BETWEEN A ROCK AND A HARD PLACE: THE IMPLICATIONS OF *ST. BERNARD PARISH GOVERNMENT V. UNITED STATES* ON FLOOD TAKINGS

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INTRODUCTION

On August 29, 2005, Hurricane Katrina devastated the Gulf Coast of Louisiana, including New Orleans and nearby St. Bernard Parish.[1] Storm surge as high as twenty-one feet rose suddenly, overwhelming the levee system around the parish and leaving many residents in need of rescue.[2] Over 170 people died in St. Bernard Parish alone,[3] out of the 1,833 killed across the Gulf Coast.[4] The flooding took weeks to subside and left homes waterlogged and moldy, with cherished possessions lost to the current.[5] One year after Hurricane Katrina, the population of St. Bernard Parish was 42,000 people smaller than before the storm.[6] Over 8,300 unsalvageable homes were demolished; those empty lots leave a stark reminder of the storm's steep toll.[7]

The government of St. Bernard Parish, along with private property owners in the parish and the Lower Ninth Ward of New Orleans, claimed that the severity of the flooding was caused by the construction and operation of the Mississippi River Gulf Outlet (MR-GO) navigation channel by the Army Corps of Engineers (Army Corps).[8] After an unsuccessful tort lawsuit,[9] the parish government and property owners turned to takings law for relief.[10] Although the United States Court of Federal Claims (Claims Court) initially found that the Army Corps' construction, operation, and lack of maintenance of the MR-GO caused

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1 Julie Landry Laviolette, *Hell & High Water: How Hurricane Katrina Transformed St. Bernard*, MIA. HERALD (Aug. 28, 2015, 1:58 PM), https://www.miamiherald.com/news/weather/hurricane/article32639868.html [https://perma.cc/4ELU-S4HH]. While most other states are divided into counties, Louisiana local governments are organized by parishes. *See Local Louisiana: Louisiana Parishes*, LOUISIANA.GOV, https://www.louisiana.gov/local-louisiana [https://perma.cc/HP6V-QE6S]; John Pope, *Why Parishes? The Story Behind Louisiana's Unique Map*, TIMES-PICAYUNE (July 22, 2019, 1:49 PM), https://www.nola.com/300/article_114112d3-89f7-5044-801b-b4a9fe981938.html [https://perma.cc/P4P9-FL36].

2 Laviolette, *supra* note 1.

3 *Id.*

4 *Hurricane Katrina Statistics Fast Facts*, CNN (Aug. 12, 2020, 10:35 AM), https://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/index.html [https://perma.cc/83RA-4CPR].

5 Laviolette, *supra* note 1.

6 *Id.*

7 *Id.*

8 *In re* Katrina Canal Breaches Consol. Litig., 533 F. Supp. 2d 615 (E.D. La. 2008); *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644 (E.D. La. 2009).

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

10 St. Bernard Par. Gov't. v. United States, 121 Fed. Cl. 687 (2015). The Takings Clause of the Fifth Amendment to the United States Constitution prohibits the government from taking private property for public use without "just compensation." U.S. CONST. amend. V.

the flooding of plaintiffs' property and so was a taking of private property for which the Army Corps must provide compensation,[11] the United States Court of Appeals for the Federal Circuit reversed based on two grounds.[12] First, the Federal Circuit opined that the Army Corps operating the MR-GO without controlling erosion was government "inaction" that could not give rise to a taking.[13] Second, the court held that plaintiffs failed to prove that government action caused the flooding of their properties because they did not consider the flood-reducing effects of other components of the government project.[14]

This Note is concerned with the implications of the Federal Circuit's conception of government action and inaction. This Note argues that the Federal Circuit inappropriately and unnecessarily categorized the Army Corps operating the MR-GO without erosion controls as government inaction that could not constitute a taking.[15] This artificial distinction of action versus inaction ignored existing caselaw and could create uncertainty for future cases.[16] With the likelihood of success on a tort theory already slim,[17] the Federal Circuit's decision could leave similarly situated plaintiffs entirely without a remedy should future courts seize upon the action-inaction distinction as articulated in this case.[18]

As global climate change will increasingly bring more frequent and severe storms,[19] while population growth continues in flood-prone

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

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

13 *Id.* at 1360–61.

14 *Id.* at 1363.

15 *See id.* at 1360; *see* discussion *infra* Part IV.

16 *See infra* Part IV.

17 *See* Janet Louise Daley & Judge Stanwood Richardson Duval, Jr., *The Discretionary Function: License to Kill? The Federal Tort Claims Act and Hurricane Katrina Implications of the Robinson/MRGO Decisions: Can the King Do No Wrong?*, 62 LOY. L. REV. 299, 338 (2016) (concluding that the Fifth Circuit's interpretation of exceptions to the Federal Tort Claims Act may make it virtually impossible for plaintiffs to recover on a tort theory); Katie Sinclair, *Water, Water Everywhere, Communities on the Brink: Retreat as a Climate Change Adaptation Strategy in the Face of Floods, Hurricanes, and Rising Seas*, 46 ECOLOGY L.Q. 259, 275–77 (2019) (describing difficulties faced by plaintiffs seeking to recover for climate change–related harm through tort law).

18 *See* Sinclair, *supra* note 17, at 272 ("[T]he court's analysis in *St. Bernard Parish II* did not sufficiently address the fact that barring recovery under a takings theory, after the denial of the plaintiffs' tort claims in *Katrina Canal Breaches*, meant that hurricane victims were functionally unable to recover any compensation from the federal government for the damage caused by the Army Corps of Engineers' construction of the MRGO and failure to maintain the levees.").

19 *See, e.g.*, Climate Change Adaptation Res. Ctr. (ARC-X), *Climate Adaptation and Storms & Flooding*, EPA, https://www.epa.gov/arc-x/climate-adaptation-and-storms-flooding [https://perma.cc/QML6-JPTQ].

areas,[20] it is likely that more instances of government projects causing or exacerbating flooding will occur.[21] This Note describes the legal framework future plaintiffs affected by such flooding will need to navigate, examined through the lens of *St. Bernard Parish Government v. United States*.

Part I summarizes the facts of the case and procedural history, including the tort claims in the Eastern District of Louisiana,[22] as well as the appeal to the Fifth Circuit Court of Appeals,[23] and the inverse condemnation claim in the Court of Federal Claims.[24] Part II summarizes the Federal Circuit's holding, which reversed the Claims Court's decision.[25] Part III discusses the background law on taking of private property by government-induced flooding and how courts traditionally distinguished between a tort and a taking. This Part also explains the importance of determining whether a case can be heard as a taking, rather than as a tort, given obstacles to recovery on a tort theory. Part IV critically analyzes the Federal Circuit's holding and reasoning and summarizes how future flood takings plaintiffs can work around the most problematic aspects of *St. Bernard Parish* to increase their likelihood of recovery.

I. FACTS AND PROCEDURAL HISTORY

A. *Tort Claims*

After Hurricane Katrina, over 400 plaintiffs in New Orleans and St. Bernard Parish filed individual tort actions to recover for hurricane-related damages, which were consolidated into groups by the United States District Court for the Eastern District of Louisiana.[26] Most

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20 Ralph W. Flick, *When Is a Temporary Government-Induced Flood a Taking: The Constitutional, Legal and Practical Application of* Arkansas Game & Fish Commission v. United States, 47 REAL EST. L.J. 428, 431 (2019).

21 *Id.* at 431–32.

22 *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644 (E.D. La. 2009).

23 *In re* Katrina Canal Breaches Litig., 673 F.3d 381 (5th Cir. 2012); *In re* Katrina Canal Breaches Litig., 696 F.3d 436 (5th Cir. 2012) (rehearing).

