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When (and Why) the Levee Breaks: a Suggested Causation Framework for Takings Claims that Arise from Government-Induced Flooding

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WHEN (AND WHY) THE LEVEE BREAKS: A SUGGESTED CAUSATION FRAMEWORK FOR TAKINGS CLAIMS THAT ARISE FROM GOVERNMENT-INDUCED FLOODING

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INTRODUCTION

In 1968, the United States Army Corps of Engineers finished constructing the seventy-six-mile Mississippi River-Gulf Outlet (MR-GO) navigational channel.[1] Congress authorized the Army Corps of Engineers to begin construction to create a shipping route between New Orleans and the Gulf of Mexico.[2] However, the MR-GO also caused significant erosion and other environmental detriments that greatly increased the risk of flooding around its vicinity.[3] The Army Corps of Engineers learned about many of these detriments and risks through numerous studies it conducted between 1998 and 2005, but never fully addressed them.[4]

Hurricane Katrina eventually showcased the MR-GO's defects in violent fashion. The MR-GO severely worsened Hurricane Katrina's effects[5] and Louisiana landowners resultingly incurred catastrophic flood damages.[6] To make matters worse, many injured landowners who sought compensation from the federal government for its construction of and failure to maintain the MR-GO instead experienced protracted and ultimately unsuccessful litigation.[7]

Unfortunately, an array of other powerful hurricanes and tropical storms in recent years have also brought devastation[8] and repeatedly sounded the alarm on an uncomfortable scientific truth[9]: sea

1. St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 691, 698, 702 (2015), *rev'd*, 887 F.3d 1354 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019). The MR-GO, its role in aggravating flood damages in Hurricane Katrina, and the resulting litigation are discussed in more detail in Part III.

2. *See* St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1357 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019).

3. *See, e.g.*, *id.* at 1358.

4. *See id.*; *St. Bernard Par. Gov't*, 121 Fed. Cl. at 704-09, 720-23.

5. *In re* Katrina Canal Breaches Litig., 696 F.3d 436, 441 (5th Cir. 2012).

6. *St. Bernard Par. Gov't*, 121 Fed. Cl. at 690-91.

7. *See infra* Part III.C.

8. *See* Oliver Milman, *From Harvey to Michael: How America's Year of Major Hurricanes Unfolded*, GUARDIAN (Oct. 16, 2018, 2:00 PM), https://www.theguardian.com/world/2018/oct/15/us-year-of-hurricanes-extreme-michael-irma-florence [https://perma.cc/X8FG-QBRU].

9. *See* Henry Fountain, *The Hurricanes, and Climate-Change Questions, Keep Coming. Yes, They're Linked.*, N.Y. TIMES (Oct. 10, 2018), https://www.nytimes.com/2018/10/10/climate/hurricane-michael-climate-change.html [https://perma.cc/C3VK-Q5P2].

levels are rising[10] and causing substantial flooding.[11] Though the federal government has attempted lofty infrastructure projects to address rising sea levels throughout the years, many of these projects have suffered from mismanagement and a dearth of basic maintenance.[12] Indeed, some projects originally built to prevent flooding have instead intensified it.[13] When an infrastructure project actually causes more severe flood damages than would have occurred without its construction, how might an affected property owner win compensation from the federal government?

A property owner who sues the federal government in tort will almost certainly fail, considering that one cannot sue the federal government unless the federal government consents to being sued.[14] With this in mind, some litigants have instead alleged that government-induced flooding amounts to a taking compensable under the Fifth Amendment.[15] Variations of this recovery method's theoretical underpinnings have received much scholastic attention in recent years.[16] Nonetheless, in *Arkansas Game & Fish Commission v.*

10. *See* Chris Mooney, *At This Rate, Earth Risks Sea Level Rise of 20 to 30 Feet, Historical Analysis Shows*, WASH. POST (Sept. 20, 2018), https://www.washingtonpost.com/energy-environment/2018/ 09/20/antarctica-warming-could-fuel-disastrous-sea-level-rise-study-finds/ [https://perma.cc/PA4L-KQJ6].

11. *See* Abbie Bennett, *Florence Floods Damaged Thousands More Homes Because of Sea Level Rise, Study Shows*, NEWS & OBSERVER (Sept. 24, 2018), https://www.newsobserver.com/ news/local/ article218944875.html [https://perma.cc/MH6R-DE56]; Andrew Freedman, *Study: Sea Level Rise Boosted Hurricane Florence's Coastal Flooding*, AXIOS (Sept. 24, 2018), https://www.axios.com/ sea-level-rise-hurricane-florence-coastal-flooding-a32d013f-5b66-470a-9536-7a54c3001d64.html [https://perma.cc/B4TG-VGW4]; *see also* Peter Kotecki, *One of California's Most Famous Surf Towns Is Threatened by Rising Sea Levels That Could Overtake Beaches and Million-Dollar Homes*, BUS. INSIDER (Oct. 12, 2018), https://www.businessinsider.com/santa-cruz-california-is-threatened-by-accelerating-sea-level-rise-2018-10 [https://perma.cc/P75G-ZZDF].

12. *See* Todd C. Frankel, *Taming the Mighty Mississippi*, WASH. POST (Mar. 14, 2018), https://www.washingtonpost.com/graphics/2018/national/mississippi-river-infrastructure/ [https://perma.cc/C7M8-7CLC]; Mark Hand, *Massive Levee Failure near Houston Exposes Danger of Crumbling Infrastructure*, THINKPROGRESS (Aug. 30, 2017), https://think progress.org/infrastructure-no-match-for-harvey-430235bd32df/ [https://perma.cc/Z2TG-XHFV].

13. *See* Adam Rogers, *Too Much Engineering Has Made Mississippi River Floods Worse*, WIRED (Apr. 4, 2018, 1:00 PM), https://www.wired.com/story/too-much-engineering-has-made-mississippi-river-floods-worse/ [https://perma.cc/28YS-BMRZ].

14. *See infra* Part I.A.

15. *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 26-27 (2012); St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1357-58 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019).

16. *See infra* Part V.A.

United States, the Supreme Court asserted that due to "the nearly infinite variety of ways in which government actions or regulations can affect property interests," lower courts may not categorically dismiss such claims via bright-line rules.[17] Instead, courts must apply fact-intensive inquiries.[18]

Arkansas Game's proscription against categorical dismissals means that litigants will likely continue to raise takings claims that arise from government-induced flooding.[19] One essential element of these claims is causation. Causation can be especially difficult to calculate because the federal government has already completed a myriad of infrastructure developments and continues to undertake ambitious projects.[20] Given that one project's beneficial aspects might offset another project's detrimental effects,[21] how can a court best determine whether the federal government sufficiently caused a litigant's property damages?

This Note contends that federal courts adjudicating takings claims that arise from government-induced flooding should employ a fact-specific causation inquiry that weighs certain factors to decide "whether the totality of the government's actions caused the injury."[22] To this end, this Note suggests that courts weigh (1) additional "risk-increasing and risk-decreasing government actions,"[23] (2) their relation to the primary infrastructure project that allegedly induced flooding,[24] and (3) the time that has elapsed between each additional project's construction.

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17. 568 U.S. at 31, 37.

18. *Id.* at 37.

19. *See infra* Part II.

20. *See* Arpan Lobo, *Bipartisan Water Resources Bill Passes Congress, President Trump Expected to Sign*, CAP. J. (Oct. 11, 2018), https://www.capjournal.com/news/bipartisan-water-resourcesbill-passes-congress-president-trump-expected-to/article_a1974620-cdd0-11e8-8c9a-533e7d8860e5.html [https://perma.cc/2D6U-KHRD].

21. *See* St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1363-64 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019) (holding that plaintiffs may not look to "isolated government actions" that caused their injury, but rather must look to "the whole of the government action" when raising a takings claim).

22. *Id.* at 1365.

