

Government Takings & Drainage

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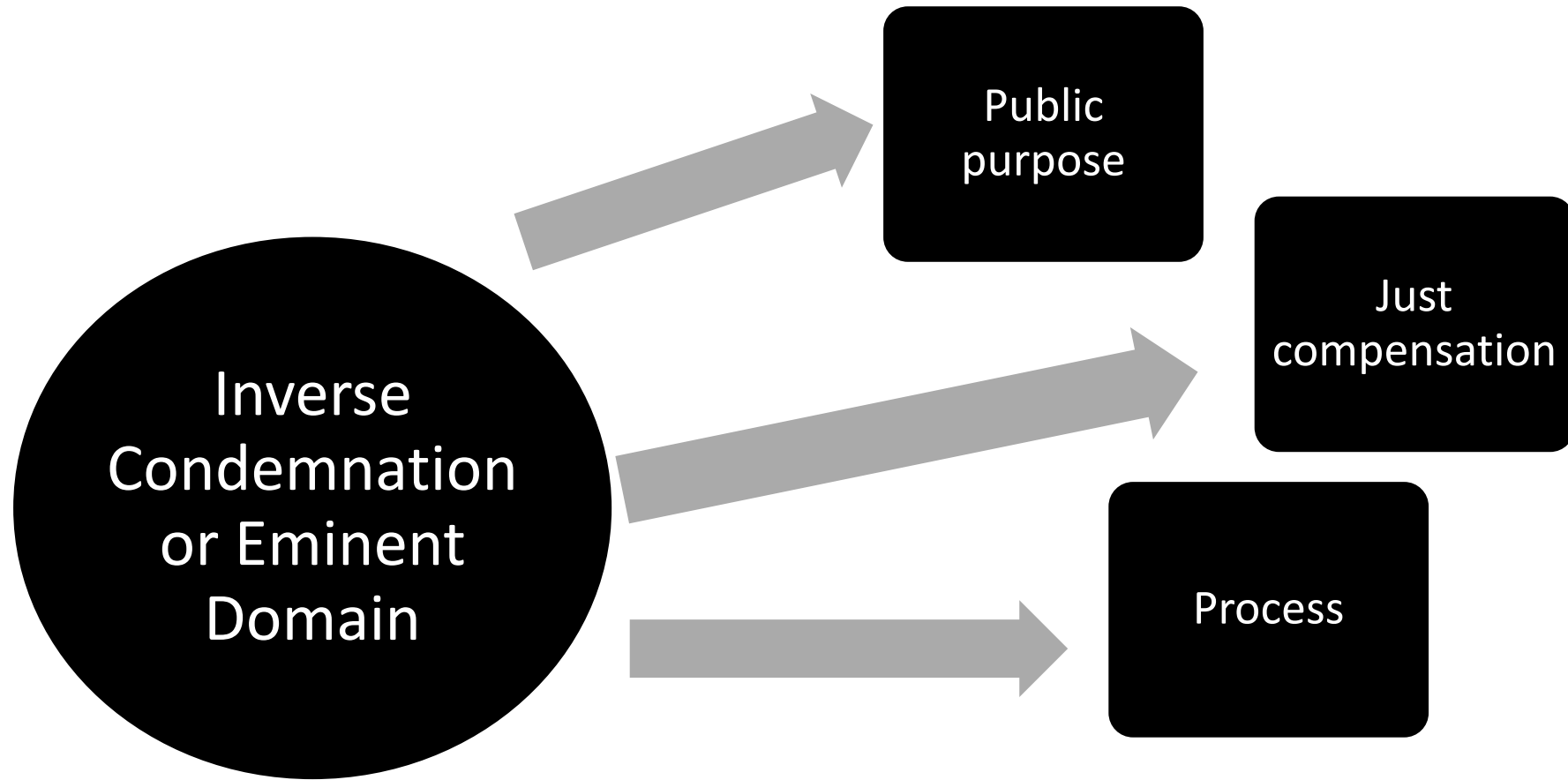
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Today's Agenda

- **Government Takings**
- **Indiana Cases**
- **Federal Cases**
- **Takeaways**

Taking(s)





What if we have too much water?

