (holding destruction of mortgage was compensable under Fifth Amendment). "The Supreme Court has held that: '[t]he total destruction by the Government of all value of [materialmen's] liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)).

122. *Cooper*, 827 F.2d at 763 (discussing precedent which recognizes destruction of property interest as compensable taking under Fifth Amendment).

123. *Id.* (finding property interest injuries compensable under temporary taking, but not permanent taking).
government action when such loss in value would not be compensable had the landowner received just compensation for the value of the land permanently appropriated by the government. Thus, just compensation may be awarded for either the land appropriated or the property interest destroyed.

IV. NARRATIVE ANALYSIS

In *Arkansas Game & Fish*, the Court of Appeals for the Federal Circuit reviewed de novo whether the Commission asserted a valid takings claim against the United States for the seven-year period of intermittent flooding in the Commission’s Management Area. The court narrowly interpreted the precedent and found the Corps’ interim deviations from the Manual inherently temporary and unlikely to recur. Consequently, it found the deviations insufficient to constitute a temporary takings claim.

The Federal Circuit focused primarily on the distinction between inherently temporary conditions and conditions that are permanent or certain to recur. The court determined temporary conditions unlikely to recur result in a mere consequential injury and give rise only to tort liability. Conversely, permanent condi-

124. See id. (discussing compensable property interest under temporary takings analysis). In a permanent taking by the government, the landowner receives just compensation for the entire value of the land before the loss in value resulting from the government action, which presumably includes the value of the property interests located on the land. See generally United States v. Miller, 317 U.S. 369 (1945).

125. See Cooper, 827 F.2d at 763 (discussing remedies under takings claim). *Cooper* permitted compensation solely for the property interest destroyed, not including the land upon which the property interest was situated. See id. For an example of a more recent case that applied the holding of *Cooper*, see McDonald v. United States, 37 Fed.C1. 110, 115 (Fed. Cl. 1997) (applying *Cooper* and allowing compensation for value of timber taken by flooding independent of land appropriated by flood waters).

126. Ark. Game & Fish II, 637 F.3d 1366, 1372 (Fed. Cir. 2011) (evaluating whether temporary deviations were compensable takings). The Commission instituted the claim under section 1491(a)(1) of the Tucker Act. *Id.* The Federal Circuit reviewed the lower court’s legal analysis and conclusion *de novo* because “determining whether a taking has occurred is a ‘question of law based on factual underpinnings.’” *Id.* at 1371 (quoting Ridge Line, Inc. v. United States, 346 F.3d 1346, 1352 (Fed. Cir. 2003)).

127. Ark. Game & Fish II, 637 F.3d at 1379 (holding temporary deviations were not compensable takings).

128. *Id.* (determining deviations were more aligned with tort action than takings liability).

129. See *id.* at 1374-79 (analyzing distinction between permanent and temporary conditions).

130. See *id.* (distinguishing between permanent and temporary conditions in finding only tort liability).
tions and inevitably recurring intermittent conditions yield a takings claim.\textsuperscript{131}

A. General Distinctions Between Torts and Takings

The court began its analysis by declaring, “In general, if particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim.”\textsuperscript{132} Takings cases involving flooding and flowage easements, however, are inherently different from other types of takings claims.\textsuperscript{133} Though it is difficult to distinguish between torts and takings with respect to flooding cases, only permanent or intermittent but inevitably recurring floods give rise to takings liability.\textsuperscript{134}

The Federal Circuit cited several cases that distinguished between floods causing a permanent physical occupation of land and floods causing a temporary invasion and consequential damage to the land.\textsuperscript{135} Specifically, the court analyzed the Supreme Court’s holdings in \textit{Cress} and \textit{Dickinson}, both of which emphasized the permanent nature of the condition causing the flooding.\textsuperscript{136} In \textit{Cress}, the Court applied a takings analysis and awarded compensation due to the permanence of the underlying condition even though it caused only intermittent flooding on the landowner’s property.\textsuperscript{137} Additionally, the Court determined there was “no difference of kind . . . between a permanent condition of continual overflow . . . and a \textit{permanent liability} to intermittent but inevitably recurring

\textsuperscript{131} See id. at 1375-77 (differentiating between tort and takings claims for deciding damages).

\textsuperscript{132} \textit{Ark. Game & Fish II}, 637 F.3d at 1374 (citing First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 328 (1987)) (holding just compensation must be paid for period during which taking was effective).

\textsuperscript{133} \textit{Id.} (articulating differences between flooding takings claims and other types of takings claims).

\textsuperscript{134} Id. (analyzing difficulties in distinguishing between flooding takings claims and other takings claims). An invasion is permanent only when there is “permanent condition of continual overflow or a permanent liability to intermittent but inevitably recurring overflows.” \textit{Id.} at 1374 (quoting United States v. Cress, 243 U.S. 316, 328 (1917)) (internal quotation marks omitted).

\textsuperscript{135} Id. at 1375 (explaining difference between permanent physical occupations and temporary invasions). In \textit{Loretto}, the Supreme Court summarized various cases that “distinguished between invasions that were permanent or temporary in character.” \textit{Loretto} v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982).

\textsuperscript{136} \textit{Id.} at 1375 (discussing Supreme Court’s holdings in \textit{Cress} and \textit{Dickinson} regarding permanent conditions necessary for takings damages).