23. *Id.*

24. *See id.* at 1366. ("When the government takes actions that are directly related to preventing the same type of injury on the same property where the damage occurred, such action must be taken into account even if the two actions were not the result of the same project.").

To help explain why litigants bring such takings claims in the first place, Part I briefly reviews governmental tort immunity and Takings Clause jurisprudence. Part II reviews the Supreme Court's 2012 *Arkansas Game*[25] decision and the arguments it rejected. Part II concludes that litigants will continue to bring forth such claims due to the Supreme Court's refusal to draw bright-line rules. Part III reviews the *St. Bernard Parish Government v. United States* litigation and the divergent causation approaches taken by the Court of Federal Claims[26] and the Federal Circuit.[27] Part IV first analyzes important policy implications that should underlie a causation calculus. Next, it looks to prior federal court decisions for guidance. Part IV then suggests a causation framework that gives courts flexibility to avoid unjust results and incentivizes the federal government to proactively combat global warming's malicious effects. Part V addresses possible counterarguments and looks to some recent scholarship concerning the theoretical viability of similar recovery theories.

I. HOW WE GOT HERE

Before diving into their policy implications, it is important to understand why plaintiffs bring takings claims regarding government-induced floods in the first place. This Part briefly reviews the federal government's immunity from tort liability before reviewing Takings Clause jurisprudence, wherein the federal government lacks immunity.

A. Government Tort Immunity

The federal government enjoys substantial immunity from tort claims, especially those that originate "from activities and events at federal flood control projects."[28] Although a detailed inquiry into the full scope of and the mechanics controlling the federal government's

25. 568 U.S. 23 (2012).

26. St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 724-38 (2015), *rev'd*, 887 F.3d 1354 (Fed. Cir. 2018).

27. *St. Bernard Par. Gov't*, 887 F.3d at 1362-68.

28. Kent C. Hoffmann, Note, *An Enduring Anachronism: Arguments for the Repeal of the § 702c Immunity Provision of the Flood Control Act of 1928*, 79 TEX. L. REV. 791, 791 (2001).

tort immunity is beyond this Note's scope,[29] a basic overview provides helpful context to explain the increase in takings claims which various judges and other legal scholars have argued look a lot like tort claims.[30]

First, the sovereign immunity doctrine holds that the federal government is immune from damages liability that it does not consent to.[31] Although the Federal Tort Claims Act (FTCA)[32] opens the federal government to tort liability in many instances, its "discretionary function exception" grants the federal government significant protections.[33] Indeed, the federal government is immune to any claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[34] A governmental action is "discretionary," and thus not subject to suit, when it (1) "involves an element of judgment" and (2) is "based on considerations of public policy."[35] Courts generally construe the discretionary function exception broadly.[36]

The Federal Flood Control Act (FCA) also provides substantial tort immunity to the federal government. Per the FCA, "[n]o liability *of any kind* shall attach to or rest upon the United States for any

29. For a helpful overview and critique of governmental tort immunity, see Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 800-22 (2007); see also Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 419-22 (2012).

30. *See St. Bernard Par. Gov't*, 887 F.3d at 1360 (contending that plaintiffs' action related to floodings induced by the federal government's "fail[ure] to maintain or modify a government-constructed project may state a tort claim, [but] does not state a takings claim"); Sandra B. Zellmer, *Takings, Torts, and Background Principles*, 52 WAKE FOREST L. REV. 193, 195 (2017) ("[T]he vast majority of cases involving temporary physical occupations by flooding are torts, not takings.").

31. *See* Rosenthal, *supra* note 29, at 801.

32. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842, 843 (codified at 28 U.S.C. §§ 1346(b), 2671-2680 (2012)).

33. *See* Rosenthal, *supra* note 29, at 803-04.

34. 28 U.S.C. § 2680(a).

35. United States v. Gaubert, 499 U.S. 315, 322-23 (1991).

36. *See* CYNTHIA BROUGHER, CONG. RESEARCH SERV., RL34131, FLOOD DAMAGE RELATED TO ARMY CORPS OF ENGINEER PROJECTS: SELECTED LEGAL ISSUES 2-3 (2011), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL34131.pdf [https://perma.cc/7UJ5-8FXN] ("[T]he presence of choice and judgment may allow the discretionary function exception to preclude any claim against the United States.").

damage from or by floods or flood waters *at any place*."[37] Perhaps unsurprisingly, federal courts have generally concluded that the FCA holds the federal government immune from negligence suits seeking damages related to governmental flood control efforts.[38]

Though governmental tort immunity in the context of flooding damages is not absolute,[39] as stated above, litigants rarely succeed on tort claims raised against the federal government for its role in damages arising from flooding. In *In re Katrina Canal Breaches Litigation*, for example, landowners[40] raised several tort claims for damages resulting from the federal government's allegedly negligent failure to maintain the MR-GO canal system.[41] However, the court held the federal government immune from each claim under either the FCA[42] or, for claims not immune under the FCA, under the discretionary function exception to the FTCA.[43] Indeed, in light of both the FCA and the FTCA, plaintiffs seldomly avoid dismissal of tort claims raised against the federal government for injuries sustained from flooding related to federal activities.[44]

B. The Takings Clause as an Alternate Source of Liability

Although plaintiffs are generally barred from asserting tort claims against the federal government for its alleged causal role in flood damages, they have more leeway in raising claims via the Fifth Amendment's Takings Clause.

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37. 33 U.S.C. § 702(c) (2012) (emphasis added).

38. Sarah Juvan, Note, *The Federal Flood Control Act: Congressional Development of a Modern-Day Ark*, 44 DRAKE L. REV. 303, 305 (1996).

39. *See, e.g.*, Cent. Green Co. v. United States, 531 U.S. 425, 437 (2001) ("[I]n determining whether [FCA] immunity attaches, courts should consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project.").

40. This lawsuit involved a different set of plaintiffs than those who filed suit in the *St. Bernard Parish Government v. United States* litigation. *See* St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1362 n.6 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019). See *infra* Part III for a more detailed discussion of both the *St. Bernard Parish* litigation and the related tort litigation in *In re* Katrina Canal Breaches Litig., 696 F.3d 436 (5th Cir. 2012).

41. 696 F.3d at 441-43.

42. *Id.* at 448.

43. *Id.* at 448-50.

44. *See* Zellmer, *supra* note 30, at 203.

The Tucker Act[45] grants jurisdiction to the United States Court of Federal Claims over certain claims brought against the United States, including claims "founded ... upon the Constitution" and claims "for liquidated or unliquidated damages in cases not sounding in tort."[46] Courts presume that the federal government has consented to suit on claims that fall within the Tucker Act's scope.[47]

Fifth Amendment takings claims are included within the Tucker Act's ambit.[48] Per the Takings Clause, "nor shall private property be taken for public use, without just compensation."[49] The Takings Clause is based upon the idea that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[50] Indeed, the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[51]

In addition to instances where the government actually condemns property using its formal eminent domain power,[52] plaintiffs may also sue for compensation under the Takings Clause via inverse condemnation claims that accuse the government of taking property without formally asserting its eminent domain authority.[53] Plaintiffs bring takings claims arising from flooding related to the govern-

45. Act of March 3, 1887, ch. 359, 24 Stat. 505 (codified at 28 U.S.C. §§ 1346(a)(2), 1491 (2012)).

46. 28 U.S.C. § 1491(a)(1).

47. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 216 (1983).

48. United States v. Causby, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine."); Hansen v. United States, 65 Fed. Cl. 76, 80-81 (2005) ("[S]o long as there is some material evidence in the record that establishes the predicates for a traditional takings claim ... a plaintiff succeeds in demonstrating subject matter jurisdiction in [the United States Court of Federal Claims] based on the Tucker Act and the Takings Clause of the Fifth Amendment.").

49. U.S. CONST. amend. V.

50. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) (alteration in original) (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002)).

