# TAKINGS AND FLOODING: 10 KEY QUESTIONS

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#### Purpose

- To review how flooding on farm property can trigger the government's obligation to provide compensation for the "taking" of property.
- To provide guidance to owners, lawyers, and government as to how to navigate liability for the taking of farm property that has been damaged by flooding.

## **Two Key Cases**

- Indiana Department of Natural Resources v. Houin, 191 N.E.3d 241 (Ind. Ct. App. 2022)
- Town of Linden v. Birge, 204 N.E.3d 229 (Ind. 2023)

### **Question One**

What was the background of the *Houin* case?

### **Question Two**

What is an "inverse condemnation" and why did the Court review these facts as an inverse condemnation?

#### **Question Three**

The case relied on a U.S. Supreme Court case called *Arkansas Game*. What was the holding of that case and why is it significant?

### **Arkansas Game Factors**

- 1. "When regulation or temporary physical invasion by government interferes with private property, ... **time** is indeed a factor in determining the existence *vel non* of a compensable taking";
- 2. "The degree to which the invasion is intended or is the foreseeable result of authorized government action";
- 3. "The character of the land at issue";
- 4. "The owner's reasonable investment-backed expectations regarding the land's use"; and
- 5. "The severity of the interference."

#### **Question Four**

What did the Court decide regarding whether a taking had occurred and why did it reach that conclusion?

### **Question Five**

What facts made the difference in reaching that decision and how might the result be different with different facts?

#### **Question Six**

Lets switch to *Birge*. What was the background and facts of that case?

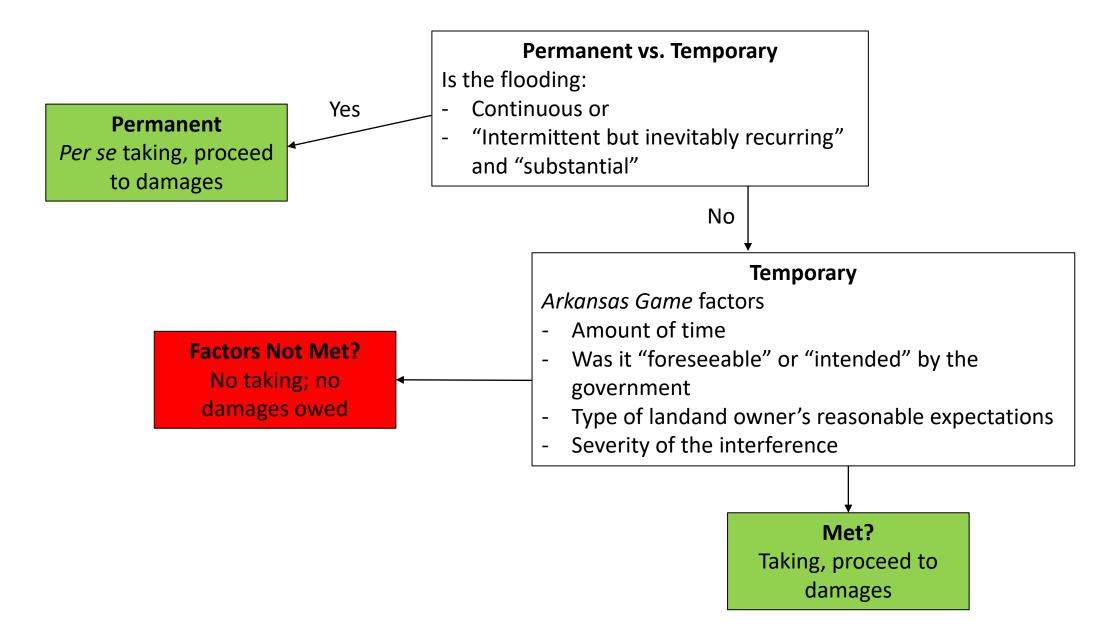
#### **Question Seven**

What did the Court hold regarding permanent vs. temporary takings and how do we know when there is a "permanent" taking? What facts made the difference?

## **Question Eight**

How do we know when the government is going to owe damages for a taking after these cases? What are the general principles they set out? What's next?

## Is There A Taking?



## **Question Nine**

What are some steps owners can take to show that flooding is continuous or intermittent but inevitably recurring?

- Document with video or photograph that include dates.
- Document not just the peak of the flooding, but what it looks like one, two, or three days later. Is there puddling that prevents farming even days later?
- It is critical to show the flooding is "substantial," so measure and document the amount of land affected by the flooding.
- Connect flooding events with rain when it rains and amounts of rainfall.
- Engage your expert early to investigate and help shape the arguments for potential litigation.

## **Question Ten**

What do government officials need to consider *Birge* and *Houin*?

- Liability has expanded and claims may be easier to make.
- There are no caps on damages for takings claims.
- Budgeting and planning should consider this.
- Municipalities with insurance should consider whether they have enough coverage.