\textsuperscript{137} \textit{Id.} (analyzing \textit{Cress} holding).
overflows. The Federal Circuit also favorably analyzed the Supreme Court's holding in *Dickinson*. Though the landowner in *Dickinson* eventually reclaimed most of his land, the "nature of the government's action remained permanent." Thus, the Supreme Court awarded just compensation to the plaintiff landowner in *Dickinson* for the "land [that] was taken [in the first place]." Finally, the Federal Circuit acknowledged several Court of Claims decisions determining "inherently temporary conditions cannot result in the taking of a flowage easement" if they will not inevitably recur.

B. Distinguishing *Ridge Line*

The Federal Circuit belabored the distinction between the case at bar and its prior decision in *Ridge Line*. The court explained *Ridge Line* "involved a permanent condition-runoff," which inherently led to the inevitably recurring flooding conditions that sufficiently constituted a takings claim. In *Arkansas Game & Fish*, however, the Federal Circuit decided it was important to determine whether the condition leading to the intermittent flooding was permanent, not whether the flooding itself was permanent.

Next, the Federal Circuit recognized *Ridge Line* requires courts to distinguish between a tort and a taking. To do this, courts must determine whether the nature of the government's action justifies a takings remedy and whether the action predictably caused the harm. The court, however, found this analysis unnecessary in *Arkansas Game & Fish* because the Corps' deviations "were by..."
their very nature temporary and, therefore, cannot be ‘inevitably recurring.’”

C. Temporary Versus Permanent Actions

The Federal Circuit analyzed the differentiating aspects between permanent and temporary conditions in *Arkansas Game & Fish*. The court recognized permanent structures and improvements typically cause overflows in government-induced flooding cases, leading to permanent flooding conditions. To distinguish this decision from prior cases, the court noted it must determine whether the decision to release water from a dam, an action not necessarily permanent, is “by its nature temporary [or] permanent.” The court concluded the government’s deviations from its flood control policy were by their very nature “ad hoc or temporary” and could not be inevitably recurring.

The court dismissed the Commission’s argument that the deviations were only temporary because the “Corps eventually stopped [the] deviation[.].” The Commission believed, regardless of whether the Corps reverted back to the original release rates, that the Corps “appropriated a temporary flowage easement for which it must pay.” Nonetheless, the court maintained that because the Corps designed the governmental action to be temporary from the start and the Corps never approved the deviations as a permanent policy, the deviations were undisputedly temporary.

148. *Ark. Game & Fish II*, 637 F.3d at 1376 (stating application of *Ridge Line* test is unnecessary when action is by its very nature temporary).

149. *Id.* at 1376-77 (articulating difference between permanent and temporary conditions). The Federal Circuit stated, “Permanent conditions often, but not always, yield inevitably recurring flooding.” *Id.* at 1377.

150. *Id.* (discussing typical cause of flooding in government flooding-induced takings cases).

151. *Id.* at 1377 (applying temporary versus permanent analysis).

152. *Id.* (determining Corps’ interim deviations were “by their very nature” temporary). The Corps’ deviations from the Water Control Plan were temporary in nature because the Corps never adopted them as permanent revisions to the Plan. *Id.* at 1370-71.

153. *Ark. Game & Fish II*, 637 F.3d at 1377 (describing Commission’s theory). The Commission claimed “the United States abandoned its easement, [which made] the taking temporary.” *Id.* Thus, the Commission believed the Corps’ decision to stop the deviations was the only characteristic rendering the deviations temporary. *See generally id.*

154. *Id.* (outlining Commission’s argument).

155. *Id.* (explaining inherently temporary nature of deviations by virtue of Corps’ failure to adopt them into permanent policy). The Corps would have had to comply with federal regulations, including drafting Environmental Assessments and Environmental Impact Statements, in order for the deviations to become permanent policy. *Id.* at 1370, 1378. But the Corps never enacted a permanent pol-
To further support its holding, the court narrowly interpreted two Court of Claims cases finding no compensable taking in circumstances similar to *Arkansas Game & Fish*. The Federal Circuit first discussed *Barnes*, in which the Court of Claims awarded compensation to the landowner only when it was clear “the permanent character of intermittent flooding could fairly be perceived.” Next, the Federal Circuit analyzed *Fromme*, in which the Court of Claims refused to find a taking “because the spoil bank only ‘represented a temporary situation.’” The Federal Circuit relied upon these cases to further emphasize the importance of the permanence of the situation leading to the flooding.

In conclusion, the Federal Circuit categorized the deviations from the 1953 Manual as a temporary situation and declared “[t]he actions at most created tort liability.” As the “deviations in question were plainly temporary and the Corps eventually reverted to the permanent plan,” the court resolved the “releases [could not] be characterized as inevitably recurring.” Thus, the Federal Circuit held the federal government did not take a flowage easement over the Commission’s land necessitating just compensation.

D. Federal Circuit’s Dissent

Circuit Judge Pauline Newman issued a strong dissent, arguing any superinduced addition of water that destroys or impairs a property’s usefulness “is a taking within the meaning of the Constitution.” Judge Newman did not interpret the precedent to require a constant or permanent flooding. Rather, she found a court icy, which further alluded to the temporary nature of the Corps’ actions.