51. Armstrong v. United States, 364 U.S. 40, 49 (1960).

52. For an example of a government asserting its formal eminent domain authority, see Kelo v. City of New London, 545 U.S. 469, 489-90 (2005).

53. *See* Moden v. United States, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (citing United States v. Clarke, 445 U.S. 253, 257 (1980)).

ment's construction of, or failure to maintain, an infrastructure project via inverse condemnation takings claims.[54]

Certain governmental regulations constitute per se takings that demand just compensation from the government, including permanent, government-authorized occupations[55] and governmental regulations that diminish all of the land's economic value.[56] For a governmental regulation that does not amount to a per se taking, courts must conduct a fact-specific inquiry to determine whether a compensable taking has occurred.[57] In these situations, courts should look to "'a complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[58] Courts may more likely assess takings liability when they can characterize the property intrusion at issue as a physical invasion effected by the government itself.[59]

As specifically related to flooding, the Supreme Court held in *Pumpelly v. Green Bay Co.*[60] that flooding induced by the government can constitute a compensable taking.[61] The Court later held in *United States v. Cress*[62] that "seasonally recurring flooding" induced by the government can constitute a Fifth Amendment taking.[63] More recently, and most importantly for this Note,[64] in *Arkansas Game & Fish Commission v. United States*, the Court held that temporary

54. *See, e.g.*, St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1359 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019); *see also* Michael Pappas, *A Right to Be Regulated?*, 24 GEO. MASON L. REV. 99, 104, 110 (2016); Zellmer, *supra* note 30, at 193, 204.

55. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

56. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

57. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32 (2012).

58. Murr v. Wisconsin, 137 S. Ct. 1933, 1942-43 (2017) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

59. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

60. 80 U.S. (13 Wall.) 166 (1871).

61. *Ark. Game*, 568 U.S. at 32.

62. 243 U.S. 316 (1917).

63. *Ark. Game*, 568 U.S. at 32.

64. Federal courts have undoubtedly decided many more takings cases related to flooding than this Note can feasibly cover. This Note focuses its analysis on the *Arkansas Game* decision and its effect on takings cases arising from temporary government-induced flooding moving forward.

government-induced flooding may also constitute a taking which demands just compensation.[65]

To conclude, litigants damaged by flooding resulting from—or worsened by—a government infrastructure project will likely not succeed with any tortious lawsuit. However, unlike with tort claims, the government is not readily immune from takings claims. This therefore incentivizes litigants to allege an inverse condemnation taking of private property compensable under the Fifth Amendment even if their claim looks a lot like a tort claim.[66]

II. SUPREME COURT PRECEDENT

Having reviewed why a litigant might raise a takings claim instead of a tort claim against the federal government for temporary flooding resulting from the federal government's construction of or failure to maintain an infrastructure project, it is now appropriate to review Supreme Court precedent governing the viability of such claims. This Part concludes by asserting that litigants will likely continue to bring similar claims given the *Arkansas Game & Fish Commission* decision.

A. The Supreme Law of the Land: Temporary Government-Induced Flooding May Constitute a Taking

In *Arkansas Game & Fish Commission v. United States*, the Supreme Court held that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability."[67] The plaintiff, Arkansas Game and Fish Commission (the Commission), owned 23,000 forested acres along Arkansas's Black River and operated a nature and hunting preserve.[68] The Commission's land also contained various oak tree species "essential to the Area's character as a habitat for migratory birds and as a venue for recreation."[69]

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65. 568 U.S. at 26-27. See *infra* Part II.A for a more thorough analysis of *Arkansas Game & Fish Commission v. United States*.

66. *See* Zellmer, *supra* note 30, at 194-95.

67. 568 U.S. at 27.

68. *Id.* at 27.

69. *Id.*

However, due to the United States Army Corps of Engineers' approval of "planned deviations" from the Clearwater Dam in Arkansas for several years, the Commission experienced significant flooding.[70] Such flooding destroyed timber, significantly changed the land's topography, and ultimately required costly renovations.[71] The Commission filed suit alleging that the Army Corps of Engineers' deviations amounted to a Fifth Amendment taking.[72]

The United States Court of Federal Claims awarded the Commission $5.7 million in damages after it determined that the six years of the Army Corps of Engineers' planned deviations from the Clearwater Dam caused "repeated annual flooding" that significantly damaged previously flourishing forests.[73] The United States Court of Appeals for the Federal Circuit subsequently reversed, holding instead that government-induced flooding may only constitute a taking if the resulting flooding is "permanent or inevitably recurring."[74]

However, in a unanimous decision,[75] the Supreme Court rejected the Federal Circuit's reasoning and reversed and remanded, concluding that "government-induced flooding of limited duration may be compensable."[76] Though the Court deferred to the trial court to determine key issues such as causation, foreseeability, and damages,[77] it nonetheless affirmed that "[f]looding cases, like other takings cases, should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules."[78] Indeed, given "the nearly infinite variety of ways in which government actions or regulations can affect property interests," the Court confirmed that "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking."[79]

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70. *Id.* at 27-28.
71. *See id.* at 29.
72. *Id.*
73. *Id.* at 29-30.
74. *Id.* at 30-31 (quoting Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1378 (Fed. Cir. 2011)).
75. Justice Kagan abstained. *Id.* at 40.
76. *Id.* at 26, 34, 38, 40.
77. *See id.* at 40.
78. *Id.* at 37 (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).
79. *Id.* at 31.

Arkansas Game thus rejected the notion that the federal government is categorically immune from Takings Clause liability in the context of even temporary flooding it induced.[80] The federal government can affect property interests in a "nearly infinite variety of ways," meaning that quick and easy bright-line rules governing liability will not suffice.[81]

B. Litigants Will Continue to Bring Similar Claims

The Supreme Court's proscription against a "blanket temporary-flooding exception" to takings claims[82] at the very least keeps such claims on the table for litigants. This, combined with substantial governmental tort immunity,[83] means that litigants will likely continue to bring similar recovery theories to try to recoup losses sustained from government-induced floods.[84] However, *Arkansas Game* provided little guidance for lower courts as to the required causation framework.[85] This lack of a set standard inevitably creates uncertainty for both plaintiffs and the federal government. A more predictable causation framework for lower courts to employ is thus crucial for litigants moving forward.

III. INCONSISTENT CAUSATION FRAMEWORKS ON DISPLAY: THE *ST. BERNARD PARISH* LITIGATION

In 2005, real property owners in Louisiana who incurred severe flood damages during Hurricane Katrina began a protracted legal battle against the federal government for its construction of and failure to maintain the MR-GO,[86] a seventy-six mile navigational

80. *See id.*

81. *Id.*

82. *Id.* at 34.

83. *See supra* Part I.A.

84. *See, e.g.*, Zellmer, *supra* note 30, at 193 ("Landowners impacted by flooding have been emboldened to pursue inverse condemnation actions by recent Supreme Court precedent, *Arkansas Game & Fish Commission v. United States*.").

85. *See* 568 U.S. at 40.

86. Note that while the Court of Federal Claims abbreviated to "MR-GO," St. Bernard Parish Gov't v. United States, 121 Fed. Cl. 687, 691 (2016), *rev'd*, 887 F.3d 1354 (Fed. Cir. 2018), the Federal Circuit instead abbreviated to "MRGO," St. Bernard Parish Gov't v. United States, 887 F.3d 1354, 1357 (Fed. Cir. 2018). This Note employs the Court of Federal Claims's

channel.[87] The plaintiffs filed suit in the Court of Federal Claims under the Tucker Act, asserting that flooding ultimately caused by the MR-GO amounted to a Fifth Amendment taking.[88] Though the court entered judgment for the plaintiffs, the Federal Circuit reversed in 2018.[89] In doing so, the two courts adopted different causation frameworks.[90]

This Part first describes the lengthy factual background to the *St. Bernard Parish* litigation before it reviews the decisions rendered in the Court of Federal Claims and the Federal Circuit. Lastly, this Part summarizes the current state of the law.