24 St. Bernard Par. Gov't. v. United States, 121 Fed. Cl. 687 (2015).

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

26 *See In re* Katrina Canal Breaches Litig., 673 F.3d at 386 (describing the history of the various tort claims as follows: "Over 400 plaintiffs sued in federal court to recover for Katrina-related damages, many naming the federal government as a defendant. Seven plaintiffs (the '*Robinson* plaintiffs') from that number went to trial. . . . [A]fter nineteen days of trial, the court

relevant to this Note are the "Robinson" plaintiffs, who alleged that the Army Corps' operation and maintenance of the MR-GO caused damage to their properties during Hurricane Katrina for which they were entitled to recovery under the Federal Tort Claims Act (FTCA).[27] The district court held that negligent operation and maintenance of the MR-GO caused the flooding that breached protective levees and ultimately flooded the Robinson plaintiffs' properties.[28] The district court also held that Section 702c of the Flood Control Act, which retains the United States' sovereign immunity for flooding related to flood control projects,[29] did not immunize the Army Corps from liability for damage caused by the MR-GO navigation channel.[30] Finally, the district court determined that the Army Corps was not immune from suit under exceptions to the FTCA.[31]

On appeal, the United States Court of Appeals for the Fifth Circuit first partially affirmed the district court's decision regarding the Robinson plaintiffs and found that the Army Corps was liable under the FTCA for failure to control the expansion of the MR-GO.[32] Despite this initial success, on a rehearing, the Fifth Circuit found that the Discretionary Function Exception to the FTCA "completely insulates the government from liability."[33] With their tort claim defeated, plaintiffs needed another theory to seek compensation for their harm.

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found that three plaintiffs had proven the government's full liability and four had not. Another group of plaintiffs (the '*Anderson* plaintiffs') had their cases dismissed on the government's motion, the court finding both immunities applicable. Still a different group (the '*Armstrong* plaintiffs') are preparing for trial of their own case against the government.").

27 28 U.S.C. § 2671 (2018); *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d at 648.

28 *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d at 697.

29 33 U.S.C. § 702c (2018) ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.").

30 *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d at 699. While the Government argued that Section 702c governed because plaintiffs' property was flooded after the breach of levees that were part of the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPV), which is a flood control project, the decision to forgo erosion control to keep the MR-GO within its original design dimensions did not concern the LPV directly, and so was not covered by the immunizing language in the Flood Control Act. *Id.*

31 *Id.* at 701; 28 U.S.C. § 1346(b) (2018). See discussion *infra* Section III.B for further explanation of the exceptions to the FTCA and *infra* Section III.C for discussion of their importance to plaintiffs alleging harm from government-induced flooding of their properties.

32 *In re* Katrina Canal Breaches Litig., 673 F.3d 381, 399 (5th Cir. 2012), *withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012).

33 *In re* Katrina Canal Breaches Litig., 696 F.3d 436, 454 (5th Cir. 2012).

B. *Inverse Condemnation Claim*

After ultimately failing in their action under the FTCA, the property owners turned to takings law.[34] The plaintiffs argued in an inverse condemnation claim that the construction, operation, and lack of maintenance or modification of the MR-GO channel by the Army Corps caused flooding on their land that was more severe than if the MR-GO had not been constructed, had been properly maintained, or had been modified prior to the hurricane.[35] The plaintiffs alleged that the Army Corps took their property for a public purpose without providing just compensation by constructing and operating the MR-GO in this manner.[36] The Claims Court agreed, providing an extremely detailed breakdown of what the Army Corps did and failed to do, how long the Army Corps knew about the flood risk, and how the MR-GO contributed to the flooding.[37] The Claims Court found that the Army Corps' construction, expansion, operation, and failure to maintain the MR-GO created a "funnel effect" directing water towards plaintiffs' properties and increasing the elevation of storm surge, which caused flooding that amounted to a temporary taking of private property without just compensation.[38] In what would become a major point of contention on appeal, the Claims Court partially attributed plaintiffs' flooding to a failure to maintain the banks of the MR-GO to their design specifications,[39] as well as a failure to modify the MR-GO to address storm surge concerns.[40]

The government appealed to the United States Court of Appeals for the Federal Circuit.[41] The Federal Circuit reversed, articulating two points of disagreement with the Claims Court.[42] First, the court determined that lack of maintenance of the channel was government

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

35 *Id.* at 690–91.

36 *Id.*

37 *Id.* at 698–709.

38 *Id.* at 746 ("Plaintiffs established that the Army Corps' construction, expansions, operation, and failure to maintain the MR-GO caused subsequent storm surge that was exacerbated by a 'funnel effect' during Hurricane Katrina . . . causing flooding on Plaintiffs' properties that effected a temporary taking under the Fifth Amendment to the United States Constitution.").

39 *Id.* at 726, 729, 731, 733, 738.

40 *Id.* at 737.

41 St. Bernard Par. Gov't v. United States, 887 F.3d 1354 (Fed. Cir. 2018); *see infra* Part II.

42 *St. Bernard Par. Gov't*, 887 F.3d at 1360–63.

inaction that could not give rise to a taking.[43] Second, the court found that plaintiffs failed to consider all government actions in their causation analysis.[44] The plaintiffs appealed to the United States Supreme Court, which denied plaintiffs' petition for a writ of certiorari.[45]

II. THE FEDERAL CIRCUIT'S HOLDING

On appeal, the Federal Circuit offered two grounds for reversing the Court of Federal Claims.[46] First, the Federal Circuit determined that the Court of Federal Claims' finding of takings liability was based largely on failure of the government to take action.[47] In the Federal Circuit's view, the government's decision not to armor the banks of the MR-GO, which allowed the channel to expand and increased wave action on levees, was pure inaction that could not give rise to a taking.[48] The Federal Circuit determined that flooding caused by a lack of maintenance could not be considered when determining whether the government was obligated to compensate plaintiffs for taking their property because the government is not obligated to compensate plaintiffs for a taking of property caused by government *inaction*.[49] The Federal Circuit stated that only effects from the construction and operation of the MR-GO could form the basis of a takings claim.[50]

Second, the court determined that the plaintiffs did not properly consider the construction of flood-protective projects in their causation analysis and so declined to determine whether the "sole affirmative acts"—the construction and continued operation of the MR-GO—were foreseeable causes of the flooding of plaintiffs' properties.[51] Essentially, the plaintiffs failed to prove that their property would not have flooded during Hurricane Katrina in the absence of any government actions.[52] To prove causation, plaintiffs should have considered all government

43 *Id.* at 1360.

44 *Id.* at 1363.

45 St. Bernard Par. v. United States, 139 S. Ct. 796 (2019).

46 *St. Bernard Par. Gov't*, 887 F.3d at 1360–63.

47 *Id.* at 1360.

48 *Id.*

49 *Id.*

50 *Id.* at 1362.

51 *Id.*

52 *Id.* at 1362–63.

actions directed to the risk that plaintiffs suffered (i.e., flooding).[53] Because the nearby Lake Pontchartrain and Vicinity Hurricane Protection Project (LPV) levee system was constructed to mitigate flood risk, the Federal Circuit held that its effects should have been considered, along with the effects of the construction and operation of the MR-GO, to determine whether the totality of the government's actions caused the plaintiffs' flooding.[54] The Federal Circuit did not disrupt any of the Court of Federal Claims' findings of fact,[55] nor did it find the case barred by the statute of limitations.[56]

III. BACKGROUND AND DISCUSSION OF PRIOR LAW

Prior law indicates that government actions that cause even temporary flooding of private property can violate the Fifth Amendment prohibition on taking of private property without just compensation.[57] Nonetheless, courts must answer the threshold question of whether a landowner's claim for government invasion of its property can be heard as a taking claim, or must be heard as a tort claim.[58] Because a number of exceptions to the FTCA allow the government to escape tort liability, whether a claim is a tort or a taking can decide whether a landowner will recover.[59]

A. *Taking of Private Property by Flooding*

The Fifth Amendment to the United States Constitution provides that the government cannot take private property for public use without providing "just compensation" to the landowner.[60] A landowner

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53 *Id.* at 1364 ("[G]overning Supreme Court and Federal Circuit authority . . . establish that the causation analysis must consider the impact of the entirety of government actions that address the relevant risk.").