...flooding can be a “taking”

Houin v. DNR – the Backstory

STATE OF INDIANA)
) SS: IN THE MARSHALL CIRCUIT COURT
COUNTY OF MARSHALL) 1986 CALENDAR TERM
CAUSE NUMBER Ctc 86-82

IN THE MATTER OF THE CHANGE)
TO THE ESTABLISHED WATER LEVEL)
OF LAKE OF THE WOODS, IN)
MARSHALL COUNTY, INDIANA)

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

This Court having heard the evidence and arguments of counsel and having heard all interested persons in regard to the issues now before the Court on the establishment of the water level of Lake of the Woods in Marshall County, Indiana, and the Court, being duly advised in the premises now enters the following Findings of Fact, Conclusion of Law and Judgment:

1. Notice of the filing, docketing and pendency of this cause has been given in accordance with the provisions

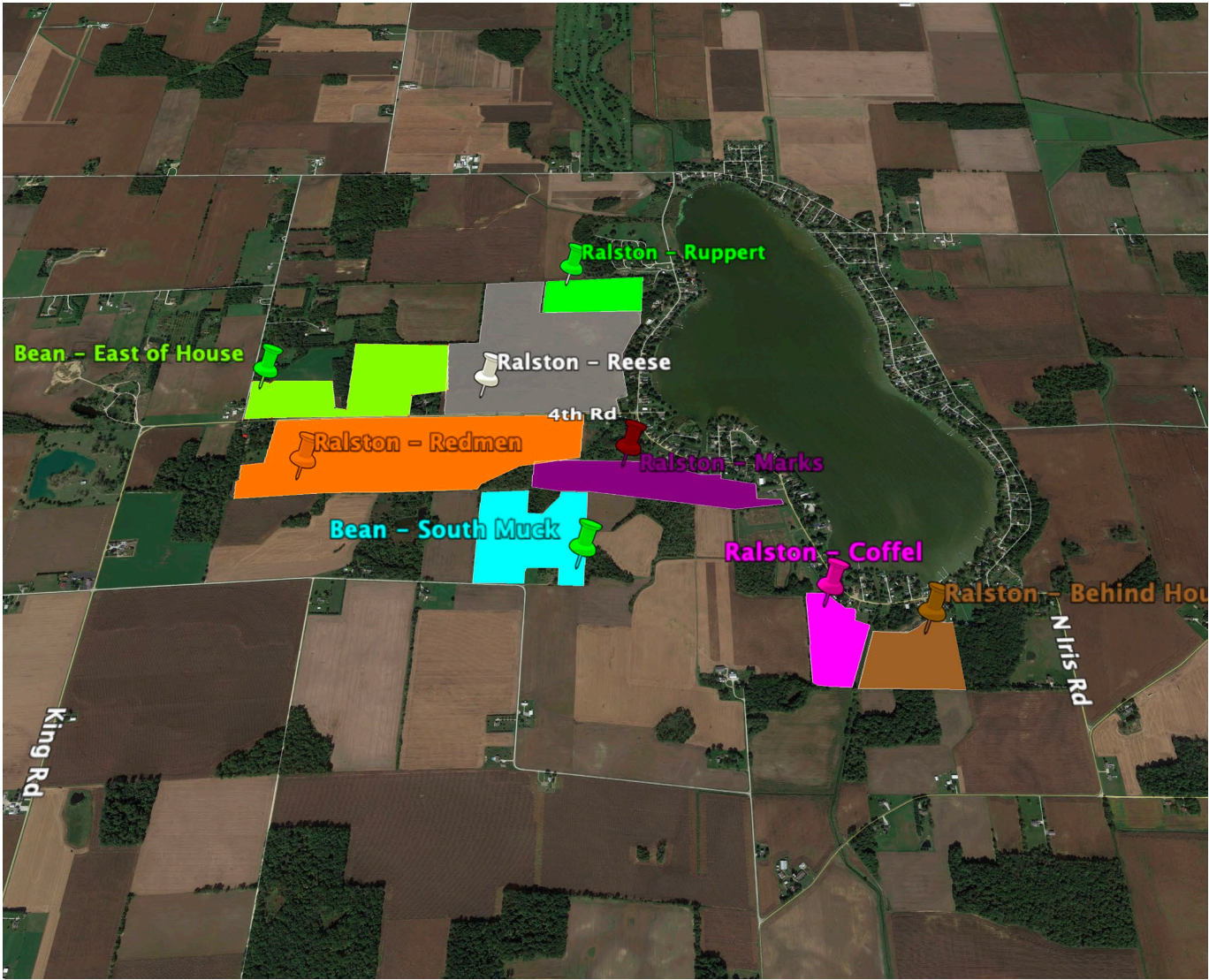
JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT AS FOLLOWS:

1. The average normal water level of Lake of the Woods in Marshall County, Indiana shall remain and hereby is re-established at 803.85 feet (elevation, mean sea level datum)

for the time period between May 15 and September 15 of each year. From September 15 to May 15 of each year the control structure gates should be opened and lower sill elevation of 802.85 feet (elevation, mean sea level datum) shall serve as the low water control.

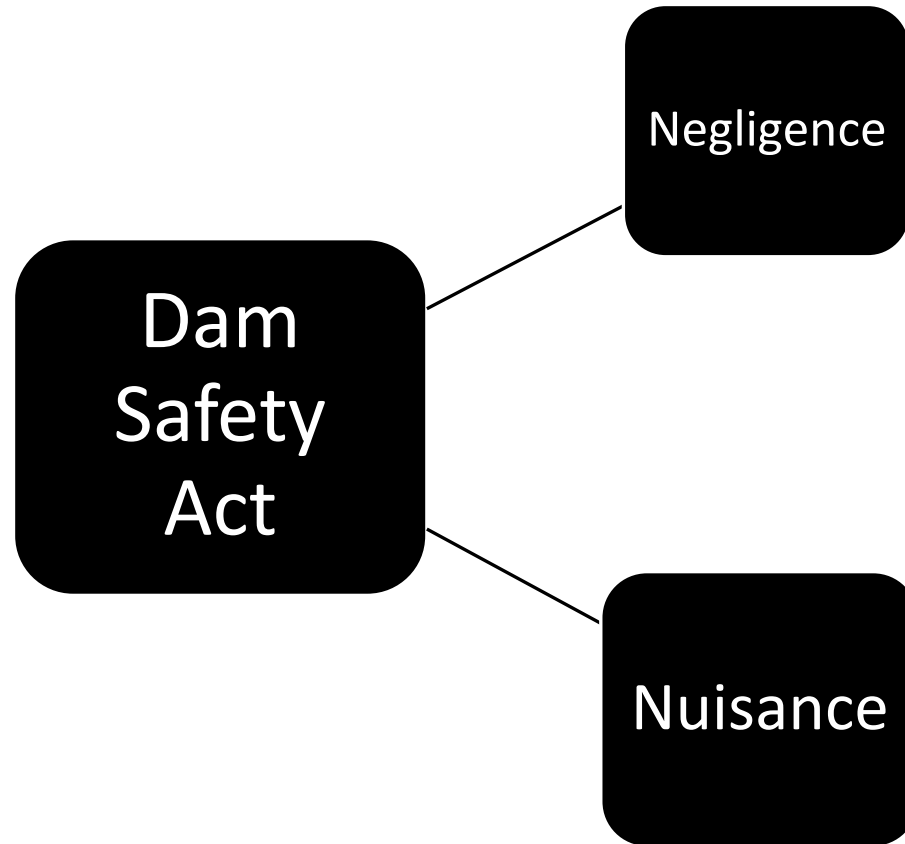
Flooded fields





Trial + Appeal

Court of Appeals - Torts



DNR is immune where damages result from its operation of dam on Indiana public lake.