A. Factual Background

In 1956, Congress authorized the United States Army Corps of Engineers to begin construction of the MR-GO navigation channel in New Orleans to create a shipping route between New Orleans and the Gulf of Mexico.[91] The Army Corps of Engineers completed construction of the MR-GO in 1968.[92] Additionally, through the Flood Control Act of 1965, and close in time to when the Army Corps of Engineers finished constructing the MR-GO channel, Congress also authorized the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPV project).[93] The LPV project led to levee construction around New Orleans.[94] Such levees were "designed to, and did, reduce the risk of flooding in New Orleans."[95]

Both construction and lack of proper maintenance of the MR-GO led to substantial environmental detriments that increased the risk of severe flooding in the MR-GO's surrounding areas. First, the MR-GO increased the salinity of local waters, which in turn destroyed wetlands that had served as natural buffers against floods.[96]

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abbreviation.

87. *St. Bernard Par. Gov't*, 121 Fed. Cl. at 690-91.
88. *St. Bernard Par. Gov't*, 887 F.3d at 1358.
89. *Id.* at 1357-59.
90. *See infra* Parts III.B-C.
91. *St. Bernard Par. Gov't*, 887 F.3d at 1357.
92. *Id.*
93. *Id.*
94. *Id.* at 1358.
95. *Id.*
96. *See id.* at 1357-58.

Secondly, the MR-GO's original designer decided against "armoring its banks with foreshore protection," which left them especially vulnerable to erosion.[97] The erosion that followed led to increased water passing through the channel at higher speeds.[98] Finally, the MR-GO "created the potential for a funnel effect," which amplified flooding.[99] A 2006 Senate Report on Hurricane Katrina recalled previous studies poignantly describing the MR-GO as a "'superhighway' for storm surges or the 'Crescent City's Trojan Horse' that had the potential to 'amplify storm surges by 20 to 40 percent.'"[100]

Moreover, the Army Corps of Engineers knew about at least some of the problems associated with the MR-GO prior to Hurricane Katrina. The Army Corps of Engineers and other governmental entities conducted numerous studies between 1998 and 2005,[101] and the Army Corps of Engineers could have foreseen the MR-GO's detrimental effects by at least 2004.[102] Nonetheless, the Army Corps of Engineers made policy choices against making certain repairs to counteract the MR-GO's detrimental aspects.[103]

Hurricane Katrina eventually showcased the MR-GO's underlying flaws when properties in Louisiana's St. Bernard Parish and New Orleans's Lower Ninth Ward experienced catastrophic flooding.[104] "[I]nevitably recurring flooding" during Hurricanes Rita, Gustav, and Ike also flaunted the MR-GO's defects.[105] The Army Corps of Engineers finally closed the MR-GO in 2009.[106]

Following Hurricane Katrina, considerable litigation over the MR-GO's role in causing the flood damages ensued. In one batch of litigation, property owners damaged by the severe flooding filed over 400 tortious lawsuits in the United States District Court for the

97. St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 691 (2015), *rev'd*, 887 F.3d 1354 (Fed. Cir. 2018).

98. *See St. Bernard Par. Gov't*, 887 F.3d at 1358.

99. *Id.*

100. *St. Bernard Par. Gov't*, 121 Fed. Cl. at 712 (internal citations omitted).

101. *Id.* at 704-09.

102. *Id.* at 720-23; *see also St. Bernard Parish Gov't*, 887 F.3d at 1358-59.

103. *See, e.g.*, *St. Bernard Par. Gov't*, 121 Fed. Cl. at 722 ("The Army Corps' policy was to allow bank erosion of the MR-GO to continue unabated.").

104. *Id.* at 690-91.

105. *Id.* at 691 (internal quotation marks omitted).

106. *Id.*

Eastern District of Louisiana.[107] These tort plaintiffs alleged that the MR-GO's construction and operation violated both the FTCA and Louisiana state negligence laws.[108] Though the tort plaintiffs initially won judgment at the lower court, the Fifth Circuit reversed in 2012 and held that the federal government was immune from the plaintiffs' tort claims.[109]

Near the same time as the tortious lawsuits' filings, however, a different set of property owners[110] in Louisiana's St. Bernard Parish and New Orleans's Lower Ninth Ward filed suit under the Takings Clause, asserting that "construction and operation of [the MR-GO] and failure to properly maintain or modify it constituted a taking by causing flooding damage to their properties."[111]

B. The Court of Federal Claims Decision

The United States Court of Federal Claims entered judgment for the *St. Bernard Parish* plaintiffs under the Takings Clause.[112] The court noted *Arkansas Game's* instruction that floodings cases brought under the Takings Clause "be assessed with reference to the particular circumstances of each case and not by resorting to blanket exclusionary rules"[113] and concluded that "the Army Corps' construction, expansions, operation, and failure to maintain the MR-GO caused ... flooding on Plaintiffs' properties that effected a temporary taking under the Fifth Amendment of the United States Constitution."[114] The court specifically determined that the MR-GO's construction and lack of maintenance caused a temporary taking that occurred from August 2005 to July 2009.[115]

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107. *Id.*

108. *Id.* at 690-91. The 400 lawsuits were consolidated into one suit. *Id.* at 691. This consolidated tortious lawsuit involved a different set of plaintiffs than those who sought relief under the Takings Clause in the *St. Bernard Par. Gov't v. United States* litigation. *See* St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1362 n.6 (Fed. Cir. 2018).

109. *St. Bernard Par. Gov't*, 121 Fed. Cl. at 692.

110. *See St. Bernard Par. Gov't*, 887 F.3d at 1362 n.6 ("[A]nother group of plaintiffs, who owned land in the St. Bernard polder, originally sued in tort but lost.").

111. *Id.* at 1358.

112. *St. Bernard Par. Gov't*, 121 Fed. Cl. at 746.

113. *Id.* (internal quotation marks omitted) (quoting Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 37 (2012)).

114. *Id.*

115. *Id.* at 744.

After first determining that the Army Corps of Engineers could have foreseen that the MR-GO would cause flooding,[116] the court turned to causation. The court's causation analysis focused entirely on the MR-GO's role in exacerbating flooding, and did not attempt to differentiate between the federal government's affirmative acts and failures to act.[117] The court instead looked holistically at the Army Corps of Engineers' "construction, expansions, operation, and failure to maintain the MR-GO."[118] The court pointed to five sources that each stemmed from the MR-GO's construction and lack of maintenance: "increased salinity"; "increased habitat and wetland loss"; "increased erosion"; "increased storm surge"; and the "funnel effect" that the MR-GO created.[119]

The court also rejected the federal government's argument that Hurricane Katrina broke the causation chain as "an intervening and unpredictable natural force."[120] Rather, the plaintiffs successfully showed that the Army Corps of Engineers' construction and lack of maintenance of the MR-GO directly caused the flooding.[121] The court similarly rejected the federal government's arguments that "subsidence, sea level rise, or land loss," or "economic development" instead caused the damaging floods.[122]

In sum, after determining that the federal government could have foreseen the flooding risk, the Court of Federal Claims determined causation by looking holistically to the Army Corps of Engineers' entire "construction, expansions, operation, and failure to maintain the MR-GO."[123] By demonstrating that the significant flooding which damaged their properties was the "direct, natural, or probable result of the Army Corps' authorized construction, expansions, operation, and failure to maintain the MR-GO and not incidental or consequential injury," the plaintiffs sufficiently proved causation.[124]

116. *Id.* at 720-23.
117. *See id.* at 724-38.
118. *Id.* at 746.
119. *Id.* at 724-38.
120. *Id.* at 739-40 (internal citations omitted).
121. *See id.* at 740-41.
122. *Id.* at 741-44.
123. *Id.* at 746.
124. *Id.* at 740-41 (internal citations and quotation marks omitted).