54 *Id.* at 1367 ("When government action mitigates the type of adverse impact that is alleged to be a taking, it must be considered in the causation analysis, regardless of whether it was formally related to the government project that contributed to the harm.").

55 *See id.* at 1360 (describing the Claims Court's findings that the Government's construction, operation, and failure to maintain the MR-GO caused increased storm surge but concluding that harm caused by "failure to maintain" cannot constitute a taking).

56 *Id.*

57 *See infra* Section III.A.

58 *See infra* Section III.B.

59 *See infra* Section III.C.

60 U.S. CONST. amend. V.

alleging a taking without just compensation can bring an inverse condemnation claim against the government authority.[61]

Government-induced flooding of private property, whether permanent or temporary, can be grounds for an inverse condemnation claim to recover compensation for the government's taking of private property.[62] To establish a taking, a plaintiff must: (1) "show that he or she has 'a property interest for purposes of the Fifth Amendment'" and (2) "establish that the government's actions 'amounted to a compensable taking of that property interest.'"[63] In *Arkansas Game & Fish Commission v. United States*, the Supreme Court of the United States clarified that even temporary flooding caused by government action may be compensable through an inverse condemnation claim.[64] In deciding whether government action that causes temporary flooding amounts to a taking, courts consider "(1) time—the duration of the physical invasion; (2) causation; (3) intent or foreseeability . . . ; (4) 'the owner's reasonable investment-backed expectations . . . ; and (5) the '[s]everity of the interference.'"[65] The *Arkansas Game* Court cautioned against applying bright-line rules (such as requiring multiple flooding events) to takings analyses while reversing the Federal Circuit's

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61 *See, e.g.*, James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 40–42 (2016) (describing the development of the doctrine of "implicit takings" by the Supreme Court).

62 *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 568 U.S. 23 (2012) (holding that temporary deviations from the Army Corps' water release schedule for a dam that flooded a wildlife refuge during the growing season could constitute a taking because there is no automatic exemption of government-induced flooding that is only temporary in duration from the Takings Clause); Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (holding that flooding on plaintiff's property from stormwater runoff attributed to the construction of a United States Postal Service building could constitute a taking if the flooding is the "direct, natural, or probable result" of the construction (quoting Columbia Basin Orchard v United States, 132 F. 132 Ct. Cl. 445 (1955))); United States v. Dickinson, 331 U.S. 745 (1947) (holding that the government must compensate landowners for land permanently flooded by a dam raising the water level in a river, land lost to erosion due to the increased water level, and damage caused by intermittent flooding); Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1871) (regarding land flooded after a dam raised the water level of a lake: "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution").

63 *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 138 Fed. Cl. 658, 664–65 (2018) (citations omitted).

64 *See Ark. Game*, 568 U.S. at 26.

65 *Upstream Addicks*, 138 Fed. Cl. at 665 (quoting *Ark. Game*, 568 U.S. at 38–39).

determination that a single flooding event could never give rise to a taking.[66]

The causation and foreseeability elements are most relevant to the analysis of the *St. Bernard Parish* case. To prove causation, a plaintiff must show that the invasion of their property would not have occurred absent government action. For example, in a case where plaintiffs alleged a taking where a government-constructed dike deposited sand and gravel on their land that increased flooding, the court determined that plaintiffs should have presented evidence of "what would have occurred if the dike had not been constructed" to prove that their land would not have flooded in the absence of government action.[67] Another plaintiff failed to prove that a canal constructed by the government caused increased flooding on his land where the land was subject to similar flooding before the canal was built and any increase in flooding was "purely conjectural."[68]

If one government action reduced the risk of flooding in ways that compensated for any increased risk from another government action, courts have held that the government did not cause the flooding and therefore did not take the property in question.[69] In addition, all components of a government action (including those that increase flood risk and those that decrease flood risk) must be analyzed to determine if the flooding was caused by the government action, or would have occurred regardless of whether the government acted.[70] For example, in *John B. Hardwicke Co. v. United States*, plaintiffs were not

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66 *Ark. Game*, 568 U.S. at 37 ("Flooding 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." (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958))); *id.* at 38 ("We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection."). On remand, the Federal Circuit determined that temporary flooding caused by the release of water from an Army Corps dam that damaged trees in an Arkansas Wildlife Management Area was compensable as a taking. Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364, 1367 (Fed. Cir. 2013).

67 *See* United States v. Archer, 241 U.S. 119, 132 (1916).

68 Sanguinetti v. United States, 264 U.S. 146, 149 (1924) ("Prior to the construction of the canal the land had been subject to the same periodical overflow. If the amount or severity thereof was increased by reason of the canal, the extent of the increase is purely conjectural.").

69 *See, e.g.*, United States v. Sponenbarger, 308 U.S. 256, 266 (1939) (holding that a flood program that placed a proposed floodway on plaintiff's land did not constitute a taking because plaintiff's land was already subject to flooding, and the flood program in many cases prevented flooding of the land) ("The far reaching benefits which respondent's land enjoys from the Government's entire program precludes a holding that her property has been taken because of the bare possibility that some future major flood might cause more water to run over her land at a greater velocity than [a prior flood].").

70 *See* John B. Hardwicke Co. v. United States, 467 F.2d 488, 491 (Ct. Cl. 1972).

entitled to compensation for flooding caused by a water diversion from one dam where the flood-protective effects of a simultaneously built dam made their property usable for farming in the first place.[71] The court in *Hardwicke* noted that plaintiffs had never experienced the benefits of the first dam before the second dam was constructed.[72] Finally, in *Arkansas Game*, where plaintiffs alleged that a diversion from the water release plan for an Army Corps dam caused increased flooding to their Wildlife Management Area, the proper comparison for causation purposes was the flood risk prior to the construction of the dam compared to the flood risk caused by the diversion from the water release plan, rather than the flood risk of the normal water release plan compared to the flood risk of the diversion from the water release plan.[73]

The foreseeability element requires that the invasion is "'the foreseeable or predictable result' of the government's action."[74] It is not necessary that the government actually foreseethe invasion of plaintiffs' property, but just that the government "*could have* foreseen" the invasion.[75] If an analysis or investigation would have revealed that an invasion onto private property would occur as a result of government action, the foreseeability element is met, even if the government did not in fact conduct any analyses or investigation into the risk.[76]

B. *Tort or Taking?*

While the same facts may give rise to both a takings claim and a tort claim,[77] the Claims Court must also decide that an inverse condemnation claim is appropriate before it can decide whether a taking has in fact occurred. This determination is ultimately a jurisdictional question.[78] The Tucker Act gives the Claims Court

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71 *Id.*

72 *Id.*

73 Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364, 1372 n.2 (Fed. Cir. 2013).

74 *Id.* at 1372 (quoting Moden v. United States, 404 F.3d 1335, 1343 (Fed. Cir. 2005)).

75 *See id.* at 1373 (emphasis added) ("Engineers *could have* foreseen that the series of deviations approved during the 1990s would lead to substantially increased flooding of the Management Area and, ultimately, to the loss of large numbers of trees there. We uphold the court's conclusion [that the flooding of the Management Area was foreseeable].").