156. *Id.* at 1378 (analyzing Court of Claims’ reasoning in *Barnes* and *Fromme*).
157. *Id.* at 1378 (addressing Court of Claim’s holding in *Barnes* that intermittent flooding must permanently recur to constitute a taking).
158. *Ark. Game & Fish II*, 637 F.3d at 1378 (indicating Federal Circuit’s interpretation of *Fromme*).
159. *Id.* (reconciling *Barnes* and *Fromme*). The court reasoned, “[B]oth *Barnes* and *Fromme* indicate that flooding must be a permanent or inevitably recurring condition, rather than an inherently temporary situation, to constitute the taking of a flowage easement.” *Id.*
160. *Id.* at 1379 (analyzing deviations from 1953 Manual).
161. *Id.* (holding Corps did not take temporary flowage easement over Commission’s Management Area).
162. *Id.* (relying on inherently temporary nature of Corps’ deviations from Water Manual’s release rate plans).
164. *Id.* (stating constitutional grounds for takings claim).
must consider the specific facts of the case to conclude whether a temporary taking or a mere consequential injury occurred.165

The dissent analyzed the precedent to conclude “flood-induced destruction of timber is a permanent injury, compensable by the Fifth Amendment.”166 Relying partly on Cooper, the dissent believed the majority erred by “incorrectly holding that the issue is solely whether the injurious flooding was eventually ended.”167 According to the dissent, the majority focused too narrowly on whether the flooding was of permanent duration, and not sufficiently on whether the damage caused by the flooding was permanent.168

V. CRITICAL ANALYSIS

The Court of Appeals for the Federal Circuit veered from the Fifth Amendment takings jurisprudence and failed to apply the Ridge Line test to the facts of Arkansas Game & Fish.169 Though the Federal Circuit varies in applying the Ridge Line test and considers different factors as most important in inverse condemnation analyses, the Federal Circuit misconstrued Fromme to reach its holding in

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165. Id. at 1381 (analyzing precedent). Precedent established that the eventual abatement of flooding does not preclude a landowner’s entitlement to just compensation. Id. Moreover, precedent does not hold floods that are short in duration, produce minimal or temporary damage, or confer a benefit upon the plaintiff amount to a taking. Id. at 1381-82.

166. Id. at 1382 (concluding property destruction is compensable under the Fifth Amendment after analyzing facts of Cooper). In Cooper, river blockage due to the Corps’ construction along a waterway caused prolonged periods of flooding on the plaintiff’s property during a five-year period. Cooper v. United States, 827 F.2d 762, 762 (Fed. Cir. 1987). Although the flooding in Cooper was not permanent, the Court of Federal Claims in Arkansas Game & Fish I stated, “the temporary taking of a flowage easement resulted in a permanent taking of timber.” Ark. Game & Fish I, 87 Fed.Cl. 594, 624 (Fed. Cl. 2009).

167. Ark. Game & Fish II, 637 F.3d at 1382 (Newman, J., dissenting) (analyzing majority’s holding). The majority focused on “whether the government flood control policy was a permanent or temporary policy.” Id. at 1377 (majority opinion). The dissent considered the majority’s view of the Fifth Amendment to be incorrect; rather than focus on the location of the damage’s cause, the dissent thought the focus should be on the location and permanence of the effect of the government’s action. Id. at 1382 (Newman, J., dissenting).

168. Id. at 1383 (Newman, J., dissenting) (stating majority’s focus on permanence of cause of flooding was too narrow). Though the majority recognized the possibility of recovery under a temporary takings scenario, it ignored its own reasoning by holding temporary deviations could not constitute a taking because they would not inevitably recur. Id. at 1376 (majority opinion). The dissent, however, believed the Federal Circuit’s holding “contradicts the entire body of precedent relating to the application of the Fifth Amendment to government-induced flooding.” Id. at 1382 (Newman, J., dissenting).

169. For a summary of case law applying the Ridge Line test, see supra notes 99-118 and accompanying text.
Moreover, the court disregarded decades of Fifth Amendment takings precedent by narrowly holding the condition leading to the flooding must be permanent to qualify as a taking.171

A. Intermittent Flooding Is Sufficient

A taking, within the meaning of the Fifth Amendment, occurs when government-induced flooding destroys or impairs the usefulness of property.172 Prior decisions require neither constant nor permanent flooding, and do not hold that the eventual abatement of flooding negates recovery under the Fifth Amendment.173 Yet, the Federal Circuit in *Arkansas Game & Fish* misinterpreted *Fromme* and "held that flooding damage is never compensable if the flooding is eventually stopped, whatever the injury."174 The Federal Circuit's indication that flooding must be a permanent or inevitably recurring condition conflicts with *Fromme*, which provides there is "not a per se rule against taking if the flooding is eventually stopped."175 Rather, *Fromme* illustrates "the traditional balance that characterizes takings decisions" with a focus on the frequency and duration of the intermittent flooding and the likelihood of future recurring flooding.176

By limiting the issue in a temporary takings analysis to "whether the injurious flooding was eventually ended," the Federal


171. For a discussion of takings precedent with respect to temporary takings by superinduced additions of water, see *supra* notes 72-104 and accompanying text.