C. The Federal Circuit Decision

The *St. Bernard Parish* plaintiffs' success in the Court of Federal Claims proved to be short-lived, however. The Federal Circuit reversed on the grounds that (1) governmental inaction cannot serve as the basis for a takings claim and (2) the plaintiffs did not prove that the Army Corps of Engineers' construction and operation of the MR-GO caused the flooding.[125]

In contrast to the Court of Federal Claims's holistic method that did not differentiate between affirmative acts and failures to act, the Federal Circuit asserted that "failure to properly maintain or to modify" the MR-GO did not constitute affirmative governmental action.[126] The Federal Circuit further declared that the federal government is only liable for takings claims arising from "authorized" actions, not the federal government's failure to act.[127] Indeed, only the MR-GO's original construction and "continued operation" could induce takings liability because they were "the sole affirmative acts involved."[128]

As to whether the MR-GO's construction and "continued operation" caused the plaintiffs' injury, the Federal Circuit held that the Court of Federal Claims erred as a matter of law in its causation framework.[129] The Court of Federal Claims did not consider the LPV project's role in reducing the risk of flooding and in offsetting the flood damages that stemmed from the MR-GO and thus effected a failure of proof.[130] Rather than looking at a single governmental infrastructure project in isolation, "the causation analysis must consider both risk-increasing and risk-decreasing government actions over a period of time to determine whether the totality of the government's actions caused the injury."[131] Indeed, for causation

125. St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1357 (Fed. Cir. 2018).
126. *Id.* at 1360.
127. *Id.* (quoting Moden v. United States, 404 F.3d 1335, 1338 (2005)).
128. *Id.* at 1362.
129. *Id.* at 1357.
130. *See id.*
131. *Id.* at 1365.

purposes, "'government action' includes *all* of the government's actions."[132]

Moreover, the "government actions must be directed to the same risk that is alleged to have caused the injury."[133] Because the LPV project sought to address the same flood risk that the MR-GO exacerbated, the Federal Circuit concluded that the Court of Federal Claims erred by not including the LPV project in its causation calculus.[134]

D. The Current Law After St. Bernard Parish *and* Arkansas Game

As stated earlier, *Arkansas Game* instructed lower courts that "[f]looding cases, like other takings cases, should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules."[135] Because the federal government can alter property interests in a "nearly infinite variety of ways," courts cannot apply a "magic formula" to determine whether it has effected a compensable taking.[136]

Nonetheless, per the Federal Circuit's *St. Bernard Parish* decision,[137] only an affirmative, "authorized activity," can give rise to a compensable takings claim.[138] Assuming such governmental action has occurred, courts assessing causation must look to all "risk-increasing and risk-decreasing government actions over a period of time" directed to the same risk so as to determine whether the "totality of the government's actions caused the injury."[139]

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132. *Id.* (emphasis added) (quoting Cary v. United States, 552 F.3d 1373, 1377 (Fed. Cir. 2009)).

133. *Id.*

134. *See id.* at 1365-66.

135. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 37 (2012) (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

136. *Id.* at 31.

137. Because "the Federal Circuit is a court of national jurisdiction hearing *every* appeal of *every* inverse condemnation claim against the United States," this decision should govern takings claims brought against the federal government, barring later reversal by the Supreme Court. *See* Brief for Cato Institute et al. as Amici Curiae Supporting Petitioners at 10, *St. Bernard Par. Gov't*, 887 F.3d 1354 (No. 18-359).

138. *See St. Bernard Par. Gov't*, 887 F.3d at 1360 (quoting Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003)).

139. *Id.* at 1365.

The Federal Circuit's distinction between action and inaction for purposes of takings liability has generated ample criticism.[140] However, given the large amount of scholarship already devoted to both the distinction between tort and takings liability, and the inherent difficulty in differentiating between the two forms of liability and between action and inaction,[141] this Note focuses its analysis solely on the Federal Circuit's causation framework, assuming affirmative governmental action.

More specifically, this Note asks: along with the primary government action that allegedly induced flooding, which other "risk-increasing and risk-decreasing government actions"[142] should courts consider in their causation frameworks? Though the Federal Circuit asserted that "'government action' includes *all* of the government's actions," it nonetheless asserted that for causation purposes, government actions must be directed to the same risk that allegedly injured the plaintiffs.[143] To this end, how "direct" of a relation must exist between each government infrastructure project considered? Additionally, what "period of time"[144] should a court consider when assessing the totality of "risk-increasing and risk-decreasing

140. *See* Petition for Writ of Certiorari at 28, *St. Bernard Par. Gov't*, 887 F.3d 1354 (No. 18-359) ("[T]he Federal Circuit's inaction rule ... provides the Government a potent tool to arbitrarily manipulate and defeat viable takings claims."); Brief for Cato Institute et al., *supra* note 137, at 12 ("The Federal Circuit's *action* versus *inaction* dichotomy is unworkable, is contrary to established Takings Clause jurisprudence, and is flatly contrary to [the Supreme Court's] recent decision in *Arkansas Game*."); Brief for Pacific Legal Foundation as Amicus Curiae Supporting Petitioners at 12, *St. Bernard Par. Gov't*, 887 F.3d 1355 (No. 18-359) ("To the displaced homeowners, it did not matter whether the flooding resulted from an act, an omission, or a combination of acts and omissions—the consequence was the same: a government policy resulted in the physical invasion of their property and displacement from their homes."); Robert H. Thomas, *MR-GO, Katrina Flooding: Inverse Condemnation and Schlimmbesserung at the Federal Circuit*, INVERSECONDEMNATION.COM (Apr. 23, 2018), https://www.inverse condemnation.com/inversecondemnation/2018/04/mr-go-katrina-flooding-inverse-condemnation-and-schlimmbesserung-at-the-federal-circuit.html [https://perma.cc/9QKN-A2T2] (asserting that the Federal Circuit's *St. Bernard Parish* decision "adopts a categorical rule that 'inaction' in maintaining [the MR-GO] results in a blanket exception to takings liability" which "diverges from at least four other lower courts (... and the Supreme Courts of California, Florida, and Minnestota [sic]), which conclude that government inaction in the face of a duty to act supports an inverse condemnation claim").

141. *See infra* Part V.A.

142. *St. Bernard Par. Gov't*, 887 F.3d at 1365.

143. *Id.* (emphasis added) (quoting Cary v. United States, 552 F.3d 1373, 1377 n.* (Fed. Cir. 2009).

144. *Id.*

government actions"?[145] Drawing strict dichotomies for each of these considerations appears difficult.

IV. A SUGGESTED CAUSATION FRAMEWORK

The divergence in causation frameworks adopted by the Court of Federal Claims and the Federal Circuit should perhaps not come as a surprise. Indeed, because the Takings Clause does not spell out a required causation framework, takings litigants frequently argue for opposing causation formulas.[146] This Part suggests a causation calculus for takings claims within the government-induced flooding context.

This Part first analyzes important policy concerns that underlie causation frameworks in the realm of the Takings Clause. Then, it looks to alternative approaches taken in previous cases for guidance. Lastly, this Part proposes that courts employ a fact-specific, case-by-case inquiry that weighs certain factors when assessing "whether the totality of the government's actions caused the injury."[147] Specifically, courts should weigh (1) additional "risk-increasing and risk-decreasing government actions,"[148] (2) their relation to the primary infrastructure project that allegedly induced flooding,[149] and (3) the time that has elapsed between each additional project's construction. Such a framework adheres to guidance from both the Supreme Court and the Federal Circuit, and also addresses the policy implications discussed below.

A. Key Policy Implications

The lack of a coherent and consistent causation framework for claims brought under the Takings Clause creates uncertainty for

145. *Id.*

146. *See* Jan G. Laitos & Teresa Helms Abel, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 WM. & MARY BILL RTS. J. 1181, 1209 (2012).