Court of Appeals - Taking

DNR argued damage was not intentional... but Court held it was *foreseeable*

Interference with property was significant, occurred over multiple years, and deprived owners of farmland's productive use

Continued flooding also damaged drainage tile system

Houin v. Ind. DNR, 191 N.E.3d 241 (Ind. Ct. App. 2022), *trans. denied*, 203 N.E.3d 196

Court of Appeals – Taking

Ark. Game & Fish Comm'n v. United States, 87 Fed. Cl. 594, 634-35 (2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd and remanded*, 568 U.S. 23, 37 (2012), *and aff'd*, 736 F.3d 1364 (Fed. Cir. 2013)

Arkansas Game

Federal Claims Court held taking + damages



Federal Circuit Court reversed Claims Court on taking



Supreme Court reversed on taking and remanded



Federal Circuit Court affirmed Claims Court's damages

Arkansas Game

Federal Claims Court

Army Corps authorized flooding in timber forest

Fact & expert evidence of timber damage

Use of technology to track water levels, tree rot, and hydrological connections

Compared “control” forests with impacted land

Timber damages

Regeneration damages

Temporary Taking Factors

Arkansas Game + Houin

If flooding is temporary or of “finite duration,” we consider:

(1) the duration of the interference

(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

Town of Linden v. Birge


Town completed drain work within drainage easement on Birge property



Birge property flooded after heavy rains

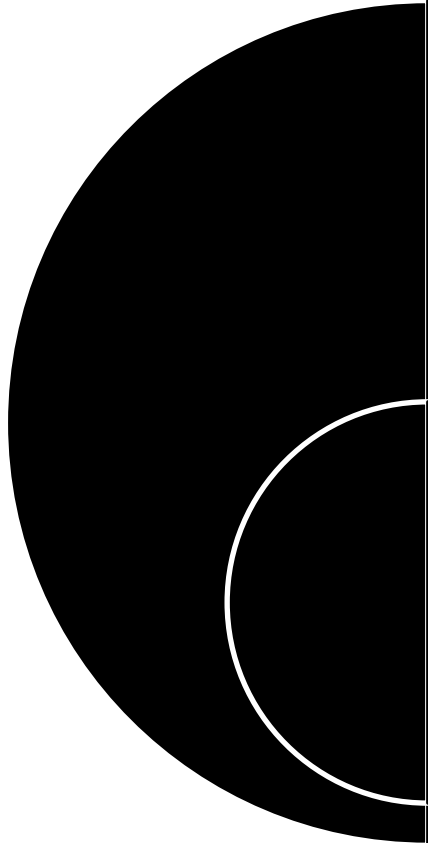


Trial court held that by using property as overflow basin for heavy rain, project amounted to a permanent taking



Court of Appeals reversed, said maybe temporary taking, and remanded

Birge



if flooding is continuous or “intermittent but inevitably recurring,” and invasion is “substantial,” then it is a *per se* taking

if flooding is temporary or of “finite duration,” *Arkansas Game* factors apply.

Birge


Compare to *Arkansas Game*, where recurrent floodings were of finite duration

Floodings in *Birge* were repetitive and of infinite duration—a “permanent condition”

- Intermittent but inevitably recurring
- If property sustains heavy rains, or unless and until corrective measures taken, flooding will persist indefinitely

The “clearest sort of taking” so government must pay for what it takes

But only if “the damage is substantial”



Ideker Farms v. Army Corps, 71 F.4th 964 (Fed. Cir. 2023)