76 *See id.*; *see also* Cotton Land Co. v. United States, 75 F. Supp. 232, 233–34 (Ct. Cl. 1948) ("If engineers had studied the question in advance they would, we suppose, have predicted what occurred.").

77 *See* Alexandra K. McLain, Note, *Choose Your Path to Recovery Against the United States: Torts v. Takings*, 22 LEWIS & CLARK L. REV. 1063, 1069 (2018).

78 *See id.* at 1064 (citing Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) and Karlen v. United States, 727 F. Supp. 544, 548 n.4 (D.S.D. 1989)).

jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for . . . damages in cases not sounding in tort."[79] In contrast, the FTCA provides that the district courts have exclusive jurisdiction over tort claims against the United States arising out of acts or omissions by government employees acting within the scope of their employment.[80] Beyond deciding the forum, the tort/taking distinction can be determinative of whether plaintiffs will be compensated for government invasion of their land because there are exceptions to the FTCA that do not apply to takings claims.[81]

The Federal Circuit articulated a test for deciding this threshold tort-or-taking question for government-caused flooding in *Ridge Line, Inc. v. United States*, where plaintiffs sought compensation for flooding on their property caused by increased stormwater runoff from construction of a new United States Postal Service building.[82] First, the government must intend to invade the property, or the invasion must be the "direct, natural, or probable result" of an authorized government activity; and second, the government action must be of a nature and magnitude to rise to the level of a taking.[83]

In order for the invasion of property to be considered the "direct, probable, or natural result" of a government action, the invasion must have been the foreseeable or predictable result of the government

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79 28 U.S.C. § 1491.

80 28 U.S.C. § 1346(b)(1) ("[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.").

81 *See infra* Section III.C.

82 Ridge Line Inc. v. United States, 346 F.3d 1346, 1355–56 (Fed. Cir. 2003).

83 *Id.* ("First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. . . . Second, the nature and magnitude of the government action must be considered." (citations omitted)). While some have argued for a stricter distinction between takings and torts, such that a taking can only arise from an intentional invasion of private property, this view has not been reflected in the courts. *See, e.g.*, Bud Davis, *Strengthening the Floodwalls: Reinterpreting the Federal Circuit's* Ridge Line *Test to Limit Government Liability in Takings Jurisprudence*, 26 FED. CIRCUIT B.J. 29, 49 (2016) ("The first Ridge Line prong, then, presents a disjunctive test: either the Government intended to take the property, or the injury was the direct, foreseeable result of government action. As this Article argues, the courts should seize on the former to limit government liability.").

action.[84] It is not enough for the government action to be the but-for cause of the invasion.[85] For example, in *Moden v. United States*, plaintiffs sought compensation for contamination of their groundwater with the chemical trichloroethylene (TCE) after the Air Force used TCE through the 1940s and 50s at a nearby Air Force base.[86] While the Modens may have proved that the Air Force's activities were the cause-in-fact of their groundwater contamination, they did not prevail because they did not prove that the Air Force should have foreseen that TCE would be released into the groundwater.[87] In contrast, in a case cited favorably in *Ridge Line*[88] and *Moden*,[89] the government was required to compensate landowners for property taken by flooding where a dam caused a lake to fill with sediment, which over time raised the water level and flooded plaintiffs' property.[90] Because the government could have foreseen the flooding caused by the dam, and it resulted naturally from the construction of the dam, the court found that an inverse condemnation claim was appropriate, and the government was required to compensate the landowners.[91]

The second prong of the *Ridge Line* test requires that flooding rises to the level of a taking.[92] Flooding that only reduces the value of a property is insufficient to constitute a taking; rather, flooding must either provide a benefit to the government at the expense of the

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84 Moden v. United States, 404 F.3d 1335, 1343 (Fed. Cir. 2005).

85 *Id.* ("[P]roof of causation, while necessary, is not sufficient for liability in an inverse condemnation case. In addition to causation, an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury." (citations omitted)).

86 *Id.* at 1338.

87 *Id.* at 1345–46.

88 *Ridge Line*, 346 F.3d at 1356–57.

89 *Moden*, 404 F.3d at 1343–44 ("The Modens interpret several cases, including *Cotton Land Co. v. United States*, 109 Ct. Cl. 816, 75 F. Supp. 232 (Ct. Cl. 1948), as explicitly rejecting the foreseeability requirement. However, we, along with our predecessor court, have a different view of *Cotton Land Co*.").

90 Cotton Land Co. v. United States, 75 F. Supp. 232, 235 (Ct. Cl. 1948).

91 *Id.* at 233–35 ("The events which occurred, although they took some time, were only the natural consequences of the collision of sediment-bearing flowing water with still water, and the progress upstream, of the deposit begun by that collision. If engineers had studied the question in advance they would, we suppose, have predicted what occurred. . . . Should the fact that the engineering study was not so complete as to include a prediction as to lands beyond the bed of the reservoir prevent a court from looking at the actual and natural consequence of the Government's act? . . . As we have said, the Government built its public improvement. The plaintiffs lost their land. The loss resulted naturally from the improvement. We hold that the plaintiffs are entitled, under the Constitution, to be compensated.").

92 *Ridge Line*, 346 F.3d at 1357 ("The second prong of the taking-tort inquiry in this case requires the court to consider whether the government's interference with any property rights of Ridge Line was substantial and frequent enough to rise to the level of a taking.").

property owner, or at the very least prevent the property owner from using their property for some time.[93] In *Ridge Line*, the Federal Circuit determined that flooding caused by construction of a postal facility could constitute the taking of a flowage easement for government use over plaintiffs' property, and so rose to the level of a taking.[94]

C. *Significance of the Tort/Taking Distinction*

The distinction between tort claims and takings claims articulated in *Ridge Line* is of particular importance to the *St. Bernard Parish* plaintiffs and future similarly situated plaintiffs because the FTCA has a number of exceptions that make recovery on a tort theory difficult.[95] The most problematic of these exceptions is the Discretionary Function Exception, which immunizes government agencies and employees from tort actions arising out of the performance or failure to perform a discretionary function or duty.[96] For this exception to apply, there must be "room for choice" in the government agency or employee's decision as authorized by statute, and the choice must be based on public policy considerations.[97] The Supreme Court articulated a two-prong standard for applying the Discretionary Function Exception in *Berkovitz v. United States*,[98] which the Fifth Circuit applied in the Hurricane Katrina litigation.[99] In order to be covered by the Discretionary Function Exception, the act that allegedly caused the plaintiff's harm must have been a "matter of choice" for the government employee.[100] An employee or agency acting in violation of a statutory mandate is therefore not

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93 *Id.* at 1356 ("[A]n invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.").

94 *Id.* at 1354–55. Note that while *Ridge Line* suggests that permanent or recurring flooding is required for flooding to rise to the level of a taking, *Arkansas Game* obviates that requirement. *See id.* at 1357; Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 26–27 (2012).

95 *See* Sinclair, *supra* note 17.

96 28 U.S.C. § 2680 ("The provisions of this chapter and section 1346(b) of this title shall not apply to—(a) Any claim . . . 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.").

97 *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 703–04 (E.D. La. 2009).

98 Berkovitz v. United States, 486 U.S. 531 (1988).

99 *In re* Katrina Canal Breaches Litig., 696 F.3d 436, 448–51 (5th Cir. 2012).