147. *St. Bernard Par. Gov't*, 887 F.3d at 1365.

148. *Id.*

149. *See id.* ("When the government takes actions that are directly related to preventing the same type of injury on the same property where the damage occurred, such action must be taken into account even if the two actions were not the result of the same project.").

litigants.[150] A more predictable framework will therefore encourage more efficient litigation moving forward.

First and foremost, a causation framework should be grounded in the Takings Clause's original purpose—that is, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[151] A causation framework should thus be flexible enough to avoid arbitrary and unjust dismissals where the federal government, for all intents and purposes, induced the flooding which damaged the plaintiff's property.

For example, the *St. Bernard Parish* plaintiffs contended that the Federal Circuit effected a causation standard that "the Government cannot lose" when it included a project not related to the MR-GO such as the LPV project in its causation calculus.[152] They argued that applying a causation method that sums the effects of all government infrastructure projects related to flood risk in the region rather than focusing on the flooding's primary cause leads to absurd results.[153] Indeed, "in the real world the Government *did* build the [MR-GO] navigation channel; ... it did foresee, two decades before it actually happened, 'the possibility of catastrophic damage to urban areas by a hurricane surge coming up' ... but consistently decided to do nothing."[154] Because the LPV levees would have survived Hurricane Katrina "long enough to prevent the inundation of Petitioners' properties" and because "Petitioners' properties would not have been flooded by Katrina if [the MR-GO] had never been built," a causation framework must focus on the MR-GO to comply with the Takings Clause's purpose.[155]

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150. *See* Laitos & Abel, *supra* note 146, at 1183 ("The law surrounding [the Takings Clause's] causation requirement, though commonly litigated, is unsettled and therefore uncertain.").

151. Armstrong v. United States, 364 U.S. 40, 49 (1960).

152. Petition for Writ of Certiorari, *supra* note 140, at 28-29.

153. *Id.* at 29 ("[I]f the very purpose of a government is to protect an area from flooding caused by hurricanes or other natural forces, it will always be the case that the flooding would have occurred if the flood protection project did not exist at all.").

154. *Id.* at 32 (citation omitted).

155. *Id.* at 29-30 ("The Federal Circuit's new causation standard ... will only operate, as here, to take private property for public use without just compensation.").

Moreover, given rising sea levels[156] and the catastrophic damages brought by floods, a causation framework should incentivize the government to enact proactive measures. Therefore, perhaps a court's consideration of additional infrastructure projects removes an incentive for the federal government to get the project right from the start and to actively maintain it.

However, a causation framework that results in *too much* takings liability has its own detrimental policy implications and could push the federal government to avoid acting altogether. Over-expansive Takings Clause liability "threatens to sweep away longstanding government immunity rules, increase the liability burdens on taxpayers at all levels of government, and seriously interfere with elected officials' good faith efforts to mediate competing social interests in the use and control of property."[157] Indeed, a framework that results in too much liability under the Takings Clause may "produce a chilling effect [that] make[s] officials less likely to restrict improvident floodplain and coastal development for fear of takings claims."[158]

As such, perhaps considering "risk-increasing and risk-decreasing" actions taken by the federal government[159] is essential to incentivizing the federal government to take proactive steps in preventing flooding. As the federal government argued, it "had no obligation to construct the LPV in the first place, nor did it have any obligation to bolster the LPV against any particular flood risks."[160] The federal government further contended that it constructed the LPV "at significant taxpayer expense" to reduce the very same flood risk the *St. Bernard Parish* plaintiffs attributed to the MR-GO.[161] For both incentive and general fairness purposes, then, perhaps a causation calculus must consider all government infrastructure projects that affect the flood risk.

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156. *See, e.g.*, Coral Davenport & Kendra Pierre-Louis, *U.S. Climate Report Warns of Damaged Environment and Shrinking Economy*, N.Y. TIMES (Nov. 23, 2018), https://www.nytimes.com/2018/11/23/climate/us-climate-report.html [https://perma.cc/G5NX-YGNM].

157. John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1049 (2000).

158. Zellmer, *supra* note 30, at 194.

159. St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1365 (Fed. Cir. 2018).

160. Brief for the United States in Opposition to Petition for Writ of Certiorari at 8-9, *St. Bernard Par. Gov't*, 887 F.3d 1355 (No. 18-359).

161. *Id.* at 9-10.

Still, this Note contends that even if courts should consider additional "risk-increasing and risk-decreasing government actions over a period of time"[162] in the causation calculus, they would still need to define the relevant "risk" and determine the length of time between such "risk-increasing and risk-decreasing" projects and the primary project that allegedly caused flood damages.

In sum, a causation framework for takings claims that arise from government-induced flooding must be flexible enough to allow litigants just compensation. Moreover, the causation framework should incentivize the federal government to take proactive steps towards preventing flood damages. At the same time, courts must be careful not to enact a regime that asserts governmental liability so quickly that it chills governmental investment in infrastructure projects.

B. Approaches Taken in Prior Federal Court Decisions

As stated earlier, *St. Bernard Parish* is not the first court decision to consider a takings claim that arose from government-induced flooding.[163] This Part looks to other decisions for guidance on the proper causation frameworks for federal courts to employ.[164]

In *Ridge Line, Inc. v. United States*, plaintiff Ridge Line, Inc. (Ridge Line) alleged that the federal government's construction of a United States Postal Service facility caused "increased storm drainage" which effected an inverse condemnation taking of Ridge Line's property.[165] The Postal Service constructed a "check dam" to combat the runoff, but it did not negate the problem the Postal facility's construction created.[166] Ridge Line ultimately sued under the

162. *St. Bernard Par. Gov't*, 887 F.3d at 1365.

163. *See supra* Part I.B.

164. Litigants may only bring takings claims against the federal government in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1) (2012). However, various takings claims against state governments in state courts have addressed both government-induced flooding and a state's failure to maintain an infrastructure project. *See* Arreola v. County of Monterey, 122 Cal. Rptr. 2d 38 (Ct. App. 2002); Jordan v. St. Johns County, 63 So. 3d 835 (Fla. Dist. Ct. App. 2011). These cases provide interesting insights into state court takings jurisprudence, but do not offer substantial guidance as to the proper causation calculus that a federal court should apply.

165. 346 F.3d 1346, 1350 (Fed. Cir. 2003).

166. *Id.* at 1351.

Takings Clause after the increased runoff forced it to pay to construct and operate a flood control system.[167]

The Federal Circuit remanded and did not actually determine whether Ridge Line had successfully proven a compensable takings claim.[168] However, the Federal Circuit directed the lower court to consider on remand both "evidence that the government failed to maintain the check dam it built" and additional indicia of whether the government's "actions (and inaction)" were reasonable.[169] As such, the Federal Circuit seemed to endorse the idea that a causation framework should consider other government actions in addition to the primary act that allegedly induced the flooding. Still, the Postal Service apparently constructed the "check dam" as part of the overall Postal Service facility project.[170] In total, *Ridge Line* offers only limited guidance as to causation.