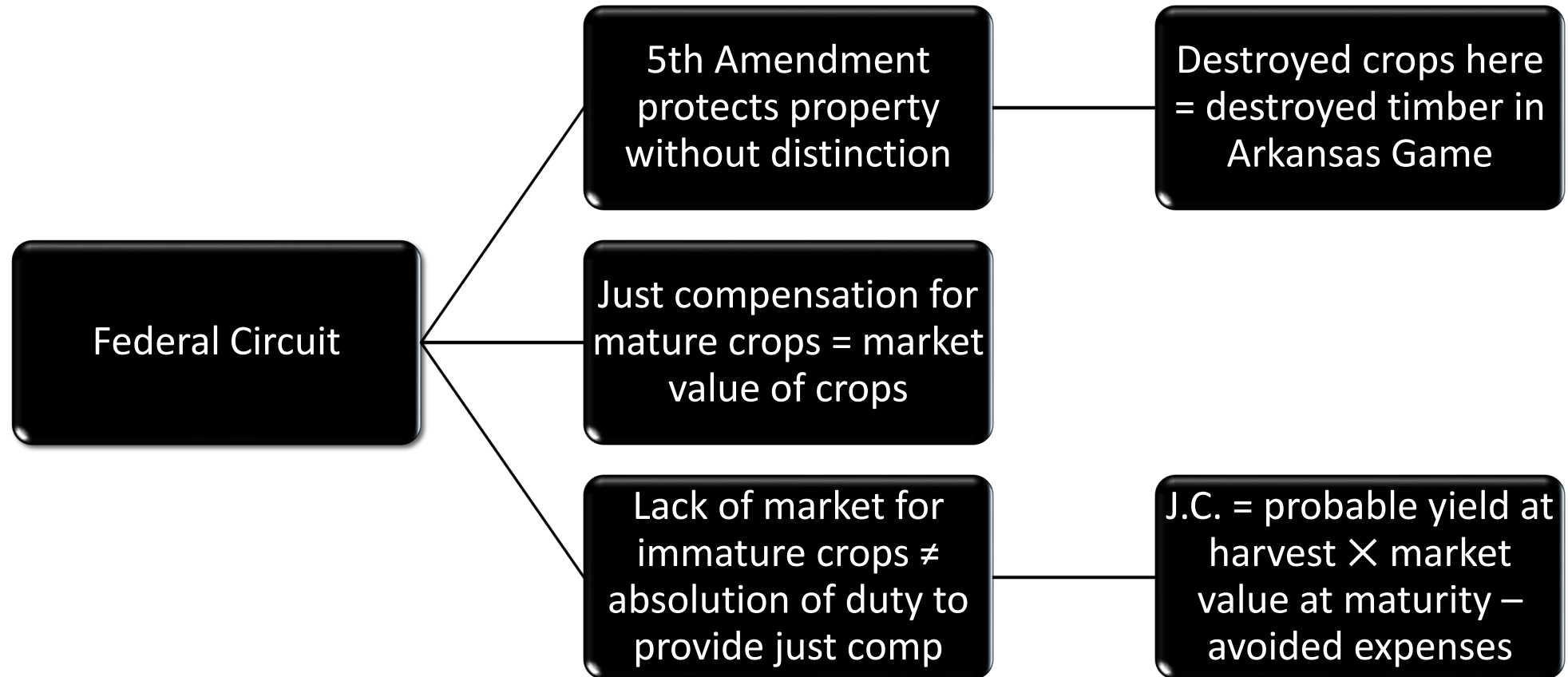
Trial Court

- USACE re-routed Missouri River
- Court held lost crops are like lost profits and aren't compensable

Appeal

- 5th Amendment protects all property
- Lack of market for immature crops doesn't mean no duty to compensate

Ideker Farms



Recent Federal Decisions

Nolan v. U.S., 173 Fed. Cl. 669 (Oct. 2024) → plaintiffs' Missouri River permanent (recurring) flowage easement claims were time-barred.

Watkins v. Lawrence County, Ark., 102 F.4th 933 (2025) → ok to value farm damages by “actual crop losses” or the “usual measure of compensation for temporary takings – fair rental value.”

Takeaways...



Flooding can be temporary or permanent taking



Impacts measure of damages



Time to file suit

Questions?

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