100 *Berkovitz*, 486 U.S. at 536 ("In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice.").

shielded by the exception.[101] Second, the action or decision must be of the nature that the exception is designed to protect—that is, an action based on policy considerations, since the Discretionary Function Exception was designed to prevent "judicial second-guessing" of policy decisions through tort law.[102] The Supreme Court in *United States v. Gaubert* clarified that the court must consider the nature of the actions taken, and whether an action is "susceptible to policy analysis," regardless of whether the government actually performed such an analysis.[103]

In the tort claim preceding *St. Bernard Parish*, the Army Corps claimed the decision to forgo erosion control and to not warn Congress of the need for such measures was a policy decision protected under this exception.[104] Further, the Army Corps argued that because erosion mitigation measures would require additional congressional authorization and funding, the Army Corps could not be liable in tort for failure to implement such measures.[105] The District Court for the Eastern District of Louisiana disagreed, finding that poor engineering decisions and ignorance of safety concerns were not policy decisions.[106] The district court further found that the Discretionary Function Exception was inapplicable because the Army Corps violated a mandate of the National Environmental Policy Act (NEPA) by preparing a flawed Final Environmental Impact Statement, failing to prepare a Supplementary Environmental Impact Statement when new information on the impacts of the MR-GO was available, and deliberately segmenting its environmental reporting to keep the public and other agencies uninformed of the serious effects of the MR-GO on the environment and public safety.[107]

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101 *Id.*

102 *Id.* at 536–37.

103 United States v. Gaubert, 499 U.S. 315, 325 (1991) ("The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis."). The Court offers the example of a government employee negligently colliding with another car while driving in connection with his job duties to illuminate this point—while driving a car involves continuous exercise of discretion, the choices made while driving are not the type that are based on regulatory policy. *Id.* at 325 n.7.

104 *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 704 (E.D. La. 2009).

105 *Id.*

106 *Id.* at 705. See *id.* at 705–17 for extensive analysis of prior caselaw to support this holding.

107 *Id.* at 725.

The Fifth Circuit disagreed with the district court regarding the Army Corps' decisions under NEPA,[108] but initially agreed that the decision not to armor the MR-GO was based on the erroneous scientific judgment that allowing the channel to expand would not increase storm surge rather than on any policy consideration, and thus was not covered by the Discretionary Function Exception.[109] However, on rehearing, the Federal Circuit held that the decision to delay shore protection measures for the MR-GO, while informed by scientific analysis, was "susceptible to policy considerations," and therefore within the protection of the Discretionary Function Exception.[110] The Fifth Circuit declared that the Discretionary Function Exception to the FTCA "completely insulate[d] the government from liability."[111]

Some scholars have criticized the *Katrina Canal Breaches* interpretation of the Discretionary Function Exception as excessively broad.[112] Judge Duval of the United States District Court for the Eastern District of Louisiana, who authored the opinion finding the Army Corps liable to the Robinson plaintiffs under the FTCA,[113] and his permanent clerk Janet Louise Daley, argue that the Fifth Circuit panel rehearing the case misunderstood the facts and improperly failed to consider the "nature of the action" in determining that the Army Corps failing to contain the MR-GO to its designed width was protected by the Discretionary Function Exception.[114] Others have critiqued the rehearing panel's conclusory determination that the Army Corps' actions and decisions concerning the MR-GO were "susceptible to policy analysis" without specifying what that policy analysis might entail, when the prior Fifth Circuit panel extensively supported its decision that the Army Corps' actions were based on misapprehension

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108 *In re* Katrina Canal Breaches Litig., 673 F.3d 381, 393 (5th Cir. 2012) ("NEPA's procedural mandates require agencies to inform their discretion in decisionmaking. An agency that complies with NEPA gives outside influences (the public, lawmakers, other agencies) more information with which to put pressure on that agency, but the original agency retains substantive decisionmaking power regardless. At most, the Corps has abused its discretion—an abuse explicitly immunized by the [Discretionary Function Exception].").

109 *Id.* at 395–96.

110 *In re* Katrina Canal Breaches Litig., 696 F.3d 436, 451 (5th Cir. 2012).

111 *Id.* at 454.

112 *See* Christopher R. Dyess, *Off with His Head: The King Can Do No Wrong, Hurricane Katrina, and the Mississippi River Gulf Outlet*, 9 NW. J.L. & SOC. POL'Y 302, 323–25 (2014); Daley & Duval, *supra* note 17.

113 *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644 (E.D. La. 2009).

114 Daley & Duval, *supra* note 17, at 337–38 ("Because the nature of the nonaction on clear scientific evidence that a failure to address the impact of the widening of the MRGO on the viability of the Reach 2 MRGO Levee concerned safety, the DFE should not have been available to the Corps.").

of scientific analyses.[115] Despite these criticisms, the Discretionary Function Exception, and its application in the Katrina litigation, continue to pose a significant obstacle for plaintiffs attempting to recover damages from the government for flooding under a tort theory.[116]

IV. ANALYSIS OF THE FEDERAL CIRCUIT'S DECISION IN *ST. BERNARD PARISH*

These prior cases establish the test for determining whether the government's invasion of private property through flooding should be heard as a taking or a tort.[117] The significance of that distinction cannot be understated for the *St. Bernard Parish* plaintiffs, who failed to recover in their tort claim under the Fifth Circuit's interpretation of the Discretionary Function Exception to the FTCA.[118] Nonetheless, in finding for the Army Corps, the Federal Circuit unnecessarily decided that the Army Corps' operation of the MR-GO without erosion control was really "inaction" that could only be remedied by tort law.[119] The Federal Circuit's determination of "inaction" was unnecessary to decide the case and contrary to prior law.[120] If the action-inaction opinion in *St. Bernard Parish* is not treated as dicta by future courts, it could have dire consequences for future plaintiffs attempting to recover for government-induced flooding of their property.[121]

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115 Dyess, *supra* note 112, at 324 ("When read together with the March 2012 opinion affirming the district court, the September 2012 opinion is confusing, unprincipled, and lacks reasoned analysis. The most obvious source of puzzlement is trying to discern a principled reason why the court made such a stark reversal. . . . The pendulum swung from 'the Corps decisions were grounded on an erroneous scientific judgment, not policy considerations' to '[t]he Corps' actual reasons for the delay are varied and sometimes unknown, but . . . the decisions here were susceptible to policy considerations.'").

116 *See* Sinclair, *supra* note 17.

117 *See supra* Sections III.A–B; Ridge Line Inc. v. United States, 346 F.3d 1346, 1352 (Fed. Cir. 2003).

118 *In re* Katrina Canal Breaches Litig., 696 F.3d 436, 454 (5th Cir. 2012).

119 St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1362 (Fed. Cir. 2018) ("Plaintiffs' sole remedy for these inactions, if any, lies in tort.").

120 *See infra* Sections IV.A–B.

121 *See infra* Section IV.D.

A. *The Federal Circuit's Action-Inaction Determination Is Dicta*

In trying to correct what it regarded as an overbroad characterization of takings law by the Court of Federal Claims, the Federal Circuit unnecessarily injected uncertainty and confusion into the taking-or-tort analysis. Because its decision turned on plaintiffs' burden of proof to prove causation, the Federal Circuit did not need to define the Army Corps' operation of the MR-GO to expand via erosion as "action" or "inaction" to find that the United States was not required to compensate plaintiffs. The Federal Circuit's decision rested on the plaintiffs' failure to demonstrate that they would not have experienced flooding if there was no government action at all (including both the MR-GO and protective levees).[122] The Federal Circuit could also have emphasized the unexpected strength and severity of Hurricane Katrina, which could have possibly flooded plaintiffs' property regardless of the impact of the MR-GO.[123]

Instead, the Federal Circuit chose to separate the decision to operate the MR-GO without erosion controls from the construction and operation of the MR-GO in general, proclaiming the Army Corps' operation of the MR-GO without controlling erosion "government inaction" that is not compensable in an inverse condemnation claim.[124] It is not clear how the Federal Circuit would have distinguished flood risk attributable to the operation of the MR-GO from flood risk attributable to "lack of maintenance"; the MR-GO was operated consistently without erosion controls.[125] It is unclear if the Federal Circuit would require plaintiffs to enlist experts to model or speculate about flood risk posed by the MR-GO if the channel had remained within its original configuration to make this demonstration. The Federal Circuit avoids this counterintuitive analysis by refusing to reach the question of whether plaintiffs' flooding was the foreseeable result of the construction and operation of the MR-GO, and instead dismissing the case based on plaintiffs' failure to consider the flood-protective effects of the LPV levees in their causation argument.[126] Because the action-inaction distinction was not required to decide the case, it should be treated as dicta.