173. *Id.* (listing cases where intermittent flooding or abatement of flooding were still compensable under Fifth Amendment). *See generally* United States v. Dickinson, 331 U.S. 745 (1947) (finding taking even where plaintiff recovered much of flooded land); United States v. Cress, 243 U.S. 316 (1917) (holding intermittent but recurring flooding was compensable under Fifth Amendment); Ridge Line, Inc. v. United States, 346 F.3d 1346 (Fed. Cir. 2003) (finding compensable taking even though property owner constructed water detention facilities to abate flooding); Cooper v. United States, 827 F.2d 762 (Fed. Cir. 1987) (holding taking remedied by Corps after five years was still compensable under Fifth Amendment); Barnes v. United States, 598 F.2d 865 (Ct. Cl. 1979) (holding intermittent flooding which damaged crops constituted taking).

174. *Ark. Game & Fish II*, 637 F.3d at 1382 (Newman, J., dissenting) (explaining majority's misapplication of *Fromme*).

175. *Id.* at 1382 (discussing majority's conflicting interpretation of *Fromme*).

176. *See id.* (providing correct interpretation of *Fromme*); *see also* *Fromme* v. United States, 412 F.2d 1192, 1196-97 (Ct. Cl. 1969) (discussing court's holding).
Circuit failed to correctly apply the *Ridge Line* test. Although the majority recognized the existence of temporary takings, it discarded its pertinence. The majority concluded no taking of any kind occurred in *Arkansas Game & Fish* because of the seemingly temporary nature of the deviations from the Manual’s approved water release rates. This contradicts the court’s recognition of the availability of recovery under a temporary takings scenario. Thus, the Federal Circuit ignored decades of precedent permitting redress for a flowage easement and the resulting property damage under a temporary takings analysis.

B. Avoiding Application of *Ridge Line* Test

The Federal Circuit failed to properly apply the *Ridge Line* test because of its unwillingness to look beyond whether the injurious flooding eventually ended. Rather than focusing solely on the temporary or permanent nature of the deviations from the Manual, the Federal Circuit should have focused on the government’s intent and the substantiality of the injuries suffered. Most notably, the Federal Circuit avoided applying the *Ridge Line* test by determining “the deviations were by their very nature temporary and, therefore, cannot be ‘inevitably recurring’ or constitute the taking of a flowage easement.”

177. *Ark. Game & Fish II*, 637 F.3d at 1382 (Newman, J., dissenting) (analyzing faults in majority’s holding).

178. *Id.* (discussing majority’s mistake in deciding case).

179. *Id.* at 1383 (explaining Corps’ temporary deviations from Water Control Manual could not constitute taking of flowage easement). The Federal Circuit concluded “the deviations were by their very nature temporary and, therefore, cannot be ‘inevitably recurring’ or constitute the taking of a flowage easement.” *Id.* at 1376 (majority opinion). The dissent, however, argues the majority disregarded the purpose of a temporary taking, which is to redress temporary takings situations. *Id.* at 1383 (Newman, J., dissenting).

180. See *id.* at 1374 (majority opinion) (stating possibility of recovery under temporary takings analysis). The majority recognized “if particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim.” *Id.* In reference to *Ridge Line*, the majority admitted the “permanent destruction or exclusive occupation by government runoff is not always required for a successful taking . . . . [T]he ‘occupation’ need not be exclusive and the destruction need not be ‘permanent.’” *Id.*

181. For a summary of precedential cases holding that temporary takings are compensable under the Fifth Amendment, see *supra* notes 72-104 and accompanying text.

182. *Ark. Game & Fish II*, 637 F.3d at 1382 (Newman, J., dissenting) (characterizing majority’s analysis as incorrect). The majority focused only “on whether the government flood control policy was a permanent or temporary policy.” *Id.* at 1377 (majority opinion).

183. See *Ridge Line, Inc.* v. United States, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003) (outlining two-prong inquiry into whether injury is compensable under tort or takings analysis).
[could not] be 'inevitably recurring' to constitute the taking of a flowage easement.” 184 Similar to the Court of Federal Claims in *Ridge Line*, the Federal Circuit in *Arkansas Game & Fish* “[f]ocus[ed] exclusively on whether the plaintiff suffered a permanent and exclusive occupation” and “did not consider . . . that the defendant had appropriated a ‘flowage easement by inverse condemnation.’” 185

Prior case law indicates “a permanent occupation need not be exclusive or continuous,” and “restoration of the plaintiff’s property [does] not preclude a finding of liability.” 186 If the Federal Circuit correctly applied the *Ridge Line* test in *Arkansas Game & Fish*, it would have determined the Corps’ deviations from the Manual were not temporary solely because they were eventually abandoned. 187 The court would have arguably found the Corps would continue to deviate from the Manual’s release rates without the Commission’s alert of the adverse effects of the increased flooding. 188 Although the Management Area was not permanently inundated by water, *Dickinson* previously concluded a permanent and exclusive occupation by government runoff unnecessary for a takings claim. 189

The Federal Circuit would have discovered the factual scenario in *Arkansas Game & Fish* passed both prongs of the test if it had properly applied the *Ridge Line* test. 190 Regarding the causation

