



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?

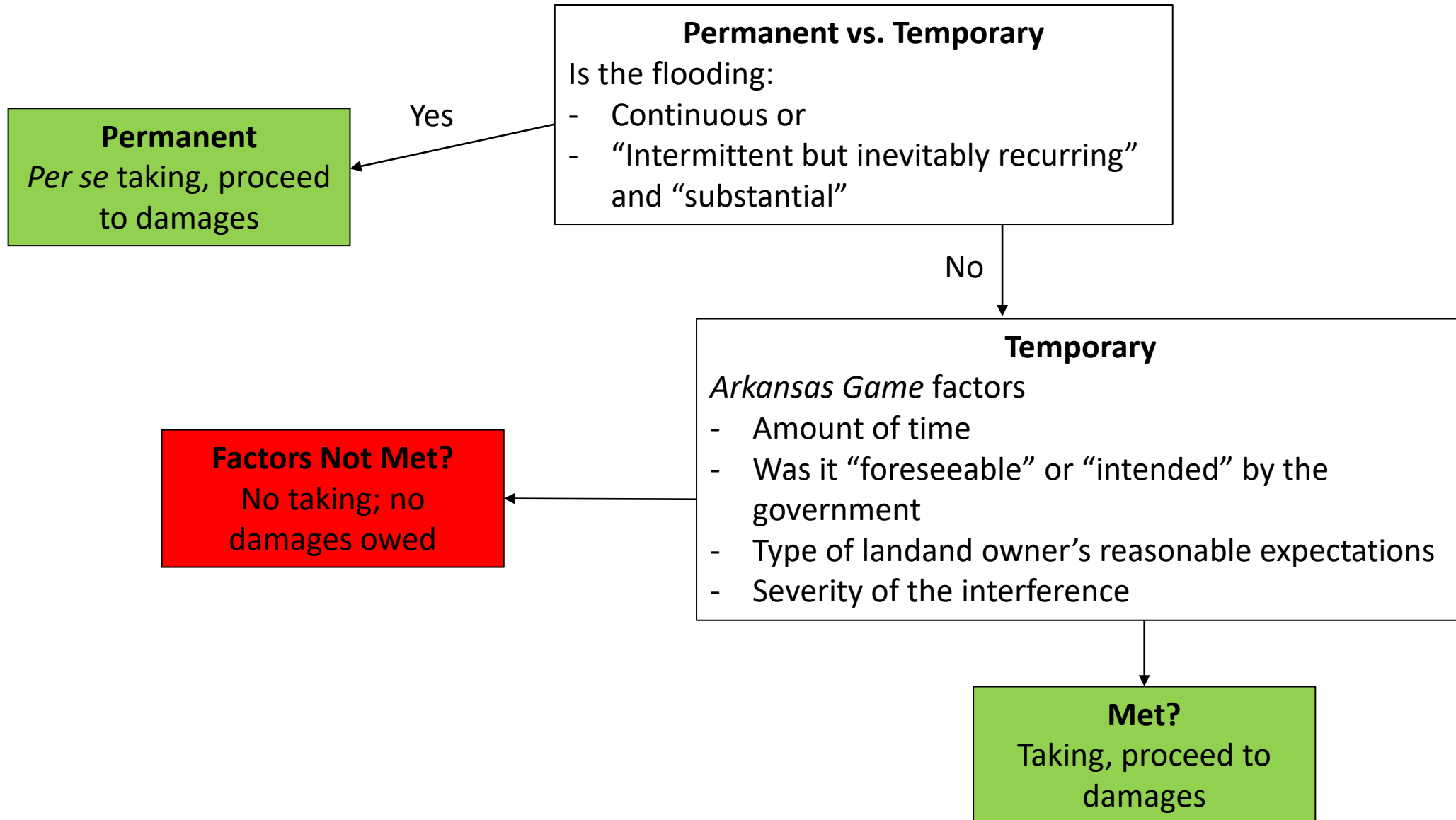
Question Seven

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.