In *John B. Hardwicke Co. v. United States*, the plaintiffs sued under the Takings Clause after the federal government induced flooding from the Rio Grande River onto their property.[171] The Court of Claims rejected plaintiffs' takings claim because "on the whole," the same project that caused the floods also "greatly enhanced" the plaintiffs' property.[172] In support of its holding, the court cited the "Miller Doctrine," under which "a condemnor need not compensate a landowner for value which the condemnor creates by the establishment of the project for which the landowner's land is condemned."[173]

At first glimpse, both *John B. Hardwicke* and *Miller* appear to support the Federal Circuit's causation approach in *St. Bernard Parish* that looks to "both risk-increasing and risk-decreasing government actions over a period of time to determine whether the totality of the government's actions caused the injury."[174] However, the Federal Circuit itself noted in *St. Bernard Parish* that neither

167. *Id.* at 1351, 1354.
168. *Id.* at 1359.
169. *Id.* at 1358.
170. *Id.* at 1351.
171. 467 F.2d 488, 488 (Ct. Cl. 1972).
172. *Id.* at 491.
173. *Id.* at 490 (citing United States v. Miller, 317 U.S. 369 (1943)).
174. St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1365 (Fed. Cir. 2018).

were ultimately "relevant" because the federal government constructed the MR-GO before it constructed the LPV project.[175]

Moreover, as the *St. Bernard Parish* plaintiffs noted, in *John B. Hardwicke* the federal government had "built two dams as part of a *single* flood control project."[176] Therefore, "[i]t was thus unsurprising that the Court of Claims held that the effects of both dams must be assessed in determining whether the project *as a whole* had increased the natural flooding risk to which plaintiff's properties were previously exposed."[177]

On similar grounds, the *St. Bernard Parish* plaintiffs cited *City of Van Buren v. United States*[178] for the proposition that "when the Government ... relies only on 'a listing of the public benefits that flow from nearly all flood control projects,' the Government cannot defeat takings liability."[179] In *City of Van Buren*, the Federal Circuit affirmed that government-induced flooding that damaged the plaintiff city's sewage lines amounted to a taking.[180] The Federal Circuit rejected the federal government's argument that "substantial benefits" arising from its flood-inducing action firmly outweighed the project's detriments.[181] Indeed, the court held that "a recitation" of "a listing of the public benefits that flow from nearly all flood control projects" was "insufficient to vitiate Van Buren's taking claim."[182] *City of Van Buren* thus rejected the federal government's argument that a single project's benefits and detriments cancelled each other out for takings purposes,[183] but neither considered, nor precluded the consideration of, the effects of other government projects.

In sum, these previous cases seem to at least endorse the idea that courts assessing causation should consider other governmental actions that contributed to or detracted from the risk that the primary infrastructure project allegedly created. Nonetheless, the

175. *Id.* at 1367 n.14.

176. Petition for Writ of Certiorari, *supra* note 140, at 37.

177. *Id.*

178. 697 F.2d 1058 (Fed. Cir. 1983).

179. Petition for Writ of Certiorari, *supra* note 140, at 36 (quoting *City of Van Buren*, 697 F.2d at 1062).

180. 697 F.2d at 1059.

181. *Id.* at 1061-62.

182. *Id.* at 1062.

183. *See id.*

additional "risk-increasing and risk-decreasing"[184] projects were apparently closely related to the government infrastructure project that the plaintiffs targeted in their lawsuits. At a minimum, these cases support the general notion that courts should also take into account other government projects that are closely related to the same risk as the flood-inducing government project.

C. A Suggested Causation Framework

Courts adjudicating takings claims that arise from government-induced flooding should apply a fact-specific, case-by-case causation inquiry that weighs certain factors in assessing "whether the totality of the government's actions caused the injury."[185] Courts should weigh (1) additional "risk-increasing and risk-decreasing government actions,"[186] (2) their relation to the primary infrastructure project that allegedly induced flooding,[187] and (3) the time that has elapsed between each additional project's construction. To this end, courts should grant the federal government more deference the closer that the additional project relates to the primary project that induced flooding. Courts should alternatively grant the federal government less deference the longer the time that has elapsed between construction of government infrastructure projects.

Sticking to a fact-specific, case-by-case inquiry from the start adheres with both *Arkansas Game*'s proscription against adopting "blanket exclusionary rules"[188] and the general purpose of the Takings Clause—"to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[189]

Further, including other "risk-increasing and risk-decreasing government actions"[190] in the causation calculus will help avoid "a

184. St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1365 (Fed. Cir. 2018).

185. *Id.*

186. *Id.*

187. *See id.* at 1066 ("When the government takes actions that are directly related to preventing the same type of injury on the same property where the damage occurred, such action must be taken into account even if the two actions were not the result of the same project.").

188. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 37 (2012).

189. Armstrong v. United States, 364 U.S. 40, 49 (1960).

190. *St. Bernard Par. Gov't*, 887 F.3d at 1365.

chilling effect [that] make[s] officials less likely to restrict improvident floodplain and coastal development for fear of takings claims."[191] If a new infrastructure project's "risk-decreasing" effects can never mitigate Fifth Amendment Takings Clause liability perhaps created by past projects, the federal government is presumably less likely to incur the expenses to embark on the new project.

However, a court must weigh the relation between the "risk-increasing and risk-decreasing government actions."[192] A "risk-decreasing" structure enacted as part of the same overall scheme as the infrastructure project that induced-flooding should weigh more heavily in offsetting liability for the government than a project only minimally related.[193] Temporality should also factor heavily into a court's causation calculus. If a court considers a longer time period, it will presumably also consider more potentially liability-offsetting government projects in its calculus than if it looks to a more precise time window.

As such, ignoring temporality and the relationship between each project weighing factor risks enacting a liability that "the Government cannot lose."[194] This Note's proposed causation framework avoids such a risk by granting less deference to the federal government when a long time has elapsed between each government action and when each government action is not closely related to each other. Moreover, weighing the time and relation between government actions will encourage the government to act quickly in enacting proactive measurements to combat risks its past projects created.

In sum, this Note's proposed causation framework provides the necessary flexibility for courts given "the nearly infinite variety of ways in which government actions or regulations can affect property interests."[195] However, the framework still balances competing interests between the federal government and private landowners by weighing essential factors such as the different "risk-increasing and risk-decreasing" projects the federal government constructed, the

191. *See* Zellmer, *supra* note 30, at 194.

192. *St. Bernard Par. Gov't*, 887 F.3d at 1365.

193. *See id.* ("To be sure, in determining causation, government actions must be directed to the same risk that is alleged to have caused the injury to the plaintiffs.").

194. Petition for Writ of Certiorari, *supra* note 140, at 28-29.

195. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012).

time between those constructions, and the relation between each project.[196] Moreover, though this Note's proposed causation framework provides courts with consistent factors to weigh in each case, it complies with *Arkansas Game* by not "resorting to blanket exclusionary rules" that would hold certain claims "categorically exempt" from Takings Clause liability.[197]

V. LIKELY COUNTERARGUMENTS

Most counterarguments to this Note's proposed causation framework will likely point to the need for a clearly defined dichotomy between tort and takings liability. Such counterarguments will likely argue that the federal government needs substantial tort immunity in order to continue constructing important infrastructure projects. One may alternatively criticize the Note's framework for allotting the federal government too much latitude.

A. Taking or Tort: Are These Lawsuits Theoretically Sound?

Takings claims arising from government-induced flooding, along with other similar recovery theories, have generated substantial academic criticism. Much of this criticism asserts that such "takings claims" are, in reality, tort claims from which the federal government is immune.[198] To this end, substantial criticism centers around the idea that government error or failure to maintain a project does not constitute a taking.[199] Professor John Echeverria writes, "If the government commits an error ... there is no compensable taking within the meaning of the Fifth Amendment."[200] Critics similarly assert that if the government fails to maintain an infrastructure

196. *St. Bernard Par. Gov't*, 887 F.3d at 1365.

197. *See Ark. Game*, 568 U.S. at 27, 37.

198. *See, e.g.*, Zellmer, *supra* note 30, at 195 ("[T]he vast majority of ... temporary physical occupations by flooding are torts, not takings.").

199. *See, e.g.*, Echeverria, *supra* note 157, at 1080 ("[P]roperty owners have no equitable claim, under the Takings Clause or on any other basis, to windfalls because of government mistakes.").