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122 *St. Bernard Par. Gov't*, 887 F.3d at 1363.

123 *Id.*

124 *Id.* at 1361–62.

125 St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 722–24 (2015).

126 *St. Bernard Par. Gov't*, 887 F.3d at 1362.

B. *Operating the MR-GO While Allowing Erosion Is Not Inaction*

The determination that operating the MR-GO without erosion control is a separate instance of government inaction that cannot be included in a takings analysis was not only unnecessary to dismiss the claim but also contrary to prior law.[127] Construction and operation without controlling for erosion is not fairly characterized as "inaction."[128] Choosing to forgo erosion control is not a severable component of the government's construction and operation of the MR-GO; as the record shows, the Army Corps purposefully allowed the MR-GO to widen through erosion, despite knowing the increase in flood risk inherent in operating the channel in this manner.[129]

The separation of the decision to forgo erosion control from the operation of the MR-GO to remove flooding caused by the "lack of maintenance" of the banks from the takings analysis is contrary to prior caselaw. Before *St. Bernard Parish*, there were numerous successful inverse condemnation cases that, in hindsight, could be characterized as a "failure to modify" or "failure to maintain" a government project to guard against a foreseeable risk. For example, in *Hansen v. United States*, plaintiffs succeeded in defeating the government's motion for summary judgment in an inverse condemnation claim against the United States for contamination of groundwater on their property.[130] The contamination was caused by the government using and burying containers of pesticide.[131] The containers leaked and entered the groundwater on the government's property, which then reached plaintiffs' property.[132] The case could have been argued as "inaction" if the facts were framed as the government's failure to maintain

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127 *See* A.S. Flynn, *Climate Change, Takings, and Armstrong*, 46 ECOLOGY L.Q. 671, 675 (2019) (criticizing the Federal Circuit for relying on "arbitrary, blurry line drawing" that runs counter to the discouragement of bright-line rules in *Arkansas Game & Fish Commission*).

128 *See* Dialogue, *Determining Climate Responsibility: Government Liability for Hurricane Katrina?*, 49 ENV'T L. REP. NEWS & ANALYSIS 10005, 10016 (2019) [hereinafter *Determining Climate Responsibility*] (Vincent Colatriano, a partner at the law firm Cooper & Kirk, PLLC, in a panel discussion of *St. Bernard Parish*, criticized the categorization of allowing the MR-GO to expand as inaction, because "[t]he claim . . . was predicated on affirmative action, the construction of the MRGO, which created a flood risk. It is true that the Corps then failed to mitigate the effects of its affirmative action. I don't think that in any sense can be fairly characterized as government 'inaction.' It is just that the government decided as a matter of policy that it wasn't going to address the effects of its earlier action.").

129 *St. Bernard Par. Gov't*, 121 Fed. Cl. at 722–24.

130 Hansen v. United States, 65 Fed. Cl. 76 (2005).

131 *Id.* at 81.

132 *Id.*

underground containers holding pesticide or failure to monitor spread of contamination, rather than burying the containers in the first place.[133] The *Hansen* case seems like a stronger argument for inaction than the argument in *St. Bernard Parish*, since the government in *Hansen* could not see the containers leaking pesticide, while the Army Corps in *St. Bernard Parish* was aware of the expansion of MR-GO and the accompanying risks for some time.[134] Nonetheless, the *Hansen* court found that contamination of plaintiff's groundwater was the "direct, natural, or probable result" of the government burying containers of pesticide, even though the government did not purposefully release the pesticide and the containers were not leaking when originally buried.[135]

As another example, in a case pre-dating *Ridge Line*, the government was required to compensate landowners for property taken by flooding when a dam caused a lake to fill with sediment, thereafter causing plaintiffs' property to flood.[136] Under an action-inaction dichotomy, flooding caused by subsequent sedimentation of the lake could be attributed to a lack of maintenance or the failure to employ sediment controls, rather than considered part of the effects of constructing and operating the dam, but the court did not so decide.[137] In deciding whether the flooding had the requisite foreseeability to be actionable as a taking, the court determined that had engineers studied the question, they likely would have concluded that sedimentation and subsequent flooding would occur, and it was not necessary for the government to have actually studied or been aware of the risk.[138] *St. Bernard Parish* is an even stronger case for finding a taking, since the Army Corps was actually aware for decades that constructing the MR-GO and operating it without erosion controls would cause flooding of plaintiffs' property during storm events.[139]

Finally, in a post-*Ridge Line* case, the collapse of a mine portal caused by the Environmental Protection Agency's removal of a 100-foot timber wall supporting the landing of a mine portal and allowing the fill

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133 *See* St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1362 (Fed. Cir. 2018) (characterizing operation of the MR-GO without erosion control as "the failure of the government to properly maintain the MRGO channel or to modify the channel" and concluding that such failures "cannot be the basis of takings liability.").

134 *St. Bernard Par. Gov't*, 121 Fed. Cl. at 722–24.

135 *Hansen*, 65 Fed. Cl. at 97–98.

136 Cotton Land Co. v. United States, 75 F. Supp. 232, 235 (Ct. Cl. 1948).

137 *Id.*

138 *Id.* ("[I]t is not necessary, in order to take jurisdiction of a suit for compensation for property taken, to find that the Government's agents were aware that their acts would result in its taking . . . .").

139 *St. Bernard Par. Gov't*, 121 Fed Cl. at 723–24.

material of the landing to settle could be compensable as a taking.[140] The court did not treat allowing the fill material of the landing to settle as severable government inaction, but rather held that there were unresolved questions of fact to determine whether the collapse of the portal was the direct, probable, or natural result of the agency's actions.[141] Similarly, the Army Corps replenishing beaches on Coney Island, which caused sand to accumulate on downdrift properties, was a taking of private property because the sand accretion was the direct, natural, or probable result of beach replenishment and rose to the level of a taking.[142] Allowing sand accretion downdrift was not treated as a severable instance of inaction or failure to employ sediment controls.[143]

Further, the cases relied on by the Federal Circuit are distinguishable from the facts in *St. Bernard Parish*. The cases relied on found that a taking does not occur where the government has not taken any affirmative action, such as constructing a project or adopting a regulation,[144] nor does a taking occur where a government flood protection project is only insufficiently protective, rather than actually increasing flooding.[145] These situations are distinct from the operation of the MR-GO by the Army Corps in a way that allowed unabated erosion to widen the channel because they involved a wholesale lack of affirmative action by the government, in contrast to the affirmative action of operating the MR-GO.