184. *Ark. Game & Fish II*, 637 F.3d at 1376 (rationalizing decision to not apply *Ridge Line* test).
185. See *id.* (emphasizing temporary nature of deviations); see also *Hansen v. United States*, 65 Fed. Cl. 76, 116 (Fed. Cl. 2005) (summarizing court’s procedure in *Ridge Line*).
187. See *Ark. Game & Fish II*, 637 F.3d at 1371 (explaining rationale for Corps’ abandonment of altered release rates).
188. See *Ark. Game & Fish I*, 87 Fed. Cl. 594, 622-23 (Fed. Cl. 2009) (discussing Commission’s repeated attempts to warn Corps of adverse effects of flooding). The Corps was on notice as early as 1996 that the repeated floods threatened the well-being of the Management Area. *Id.* It was not until 2001, however, that the Corps ceased the deviations. *Id.*
190. See *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003) (articulating both prongs of *Ridge Line* test). The first prong considers whether the government intends to invade a particular property interest; if not, whether the alleged invasion was the direct, natural, or probable result of the government’s action. *Id.* The second prong examines the nature and magnitude of the government action by determining whether the government appropriated a
prong, the Corps did not intentionally flood the Management Area with superinduced additions of water. Thus, the court should have continued its analysis to determine whether the excess Management Area flooding was a foreseeable result of the Corps' deviations from the Manual. As articulated by Hansen, the proper foreseeability analysis considers whether the negative effects of the government activity could be foreseen, not whether they should be foreseen.

Through experiments or further research, the Corps could have foreseen the excess flooding caused by the releases from the Dam; in fact, "the Corps had available to it a computerized modeling system." No intervening cause disrupted the chain of causation to effectuate the timber mortality because the hardwood trees had already suffered severe damage prior to the summer droughts of 1999 and 2000. Moreover, members of the Commission repeatedly warned the Corps that the continuous deviations caused excessive flooding in the Management Area. As such, the flooding in the Management Area was a likely result of the increased flow of water from the Clearwater Dam.

benefit from the invasion or whether the property owner was preempted from the right to enjoy the property for an extended period of time. Id.

191. See Ark. Game & Fish II, 637 F.3d at 1367-68 (explaining purpose of Corps' deviations from Clearwater Dam's flood release rates).

192. For a further discussion of the foreseeability aspect of the Ridge Line test's causation prong, see supra notes 105-109 and accompanying text.

193. For a further explanation of the Hansen court's interpretation of the Ridge Line causation prong, see supra notes 114-115 and accompanying text.

194. Ark. Game & Fish I, 87 Fed. Cl. 594, 623 (Fed. Cl. 2009) (summarizing facts of case). "[T]he Corps had available to it a computerized modeling system that could have been used to evaluate potential hydrological effects of its deviation from the water control plan . . . . [T]he effect of deviations in the Management Area was predictable, using readily available resources and hydrologic skills." Id.

195. See Cary v. United States, 552 F.3d 1373, 1379 (Fed. Cir. 2009) (holding injury may not be foreseeable if intervening event breaks chain of causation). "For an injury to be a compensable taking, the court must determine that no break in the chain of causation existed between the suspected government authorized action and the injury." Id. at 1380. "The reverse is [not] true, that an injury foreseeable necessarily is without a break in the chain of causation. Foreseeability and causation are separate elements that must be shown." Id.

196. Ark. Game & Fish I, 87 Fed. Cl. at 622-23 (discussing Commission's repeated attempts to warn Corps of excessive flooding).

197. Ridge Line, Inc. v. United States, 546 F.3d 1346, 1355 (Fed. Cir. 2003) (articulating causation prong of Ridge Line test). When the government does not intend to invade the property interest, the test for the causation prong is whether the invasion "is the direct, natural, or probable result of the authorized activity, and not the incidental or consequential injury inflicted by the action." Id. For a further explanation of the Ridge Line test, see supra notes 99-104 and accompanying text.
The facts in *Arkansas Game & Fish* also satisfy the appropriation prong of the *Ridge Line* test. The nature and magnitude of the Corps' taking within the Management Area qualifies as "great" due to the excessive timber mortality throughout the Management Area over the seven-year period of flooding. The sustained timber mortality during this flooding period will severely hinder the Management Area's recreational benefits as the native timber species die and the waterfowl cease to visit the area. Though the flooding in the Management Area did not appropriate a direct benefit to the Corps, the damage will likely impede recreationalists' use of the Management Area, as the decreased vegetation will attract less migratory waterfowl during the winter months.

The Commission's repeated attempts to alert the Corps of the danger the excess water posed to the Management Area's delicate ecosystem highlights the magnitude of the taking. As early as 1996, the Commission warned the Corps the increased flows "were damaging the bottomland hardwoods." The Commission also stressed "the deviations from the authorized plan of operation of...

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198. *Ridge Line, Inc.*, 346 F.3d at 1356 (outlining appropriation prong of *Ridge Line* test). The appropriation prong of the *Ridge Line* test must consider the nature and magnitude of the government action. *Id.* "An invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner[']s right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces it value." *Id.*

199. For a further summary of the excessive timber mortality and invasion of new wetland vegetation, see *supra* notes 60-62 and accompanying text.


201. *Ark. Game & Fish I*, 87 Fed. Cl. 594, 601 (Fed. Cl. 2009) (explaining chief concern of Commission's habitat coordinator is managing forests to provide food and hard mast essential for migratory birds). It is likely that the migratory waterfowl, prized by both the Management Area and the recreational sportsmen who hunt in the Management Area, will cease to visit the area absent the hardwood trees necessary for the birds' diet and reproductive habitat. *Id.* During the flooding period, the Commission's regenerative logging efforts were expensive and inefficient due to "the dead and declining timber [that] was distributed irregularly throughout the Management Area." *Id.* at 620.

