



***Indiana Farm Bureau***<sup>®</sup>

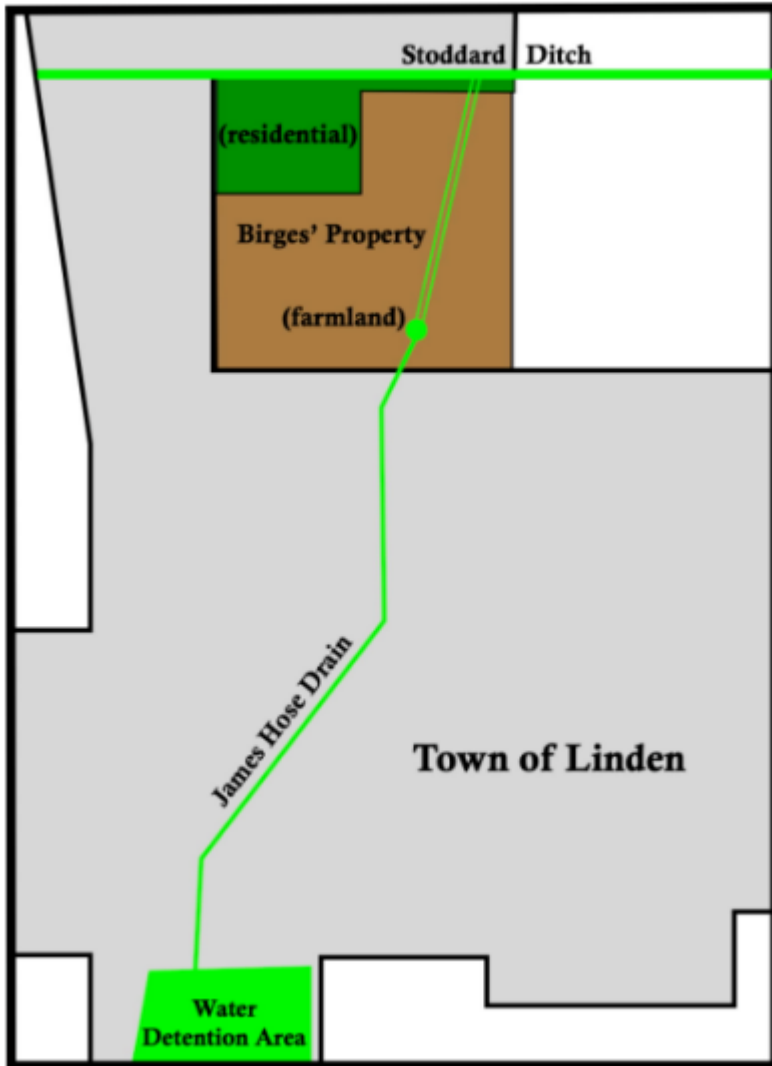
# **TOWN OF LINDEN V. BIRGE**

**187 N.E.3D 918 (IND. CT. APP. 2022)**

Mark Thornburg, Director of Legal  
Affairs

# Facts

\*923



- 1898 agricultural drain built
- 1927 drain rebuilt
- Flooding in town
- Reconstructed in 2012
- Ponding on low-lying areas after any significant rainfall (5 to 7 days)
- Made farming of the affected areas more difficult
- Refused to pay assessment

# Procedural History

- 2014 brought an action alleging inverse condemnation
- Prevailed
- Trial court's order:
  - “The category of taking that applies to his case is a ‘permanent physical invasion of . . . Property.’
  - The design and reconstruction of the James Hose Drain uses Plaintiffs’ property as the overflow basin for any heavy rain.
  - This is a “permanent physical invasion’ of Plaintiffs’ property and therefore a taking[.]” 927.
- But the Town appealed

# Issue on Appeal

- “Whether the trial court erred in concluding that the effect of the improvements to the drain on the Property was sufficient to constitute a taking.”

# Takings Law

- A property owner may bring a suit of inverse condemnation to recover money damages if the government takes property but fails to initiate proceedings.
- There are two broad categories of takings
  - Actual appropriation or ouster from private property, *and*
  - Regulatory takings
    - 1. Permanent physical invasions;
    - 2. Regulation that completely deprives an owner of all economically beneficial use of the property; and
    - 3. All other regulatory takings (the kind applicable here)

# Temporary Invasion

- “[G]overnment-induced flooding can constitute a taking of property, and because ***a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable.***” *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 34 (2012).
- Flooding cases are fact-specific. *Birge* at 931.
- Factors to consider (the Penn Central/Arkansas factors)
  - The duration and severity of the interference
  - The degree to which the invasion is intended or is foreseeable as result of the government action
  - The character of the land at issue
  - The owner’s reasonable investment-backed expectations regarding the land’s use. *Id.*

# Reversed and Remanded

- “[T]he trial court erred as a matter of law when it found that the frequent but non-permanent flooding of the Property constituted a permanent invasion of the property and a per se taking.
- Instead, such temporary but frequent flooding must be analyzed under the *Penn Central* factors as expanded in *Arkansas Game*.” *Birge* at 931.

# Petition to Transfer

- Birge petitioned the Indiana Supreme Court to take the case.
- Main argument:
  - A permanently installed drainage system which was designed to cast excess storm and floodwaters upon Birges property (in and outside the drainage easement) constituted a permanent physical invasion—and is therefore a taking.
  - 850,000 acres across the State are at risk