For example, in *United States v. Sponenbarger*, the Supreme Court held that the government constructing a flood protection project that failed to protect the plaintiff was not a taking under the Fifth Amendment.[146] While the Federal Circuit points to this case in *St. Bernard Parish* to support the claim that government inaction cannot give rise to a taking, this case does not support finding that construction and operation without proper maintenance of the MR-GO is itself government inaction. Constructing a project which, as operated by the government, causes flooding is not analogous to constructing an insufficiently protective flood control project that merely fails to protect particular plaintiffs from flooding. Exposing plaintiffs to additional flood risk that would not exist in the absence of government action is clearly distinguishable from constructing a project that keeps the flood

140 Placer Mining Co. v. United States, 98 Fed. Cl. 681, 687 (2011).

141 *Id.*

142 Vaizburd v. United States, 384 F.3d 1278, 1283 (Fed. Cir. 2004).

143 *Id.*

144 Georgia Power Co. v. United States, 633 F.2d 554 (Ct. Cl. 1980).

145 United States v. Sponenbarger, 308 U.S. 256 (1939).

146 *Id.*

risk to particular properties the same as before the project was constructed. The Fifth Amendment does not impose any affirmative obligation to protect property, as the *Sponenbarger* plaintiffs tried to allege, but it does establish the right to be free from uncompensated taking of one's property by the government, as alleged by the *St. Bernard Parish* plaintiffs.[147]

In *Georgia Power Co. v. United States*, another case relied on by the Federal Circuit in *St. Bernard Parish*, plaintiffs held a powerline easement twenty-five feet above a reservoir.[148] Masts of sailboats in the reservoir were tall enough to invade this easement.[149] Plaintiffs argued that the government had an affirmative obligation to regulate the mast height of sailboats allowed in the reservoir to keep them from interfering with their powerline easement, and that allowing sailboats with too-tall masts to navigate the reservoir was a taking of their property.[150] The court held that failure to regulate sailboat heights was not a taking.[151] While this case supports the contention that inaction, and particularly failure to regulate, cannot give rise to a taking, the construction and operation of the MR-GO is not at all analogous to a wholesale failure to regulate conduct because it required multiple affirmative actions by the government.[152] Again, while the Fifth Amendment does not create an affirmative obligation to protect property, it does create the right to be free from uncompensated government invasion of private property.[153]

C. *Severing the Decision to Forgo Erosion Control from the Operation of the MR-GO Contradicts the Federal Circuit's Causation Analysis*

Separating the decision to allow expansion via erosion from the operation of the MR-GO as a whole not only contradicts prior law but also the Federal Circuit's own reasoning. The court extensively describes how the plaintiffs' failure to consider the flood-protective effects of the LPV levees in their causation analysis was fatal to their

147 U.S. CONST. amend. V; *Sponenbarger*, 308 U.S. 256; St. Bernard Par. Gov't v. United States, 887 F.3d 1354 (Fed. Cir. 2018).

148 *Georgia Power Co.*, 633 F.2d 554.

149 *Id.* at 555.

150 *Id.*

151 *Id.* at 556.

152 *See* discussion *supra* Part II.

153 U.S. CONST. amend. V.

claim because they failed to "consider the impact of the entirety of government actions that address the relevant risk."[154] This holding is in line with prior law,[155] and undermines the court's disregard of the impact of expansion of the MR-GO through erosion on the plaintiffs' flooding. The court chides plaintiffs for "cherry-picking" only government actions that increased their flood risk,[156] but similarly cherry-picks one aspect of the Army Corps' operation of the MR-GO (keeping the channel open to ship traffic) while ignoring the expansion-by-erosion that was also an integral component of the Army Corps' operation of the channel.[157]

Deciding that the operation of the MR-GO can somehow be analyzed without considering the effects of the decision not to incorporate erosion control seems even less appropriate than considering the flood-increasing impact of one dam, but not the flood-protective impact of another simultaneously-constructed dam,[158] or considering flooding from deviations from a water release plan without considering the flood-protective impacts of the initial construction of the dam.[159] While the Federal Circuit refuses to allow plaintiffs to separate the impacts of separate but related government actions in determining causation, it somehow expects plaintiffs to analyze a hypothetical reality where the MR-GO had not expanded. The MR-GO and the LPV levees are too related to be considered in isolation,[160] but two aspects of operating a single navigation channel are somehow expected to be severed in determining whether a taking has occurred.[161] In addition to being analytically difficult and artificial, it also runs counter to decades of caselaw requiring plaintiffs to "consider the

154 St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1364 (Fed. Cir. 2018).

155 *See supra* Section III.A.

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

157 *Id.* at 1362, 1362 n.7.

158 John B. Hardwicke Co. v. United States, 467 F.2d 488, 491 (Ct. Cl. 1972), *cited in St. Bernard Par. Gov't*, 887 F.3d at 1364.

159 Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364, 1371 n.2 (Fed. Cir. 2013), *cited in St. Bernard Par. Gov't*, 887 F.3d at 1364–65.

160 *St. Bernard Par. Gov't*, 887 F.3d at 1365–66.

161 *Id.* at 1362 ("The failure of the government to properly maintain the MRGO channel or to modify the channel cannot be the basis of takings liability. . . . Here, the sole affirmative acts involved were the construction of MRGO, which was completed by 1968, and the continued operation of the channel."). Footnote 7 makes clear that the Federal Circuit considers "operation" only to include allowing ship traffic through the channel. *Id.* at 1362 n.7 ("At least by 2009, it appears that plaintiffs concede that MRGO's operation was causing them no injury because they alleged that the closure of the channel in that year 'made at most a negligible contribution to protecting Plaintiffs' properties from the risk of recurring future flooding.'").

impact of the entirety of government actions that address the relevant risk."[162]

D. *Implications for Future Cases*

The Federal Circuit's mischaracterization of operating the MR-GO without erosion control as non-compensable inaction unfortunately confuses the analysis for future takings claims.[163] If taken too far, this dicta could severely limit the ability of future plaintiffs to recover, especially because recovery in tort is exceedingly difficult.[164] For example, in a case brought by property owners upstream of dams constructed by the Army Corps whose properties flooded during Hurricane Harvey in August 2017, the government unsuccessfully tried to characterize the case as one of inaction.[165] The government's theory of the case was that the flooding was caused by the Army Corps' failure to purchase land upstream of the dam or modify the dam to prevent flooding upstream, rather than by the government action of constructing and operating the dam in the first place.[166] The Court of Federal Claims rejected that argument,[167] but under *St. Bernard Parish*, the Federal Circuit might find it persuasive. The Court of Federal Claims implicitly distinguished *Upstream Addicks* from *St. Bernard Parish* by focusing on the affirmative action of building and modifying the dam such that it could impound water on both government-owned

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162 *Id.* at 1364.

163 Flynn, *supra* note 127, at 675 (criticizing the "blurry" action versus inaction distinction); *Determining Climate Responsibility*, *supra* note 128, at 10016 (discussing the potential "fuzzy line" between action and inaction, especially where the government has affirmatively acted to construct a project such as the MR-GO).

164 Sinclair, *supra* note 17, at 272 (noting that the holding in *St. Bernard Parish* "foreshadows the difficulties plaintiffs will face trying to recover in court for flooding and hurricane damage under a takings theory," praising the Claims Court's decision for acknowledging that "the distinction between action and inaction is to some extent artificial and arbitrary, and it is undeniable that the Army Corps of Engineers' construction of the MRGO led to erosion and loss of wetlands, creating a higher risk of flooding," and explaining that the "Federal Circuit's claim that plaintiffs can only recover under a tort theory is also functionally useless since prior rulings in Katrina Canal Breaches found that the Army Corps of Engineers' actions in constructing and maintaining the MRGO were exempt from the FTCA under the discretionary function exception.").

165 *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 138 Fed. Cl. 658, 666 (2018).