202. *Id.* at 623 (articulating Commission's repeated warnings to Corps); see also *AGFC Considers Appeal in Dave Donaldson Black River WMA Case*, LOG CABIN DEMOCRAT (Apr. 10, 2011), http://thecabin.net/sports/outdoors/2011-04-10/agfc-considers-appeal-dave-donaldson-black-river-wma-case#Ttp8EyZz6IYE (predicting possible Commission appeal of Federal Circuit ruling). "By the late 1990s ... the Corps of Engineers had been repeatedly warned by members of the Commission that the ongoing deviations were causing flooding in the Management Area." *Ark. Game & Fish I*, 87 Fed. Cl. at 623.

203. *Ark. Game & Fish I*, 87 Fed. Cl. at 622 (noting Commission's attempts to warn Corps of damage to hardwoods due to increased flooding).
Clearwater Lake were the direct cause of the growing season flooding and incurred damages on the [Management Area]."

The facts of *Arkansas Game & Fish* also satisfy the preemption formulation of the appropriation prong. The substantial and frequent flooding rose to the level of a taking because it occurred every year during the growing season, so long as the Corps deviated from Manual. Despite the fact that the flooding eventually ceased and the Commission reclaimed its land, the Supreme Court previously concluded such termination does not bar recovery under a takings claim.

C. Destruction of Property as a Taking

As articulated by the Federal Circuit in *Cooper*, an alternative means to determine whether governmental activity constitutes a taking is to look specifically at the destruction of the property interest. In fact, several Supreme Court cases found the destruction of a property interest during a temporary taking compensable under the Fifth Amendment. The government in *Arkansas Game & Fish* argued the Commission "waived its claim for [a] flowage easement" by asserting timber "was the only property interest claim

204. See id. (discussing Commission’s communications with Corps regarding flooding within Management Area).

205. See *Cary v. United States*, 552 F.3d 1373, 1380 (Fed. Cir. 2009) (describing preemption formulation of appropriation prong). "To meet this preemption formulation of the appropriation prong, the complaint must allege that 'the government's interference with any property rights of [the landowners] was substantial and frequent enough to rise to the level of a taking.'" *Id.* (quoting *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1357 (Fed. Cir. 2003)).

206. *Id.* at 1381 (explaining substantial and frequent aspect of test). "In the flooding cases, appropriation means that the water stays on the property indefinitely, or predictably returns - a permanent invasion." *Id.* Though the flooding at issue in *Arkansas Game & Fish* will not predictably return, during the seven-year deviation period the flooding predictably returned each growing season while the Corps continued to deviate from the Water Control Manual. *Ark. Game & Fish II*, 637 F.3d 1366, 1369-71 (Fed. Cir. 2011). The invasion of water was not permanent because it receded each year, but it was by no means an isolated situation "such as one or two floodings, [which] do not make a taking.... Repeated invasions of the same type have often been held to result in an involuntary servitude." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1357 (Fed. Cir. 2003) (quoting *Eyherabide v. United States*, 345 F.2d 565, 569 (1965)).


208. *Cooper v. United States*, 827 F.2d 762, 763 (Fed. Cir. 1987) (stating destruction of property interest is compensable taking within meaning of Fifth Amendment). "Cooper had a property interest in the timber when the taking of the timber became complete.... [Thus,] he is entitled to compensation for the value of the timber destroyed." *Id.* at 764.

209. For a further synopsis of the destruction of property interests compensable under the Fifth Amendment, see *supra* notes 119-124 and accompanying text.
ever identified;” however, the court regarded this distinction as immaterial.\textsuperscript{210}

The majority in \textit{Arkansas Game & Fish} ignored the distinction between property destruction and flowage easements.\textsuperscript{211} Instead, it focused solely on the flowage easement analysis and failed to apply the Federal Circuit’s prior holding in \textit{Cooper}.\textsuperscript{212} Specifically, the Federal Circuit distinguished \textit{Cooper} from \textit{Arkansas Game & Fish} by pointing out the plaintiff in \textit{Cooper} requested compensation for lost timber, not for a flowage easement.\textsuperscript{213} This analysis is erroneous because the taking of timber and the taking of a temporary flowage easement are inherently intertwined.\textsuperscript{214} The government’s appropriation of the flowage easement resulted in the loss of timber; thus, compensation for the taking of timber is appropriate even though such compensation would not be awarded if a permanent appropriation of property occurred.\textsuperscript{215} The Federal Circuit should have performed a more thorough analysis of \textit{Cooper} in relation to the facts at hand and accordingly found the government appropriated a taking of the Management Area.\textsuperscript{216}

\textsuperscript{210} See Ark. Game & Fish I, 87 Fed. Cl. 594, 617-18 (Fed. Cl. 2009) (analyzing impact of Federal Circuit’s decision in \textit{Cooper} in guiding Commission’s focus on timber takings). Although the temporary flowage easement over the Commission’s property “was the underlying progenitor” of the floods, “superinduced additions of water and a resulting temporary flowage easement have always been embedded within the Commission’s claim for the taking of its timber.” \textit{Id.} at 618.