200. *Id.* at 1047.

project it constructed, only tort liability—not takings liability—should result.[201]

As such, one may argue that such takings claims should not be brought in the first place, and that a causation framework should work more quickly to dispel them. If a causation framework fails to do so, one might contend, litigants will use the Takings Clause as a way around governmental tort immunity. Indeed, a regime that results in too much liability for the federal government under the Takings Clause perhaps "threatens to sweep away longstanding government immunity rules, increase the liability burdens on taxpayers at all levels of government, and seriously interfere with elected officials' good faith efforts to mediate competing social interests in the use and control of property."[202]

Yet, various legal scholars also acknowledge that objectively distinguishing between government torts and takings is an extremely difficult task in its own regard.[203] Recent scholarship contends that at least in some scenarios a government's "failure to regulate, or its failure to act to protect private property," can give rise to a Fifth Amendment taking, which demands just compensation.[204] Although "[c]ourts and commentators frequently assert ... that the Takings Clause is implicated only when the government changes the law,"[205] Professor Christopher Serkin writes that the government sometimes becomes "so entangled in the substantive content of property that the line between acts and omissions becomes especially blurry."[206]

Therefore, sometimes "no principled basis exists for distinguishing between regulatory acts and omissions" and liability under the

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201. *See St. Bernard Par. Gov't*, 887 F.3d at 1360 ("While the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, it does not state a takings claim.").

202. Echeverria, *supra* note 157, at 1049.

203. *See* Zellmer, *supra* note 30, at 201 (noting that "[c]ourts have long struggled to distinguish takings claims from tort claims" and that those who attempt to define a clear dichotomy between taking and tort "may find themselves stuck in a 'Serbonian Bog'").

204. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346 (2014) ("[P]roperty owners could be constitutionally entitled to either governmental intervention on their behalf or to compensation if the government fails to act.").

205. *Id.* at 349.

206. *Id.* at 347.

Takings Clause is justified.[207] Indeed, Professor Serkin contends, "the government can violate the Constitution by failing to take affirmative steps to change preexisting law or by failing to protect property from the application of preexisting law."[208] Similarly, Professor Timothy Mulvaney asserts that "there are very exceptional instances where the state's *non-enforcement* of existing regulatory safeguards and obligations rises to the level of fundamental unfairness and injustice absent compensation."[209]

Distinguishing between action and inaction and between tort and taking is a difficult task,[210] and any attempt at a clear dichotomy breaks down at some point. For example, in *St. Bernard Parish Gov't v. United States*, the Court of Federal Claims found that the Army Corps of Engineers had made policy decisions not to correct active problems with the MR-GO.[211]

Furthermore, by instructing courts to weigh the effects of additional "risk-increasing and risk-decreasing government actions,"[212] this Note's proposed causation framework avoids creating a regime that too quickly results in governmental liability. This will avoid creating negative incentives for the government to avoid any action for fear of tort liability.[213]

B. Too Much Deference to the Federal Government?

Alternatively, one may instead criticize the Note's proposed causation framework for even considering additional "risk-increasing and risk-decreasing government actions"[214] in the first place. As the *St. Bernard Parish* plaintiffs argued, their "properties would not

207. *Id.* Indeed, "[s]ometimes the distinction between action and inaction entirely breaks down," and "focusing too narrowly on an affirmative-act requirement can obscure the imposition of real and cognizable harm." *Id.* at 373-74.

208. *Id.* at 354.

209. Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. REV. 145, 148 (2018) (emphasis added).

210. *See* Zellmer, *supra* note 30, at 201; *see also* Mulvaney, *supra* note 209, at 148; Serkin, *supra* note 204, at 373-74.

211. St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 721-22 (2015), *rev'd*, 887 F.3d 1354 (Fed. Cir. 2018) ("The Army Corps' policy was to allow bank erosion of the MR-GO to continue unabated.").

212. *St. Bernard Par. Gov't*, 887 F.3d at 1365.

213. *See supra* Part IV.C.

214. *St. Bernard Par. Gov't*, 887 F.3d at 1365.

have been flooded by Katrina if [the MR-GO] had never been built."[215] Therefore, perhaps this Note's proposed causation framework gives the federal government *too much* leeway.

However, this Note instructs courts to weigh each additional governmental project's relation to the primary project at issue and the time that has elapsed between each project's construction. The framework thus avoids creating a regime under which the federal government "cannot lose."[216] Moreover, instructing courts to avoid bright-line rules from the start and to conduct fact-specific, case-by-case inquiries[217] will give courts the necessary flexibility to avoid arbitrary and unjust results.

In sum, the Note's proposed causation framework balances competing interests between the federal government and private landowners. The framework also incentivizes the federal government to take proactive steps toward combatting the malicious effects of rising sea levels, while avoiding bright-line rules and giving courts the necessary flexibility to avoid unjust results.

CONCLUSION

Hurricanes and other severe storms have significantly damaged private property.[218] In the instance where a failed governmental infrastructure project worsens the effects of flood damages,[219] a private citizen may want to bring suit to win at least partial compensation.

Due to substantial tort immunity granted to the federal government, litigants have little chance at succeeding on any tort claim against the federal government.[220] However, under the Tucker Act,[221] the federal government is not automatically immune from takings claims.[222] As such, in recent years, landowners have sought recovery from the federal government for their damages by alleging

215. Petition for Writ of Certiorari, *supra* note 140, at 29.
216. *Id.*
217. *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 26-27, 37 (2012).
218. *See supra* notes 8-11 and accompanying text.
219. *See supra* notes 12-13 and accompanying text.
220. *See supra* Part I.A.
221. 28 U.S.C. § 1491(a)(1) (2012).
222. *See supra* Part I.B.

that by inducing temporary flooding, the federal government effected an inverse-condemnation taking compensable under the Fifth Amendment.[223]

In *Arkansas Game & Fish Commission v. United States*, the Supreme Court held that courts may not categorically dismiss takings claims within this realm and instead must apply fact-specific inquiries in each case.[224] Given the Supreme Court's proscription against bright-line rules and categorical dismissals, litigants will likely continue to bring such takings claims in federal court.[225]

One essential element of inverse takings claims that arise from government-induced flooding is causation. The Supreme Court did not address causation in its *Arkansas Game* decision,[226] and courts have since employed divergent causation frameworks.[227] This Note suggests a causation framework that adheres to guidance from both the Supreme Court and the Federal Circuit, but that also offers more predictability for litigants moving forward.

This Note contends that federal courts should apply a fact-specific, case-by-case analysis that weighs certain factors to assess "whether the totality of the government's actions caused the injury."[228] Specifically, courts should weigh (1) additional "risk-increasing and risk-decreasing government actions,"[229] (2) their relation to the primary infrastructure project that allegedly induced flooding,[230] and (3) the time that has elapsed between each additional project's construction. Courts should grant the federal government more deference the closer that the additional project relates to the primary project that induced flooding. Further, the federal government should receive less deference the longer the time that has elapsed between construction of government infrastructure projects.

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223. *See supra* Part III.

224. 568 U.S. 23, 31, 37 (2012).

225. *See supra* Part II.

226. *See* 568 U.S. at 40.

227. *See supra* Part III.

228. St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1365 (Fed. Cir. 2018).

229. *Id.*

230. *See id.* at 1366 ("When the government takes actions that are directly related to preventing the same type of injury on the same property where the damage occurred, such action must be taken into account even if the two actions were not the result of the same project.").

The Note's proposed causation framework offers courts flexibility to avoid arbitrary and unjust results, but still offers predictable factors that litigants can look to in every case.[231] Moreover, the causation framework balances competing interests between the federal government and private landowners, and incentivizes the federal government to take proactive steps towards preventing flood damages and protecting private property.[232] In light of both rising sea levels[233] and the Supreme Court's *Arkansas Game* decision that will encourage litigants to continue to bring such takings claims,[234] it is essential that lower courts develop a consistent and predictable causation framework. This Note's proposed causation framework advances the purposes of the Takings Clause[235] while still incentivizing the federal government to take positive action.

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231. *See supra* Part IV.C.
232. *See supra* Part IV.C.
233. *See, e.g.*, Davenport & Pierre-Louis, *supra* note 156.
234. *See supra* Part II.
235. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

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