166 *Id.*

167 *Id.*; *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219 (2019) (applying *Arkansas Game* factors to determine that plaintiffs were entitled to compensation).

and private property,[168] and focused on the causation analysis of *St. Bernard Parish* rather than the action-inaction analysis.[169]

In *Upstream Addicks*, there is strong evidence that the Army Corps knew that a storm of the magnitude of Hurricane Harvey could cause upstream flooding of plaintiffs' property,[170] just as the Army Corps knew that unabated erosion of the MR-GO could cause flooding of plaintiffs' properties.[171] Flooding of the plaintiffs' property was the "direct, natural, and probable" result of the construction and operation of the dams in this way. However, under *St. Bernard Parish*, the court could have treated construction in 1945 and 1948 as the sole actions, and failure to modify the dam or acquire upstream land through eminent domain as more intense storms were predicted as severable instances of inaction. In light of *St. Bernard Parish*, the court in *Upstream Addicks* could have determined that flooding would not have occurred when the dams were built, and flooding experienced by plaintiffs was not a taking because it was attributable to subsequent failure to modify the dam or acquire property.[172] While this conclusion is contrary to pre-*St. Bernard Parish* cases, *St. Bernard Parish* opened the door to such a result.[173]

Future courts deciding whether the government has taken property without just compensation by flooding private property should not supplant the *Ridge Line* test with an artificial action-inaction distinction. Courts should not discount flooding attributable to operation of a project in a way that increases flood risk and fails to abate that risk as caused by inaction if the government knew or could have known that flooding would be the direct, natural, or probable result of operating the project in that manner.

Plaintiffs seeking compensation for flooding caused or exacerbated by government projects must therefore deemphasize the force of the Federal Circuit's action-versus-inaction analysis in *St. Bernard Parish.* Future plaintiffs should characterize the distinction between the action of operating the MR-GO from the inaction of forgoing erosion controls

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168 *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 138 Fed. Cl. at 666 ("The government acted when it built and then modified the dams in such a way that they could and did impound storm water behind the dams on both government and private property. That the government's action bore fruit or had consequences only some years later does not obviate the reality that *action*, not inaction, is at issue." (emphasis added)).

169 *Id.*; *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. at 228–29.

170 *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 138 Fed. Cl. at 662.

171 St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 722–24 (2015).

172 St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1362 (Fed. Cir. 2018).

173 *See supra* Section IV.B.

as dicta to correct a potentially overbroad statement of the reach of the Takings Clause, and not as a new test for distinguishing torts from takings.[174] Courts should recognize that the Federal Circuit's decision was based mostly on plaintiffs not meeting their burden of proof regarding causation by failing to consider the entire scope of government action affecting flood risk, and that it was unnecessary to decide that operation without addressing erosion was inaction because plaintiffs would not have prevailed regardless.[175]

Future courts could also interpret the Federal Circuit's determination that operating the MR-GO without erosion controls is inaction as simply shorthand for the flooding not being a direct, natural, or probable result of the construction and operation of the MR-GO and continue to apply the *Ridge Line* test, rather than picking apart many facets of government actions to designate some true action and some inaction. This is what the Claims Court seems to have done in a recent case where flooding was caused by a buildup of sediment from a flood control structure on the Mississippi River.[176] Doing otherwise could leave injured property owners entirely without compensation where the government causes their property to be flooded.

CONCLUSION

As climate change raises the frequency of large storm events with increasingly intense rainfall,[177] and population density continues to increase in flood-prone areas,[178] many more landowners will be impacted by flooding. Recent projections predict significant increases in both coastal and inland flood risk. One study estimates that as many as 300 million people globally will be at severe coastal flood risk from sea level rise by 2050, with that number swelling to 480 million by

174 *See supra* Section IV.A.

175 *St. Bernard Par. Gov't*, 887 F.3d at 1363. The Claims Court seems to have done just that in the Harvey Dam litigation. *See In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 138 Fed. Cl. at 666; *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 228–29 (2019).

176 *See* Mississippi v. United States, 146 Fed. Cl. 693, 703–04 (2020) (rejecting the government's argument that a claim based on buildup of sediment is a tort, not a taking, and applying the *Ridge Line* test to determine that the case can be heard as a taking).

177 *See* Sinclair, *supra* note 17, at 273–74.

178 *See id.*; Flick, *supra* note 20, at 431.

2100.[179] Another study estimates inland flood damage driven by climate change will cause up to seven billion dollars in damage within the contiguous United States alone by 2100, with the greatest exacerbation of flooding occurring in the Southeast, Northeast, and Midwest.[180] More precipitation and flooding leaves more chances for government projects to cause or exacerbate flooding of particular properties that would otherwise not have been flooded.

Takings law, as it stands, is not a viable mechanism for mitigating climate change impacts.[181] However, where property is flooded, and that flooding is caused or exacerbated by the misguided government decisions of the past, property owners will still attempt to seek compensation from the government for the loss of their property. Under recent expansive interpretation of the Discretionary Function Exception in the FTCA, plaintiffs like those in *St. Bernard Parish* and *Upstream Addicks* are unlikely to be able to prevail on a tort claim.[182] Under *St. Bernard Parish*, the ability of similar plaintiffs to recover in an inverse condemnation claim could now be severely limited.[183] Of course, this may be exactly the result the Federal Circuit sought to achieve.

While holding the government liable for takings for flooding caused by a total lack of action is not appropriate, allowing the government to sidestep takings liability by contorting the facts into a case of inaction where it had previously affirmatively acted could leave a population of climate refugees who are victims of their own government.[184] As seen in the Hurricane Harvey dam litigation, there can be plausible arguments on either side that a particular component of what caused the flooding should be treated as action or inaction.[185] Rather than reducing the conversation to clever wordsmithing by lawyers, where there is some affirmative act by the government, the

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179 Scott A. Kulp & Benjamin H. Strauss, *New Elevation Data Triple Estimates of Global Vulnerability to Sea-Level Rise and Coastal Flooding*, NATURE COMMC'NS (Oct. 29, 2019), https://www.nature.com/articles/s41467-019-12808-z [https://perma.cc/X7P2-53Y3?type=image].

180 Cameron Wobus, Ethan Gurmann, Russell Jones, Matthew Rissing, Naoki Mizukami, Mark Loriel, Hardee Mahoney, Andrew W. Wood, David Mills, & Jeremy Martinich, *Climate Change Impacts on Flood Risk and Asset Damages Within Mapped 100-Year Floodplains of the Contiguous United States*, 17 NAT. HAZARDS & EARTH SYS. SCIS., 2199, 2207–08 (2017).

181 *See* Sinclair, *supra* note 17, at 272–73.

182 *See* Dyess, *supra* note 112, at 323–25.

183 *See* Sinclair, *supra* note 17, at 272–73.

184 *See supra* Section III.C; Dyess, *supra* note 112; Sinclair, *supra* note 17.

185 *See supra* Section IV.D.

Ridge Line test should govern whether flooding attributable to subsequent operational decisions is compensable as a tort or a taking.[186]

Future courts should treat the action-inaction discussion in *St. Bernard Parish* as dicta or shorthand for the flooding not being a direct, natural, or probable result of the construction and operation of the MR-GO and continue to apply the *Ridge Line* test.[187] While there is some evidence that the causation holding of *St. Bernard Parish* will have the most impact over future cases,[188] future plaintiffs must be aware of the potential impact of the action-inaction distinction and be prepared to employ arguments to diminish its sway over the result of their case if they hope to be compensated for government-caused flooding of their property.

186 *See supra* Section IV.B.

187 *See supra* Part IV.

188 *See, e.g.*, Mississippi v. United States, 146 Fed. Cl. 693, 701–03 (2020) (analyzing causation where multiple government actions might have increased or decreased flood risk through the lens of the analysis in *St. Bernard Parish*); Ideker Farms, Inc. v. United States, 146 Fed. Cl. 413, 421 (2020) (applying the causation holding and an exception articulated in *St. Bernard Parish* to a flood takings case arising out of the Army Corps' Missouri River Recovery Program).