\textsuperscript{211} Ark. Game & Fish II, 637 F.3d 1366, 1381 (Fed. Cir. 2011) (Newman, J., dissenting) (mentioning \textit{Cooper} briefly). The only deference the Federal Circuit majority paid to its previous holding in \textit{Cooper} was a mention in a string cite discussing that eventual abatement of flooding does not preclude entitlement to just compensation. \textit{Id.}

\textsuperscript{212} See id. (describing Federal Circuit’s failure to apply \textit{Cooper} to Arkansas Game & Fish).

\textsuperscript{213} \textit{Id.} at 1378 n.7 (majority opinion) (stating \textit{Cooper} is not analogous to \textit{Arkansas Game & Fish}). The Federal Circuit found \textit{Cooper} did not govern because plaintiff only sought compensation for the lost timber, not for the government’s appropriation of a temporary flowage easement. \textit{Id.} Thus, the Federal Circuit held that application of \textit{Cooper} was inappropriate to the facts at hand because the Commission sought compensation under a taking of a flowage easement analysis. \textit{Id.}

\textsuperscript{214} See \textit{Cooper} v. United States, 827 F.2d 762, 762-64 (Fed. Cir. 1987) (describing remedies available under takings analysis).

\textsuperscript{215} \textit{Id.} at 753 (outlining compensation for injuries suffered under temporary taking versus permanent taking). For a further discussion of the relationship between compensation for a property interest lost during a temporary taking versus compensation for a permanent taking, see supra notes 119-124.

\textsuperscript{216} \textit{See Cooper}, 827 F.2d at 753 (holding where remedy under takings analysis is unavailable, remedy for destruction of property may be appropriate).
VI. IMPACT

Some theorists characterize property rights as a “bundle of sticks,” in which landowners have the exclusive control over the use of their property.\textsuperscript{217} The power to exclude another from one’s land remains a treasured right, and consequently, an appropriation of one’s land is “perhaps the most serious form of invasion of an owner’s property interests.”\textsuperscript{218} Particularly in the case of a wildlife management area, a private owner or a state’s right to exclude others can mean the difference between the life and death of wildlife and ecological resources.\textsuperscript{219} Moreover, after the inundation by water and appropriation of property, collection of just compensation must occur to effectively restore the biological diversity destroyed or impaired by the government’s taking.\textsuperscript{220}

In light of these concerns, the Federal Circuit’s misguided holding in \textit{Arkansas Game & Fish} is alarming for three reasons.\textsuperscript{221} First, the court completely ignored the longstanding precedent establishing the possibility of recovery under a temporary takings analysis.\textsuperscript{222} Second, it failed to apply the well-established \textit{Ridge Line} torts versus takings test previously used in similar cases.\textsuperscript{223} Third, the Federal Circuit failed to consider the destroyed timber on the property as a destruction of property, for which prior precedent has held compensable under the Fifth Amendment.\textsuperscript{224}


\textsuperscript{219.} For a summary of the death of timber within the Dave Donaldson Wildlife Management Area as a result of Corps-induced excessive flooding, see supra notes 58-61 and accompanying text.

\textsuperscript{220.} For a further explanation of regeneration costs, see supra note 62 and accompanying text.

\textsuperscript{221.} For a further discussion of these three reasons, see infra notes 222-224 and accompanying text.

\textsuperscript{222.} For a further outline of precedential cases awarding just compensation under a temporary takings analysis, see supra notes 75-104 and accompanying text.

\textsuperscript{223.} For a further summary of the \textit{Ridge Line} torts versus takings analysis and cases that successfully applied it, see supra notes 99-118 and accompanying text.

\textsuperscript{224.} For a further explanation of the compensability of destroyed property under the Fifth Amendment, see supra notes 119-125 and accompanying text.
A. Federal Circuit Ignores Possibility of Compensation Under a Temporary Takings Claim

The Federal Circuit originally acknowledged “particular government action would constitute a taking when permanently continued, [and] temporary action of the same nature may lead to a temporary takings claim,” but it failed to apply this logic to *Arkansas Game & Fish*. Rather, the court focused too narrowly upon the permanence of the condition leading to the intermittent flooding. Therefore, the court misinterpreted the binding precedent holding the “'effect of the government action causing the damage [ ] is the proper focus of the taking analysis.’”

By incorrectly analyzing whether *Arkansas Game & Fish* qualified as a temporary taking, the Federal Circuit barred itself from applying the subsequent *Ridge Line* test. The court’s misguided and narrow classification of the facts placed the case into a non-taking category. Subsequently, the court analyzed the case no further.

The Federal Circuit’s limited concentration on the cause of the appropriation, rather than the actual property interest appropriated, will have a detrimental impact on future litigants bringing takings claims against the government. Such a misconstrued analysis impedes litigants with an affected property interest harmed by a temporary government action. The court’s reasoning completely ignores the precedent allowing compensation for a tempo-

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225. *Ark. Game & Fish II*, 637 F.3d 1366, 1374 (Fed. Cir. 2011) (citing First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 328 (1987)). For a further summary of both the Supreme Court and Federal Circuit’s recognition of compensation under a temporary takings theory, see supra notes 75-82 and accompanying text and supra notes 132-142 and accompanying text.

226. *See* *Ark. Game & Fish II*, 637 F.3d at 1382-83 (quoting *Owen* v. United States, 851 F.2d 1404, 1412 (Fed. Cir. 1988)) (holding erosion caused below high water mark due to excessive flooding constituted compensable taking). For a further discussion of the proper focus under a takings analysis, see supra notes 116-118 and accompanying text.

227. *See* *Ark. Game & Fish II*, 637 F.3d at 1382-83 (quoting *Owen*, 851 F.2d at 1412) (defining proper focus under takings analysis).

228. For a further examination of the court’s narrow classification of the facts as a non-taking case, see supra notes 143-168 and accompanying text.

229. For a description of the court’s classification, see supra notes 159-162 and accompanying text.

230. For further explanation of the court’s absence of analysis, see supra notes 182-207.

231. For a further discussion of the court’s narrow focus on the cause of the appropriation, see supra notes 172-181 and accompanying text.

232. For a summary of the analytical differences between the cause of appropriation and the property interests being appropriated, see supra notes 172-181.
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rinary taking under the Fifth Amendment so long as the property was appropriated during the specified period.233

B. Court’s Failure to Apply Ridge Line Test

Had the court given more deference to precedent, it would have recognized Arkansas Game & Fish was ripe for analysis under the Ridge Line test.234 Application of the Ridge Line test would have resolved the court’s uncertainty by guiding it through a more detailed analysis of the facts at hand.235 The Federal Circuit itself developed the Ridge Line test to distinguish between situations where compensation was appropriate under a tort or temporary takings analysis; therefore, it is perplexing the court chose not to analyze this case under the guidance of Ridge Line merely because the condition causing the intermittent flooding in Arkansas Game & Fish was temporary.236

The court’s decision not to apply the Ridge Line test will have potentially negative consequences for future litigants in cases similar to Arkansas Game & Fish.237 This holding will especially affect cases in which the main issue is whether the government action is a tort or a taking.238 A hasty judicial decision to classify a case as a non-taking situation before applying the Ridge Line analysis may bar deserving litigants from receiving just compensation in future temporary takings claims.239

233. For a further explanation of intermittent flooding temporary takings, see supra notes 172-181 and accompanying text.
234. For a further analysis of the Ridge Line test, see supra notes 99-118 and accompanying text. For a further discussion of the analysis the court would have applied had it employed the Ridge Line test, see supra notes 182-207 and accompanying text.
235. For a further prediction of the decision the court should have reached had it applied the Ridge Line test, see supra notes 182-207 and accompanying text.
236. For a further outline of the reasons the court chose not to apply the Ridge Line test, see supra notes 143-148.
237. For a further description of the possible negative effects on future litigants, see supra notes 225-233 and accompanying text.
238. For a further explanation of the analytical difference between torts and takings, see supra notes 99-118, 132-142 and accompanying text.
239. For a further discussion of application of the Ridge Line test, see supra notes 143-148.
C. Failure to Recognize the Destruction of Property as Compensable Under the Fifth Amendment

Lastly, the Federal Circuit ignored its own precedent when it forwent utilizing the Cooper analysis in Arkansas Game & Fish. The Federal Circuit erroneously determined Cooper was inapplicable because the Commission sued the Corps seeking compensation for a temporary flowage easement, not compensation for the destruction of the damaged timber. This was another oversight by the Federal Circuit, as Cooper clearly established the distinction between compensation for a flowage easement and for damaged property is unnecessary because the two are closely related.

The Federal Circuit’s narrow and misguided holding in Arkansas Game & Fish unsettles the extensive and diverse flowage easement takings precedent. Moreover, it inevitably hinders litigants with a temporary takings allegation from prevailing against the government. The court gave the government unprecedented power to occupy private property without just compensation and emphasized the federal government’s apparent disregard for the environmental destruction caused by such a taking. The Corps-approved seven-year period of repeated flooding severely damaged the Dave Donaldson Black River Wildlife Management Area’s several thousand acres of hardwood trees, inevitably impaired the area’s biodiversity, and diverted the prized migratory waterfowl away from the Management Area. The Federal Circuit’s failure to justly compensate the Commission under a temporary takings

240. For a further summary of the Federal Circuit’s treatment of Cooper, see supra notes 208-215 and accompanying text.
241. See supra notes 208-215 (analyzing majority’s treatment of Cooper).
242. For a further discussion of the unnecessary distinction between a flowage easement and destruction of property, see supra notes 211-215 and accompanying text.
243. See Ark. Game & Fish II, 637 F.3d 1366, 1382-83 (Fed. Cir. 2011) (Newman, J. dissenting) (explaining deficiencies in majority’s holding). The dissent reasoned that the majority’s “ruling contradicts the entire body of precedent relating to the application of the Fifth Amendment to government-induced flooding.” Id. at 1383.
244. For a further explanation of the difficulties future litigants will have under the majority’s holding in Arkansas Game & Fish, see supra notes 221-233 and accompanying text.
245. For a further analysis of the environmental repercussions of the Corps’ action, see supra notes 25-61 and accompanying text.
246. For a further description of the damaged hardwood trees within the Management Area, see supra note 61 and accompanying text.
theory for the Corps’ rash water management practices is both an ecological and constitutional tragedy.\footnote{For a further summary of the constitutional and environmental implications of the majority’s decision, see supra notes 217-246 and accompanying text.}

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\footnotetext{247. For a further summary of the constitutional and environmental implications of the majority’s decision, see supra notes 217-246 and accompanying text.\footnote{J.D. Candidate, 2013, Villanova University School of Law; B.A., 2010, Middlebury College.}}