General Information for Flood Victims©[1]

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During the 2011 flood, examinations of the river, while at its highest flood stages, and of the damages left after the river receded, were conducted by DOMINALAW Group pc llo. We inspected the river from northwest Missouri to the Nebraska South Dakota border in Boyd County. Along the way our inspections, both from the ground and the air included examinations of the river from north to south:

Sunshine Bottoms in Boyd County, Nebraska
Lazy River Acres, Niobrara, Nebraska
Santee, Knox County, Nebraska
Gavins Point Dam in Knox County
Yankton and Vermillion in South Dakota
New Castle and Ponca in Dixon County, Nebraska
Dakota City, Nebraska
Dakota Dunes, South Dakota
Homer, Dakota County, Nebraska
Decatur and Tekamah in Burt County, Nebraska
Onawa and Missouri Valley in Onawa and Harrison Counties, Iowa
Blair and Fort Calhoun, Nebraska
Honey Creek, Iowa
Omaha and Council Bluffs
Bellevue, Sarpy County, Nebraska
Percival and Hamburg, Iowa
Rulo, Nebraska
Mound City and Fortescue, Holt County, Missouri
St. Joseph, Missouri

Suing the Corps of Engineers

We considered responsibility for causation of the 2011 flood in detail. Much attention was devoted to the theories that (a) the Corps of Engineers mismanaged the river and caused the flood, and (b) the Corps of Engineers intends to move people away from the river, and allegedly intentional flooding is motivated by this policy.

The US Army Corps of Engineers has been responsible for the management of the Missouri River since Congress first allocated responsibility and funds for this purpose. This occurred in 1824. Since then more than a dozen congressional enactments have expanded and altered the Corps' authority and duties.

When the Missouri River dams were built, three (3) basic congressional mandates governed Corps operations of the dams.

1. Flood control.
2. Hydroelectric power.
3. Navigation.

Over the years many more duties were added. They include:

4. Protection of water supply.
5. Preservation of consumptive beneficial uses, i.e., water for man.
6. Water quality.
7. Fish and wildlife.
8. Endangered species.
9. Historical preservation.

The *Clean Water Act* and other anti-pollution measures, designed to protect all the nation's waters, impact the river. The *Clean Water Act* is policed by State Departments of Natural Resources and the US EPA. It is not the Corps' direct responsibility.

These historical comments are offered to help the reader understand the evolving nature of the Corps' mission. Congress has not ranked the activities in order of importance, and it has not authorized the Corps to do so. Though this letter lists the priorities in a numerical sequence, this *does not* reflect congressional policy or Corps authority. Congress has made it the Corps' duty to meet all management objectives and make all equally prior and important.

The complex nature of the river system and the complex, conflicting array of congressional mandates have changed what the Corps must consider, how it makes decisions, and what it must decide. This explanation is background. It sets the stage for understanding a complicated legal problem.

Sovereign Immunity

The problem is ***sovereign immunity***. Simply, sovereign government is immune from suit by its citizens for anything except to the extent it consents to be sued. The United States Constitution's Fifth Amendment contains an important limitation on sovereign immunity. The government is required to pay a citizen when it ***takes*** property for a public purpose. A "taking" is different from a one-time, single event, intentional or negligent act, which

is called a ***tort***. The government is immune from liability for torts, but must pay for takings.

Congress has enacted a federal *Tort Claims Act*. It includes a partial waiver of sovereign immunity for cases like, for example, automobile collisions involving military vehicles and civilians, etc. But, the *Tort Claims Act* does not waive sovereign immunity for damages resulting from floods caused by intentional or negligent acts of the United States, or the Corps of Engineers, on the nation's rivers and streams. Simply, the Corps is immune for suits based on tort claims for flood damages. This is fortified by the *Mississippi River Systems Control Act*, which firmly, simply provides that the United States and the Corps shall not be liable for damages caused by floods anywhere under any circumstances. This *Mississippi Act* includes the entire Mississippi River Basin and all its tributaries.

How Does a Tort Differ From a Taking

Torts for which the federal government is immune from suit and takings for which it must pay compensation, must be distinguished. This is an obligation of federal courts hearing such cases. When the taking is not acknowledged by the government, and the proceeding is one brought by the property owner to prove the taking, it is called inverse condemnation. "Inverse condemnation" law is tied to and parallels tort claim.[2] Not all government invasions of property by flood waters, sand, or otherwise, are "takings," even though the owner's property might be destroyed by the process. Courts have held that:

> The line distinguishing potential physical takings from possible torts is drawn by a two-part inquiry. First, a property loss compensable as a taking… [occurs]… when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an unauthorized activity and not an incidental or consequential injury inflicted by the [government] action…. Second, the nature and magnitude of the government action must be considered. Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate benefit to the government at the expense of the property owner, or at least preempt the property owner's *right to enjoy his property* for an extended period of time, rather than merely inflicting injury that reduces its value.[3]

Distinguishing "between torts and takings can be a difficult exercise…."[4]

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[2] 9 Rohan & Reskin, *Nichols on Eminent Domain* § 34.03[1].
[3] *Ridge Line, Inv., v. US*, 346 F3d 1346 (Fed Cir 2003).
[4] *Placer Mining Co., Inc., v. US*, 98 Fed Cl 681 (CFC 2011).

The two-part test announced in the 2003 *Ridge Line* decision and followed in 2011 by the Court of Federal Claims in a case against the United States is difficult to apply to a setting like the 2011 flood. In an attempt to make the laws' expectations for prove clearer, efforts to delineate the elements of proof required in tort claims arising from floods and flooding have been made. Reduced to their essence as we read them, the current state of the law requires these elements to prove a right to be compensated for a taking in an inverse condemnation case:

1. Ownership of a property right.

2. Interference in that property right by the government.

3. For a public purpose.

4. Interference that is more than indirect and consequential as a result of the government action, but instead constitutes an actual, permanent invasion of the land resulting in either a permanent condition of continual overflow or a permanent liability to intermittent but inevitably recurring overflows.

5. Proof of the Original High Watermark and the likelihood of inevitably recurring floods above it.

6. Damages, measured by the difference between the value of the property before the taking and its value after the taking.[5]

Generally, if a particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim.[6] But, cases involving flooding and flowage easements are different. The Supreme Court and the Court of Federal Claims, which is responsible for appellate decisions below the Supreme Court level in cases involving alleged condemnation by the federal government, dictate the courts must distinguish between a tort and a taking. An injury that is only "in its nature indirect and consequential" is a tort and "cannot be a taking."[7]

Since 1924 the Supreme Court has recognized that, to be considered a taking, overflows or floods must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.[8] Since the early part of the 20th Century, the Supreme Court has stated an invasion is permanent when there is a

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5 *Arkansas Game & Fish Commn v. US*, 637 F3d 1366, 1373 (Fed Cir 2011), citing *United States v. Gress*, 243 US 316 (1917).

6 *First English Evangelical Lutheran Church of Glendale v. City of Los Angeles*, 482 US 304 (1987).

7 *Sanguinetti v. United States*, 264 US 146 (1924).

8 *Id*. at 149.

"permanent condition of continual overflow" or "a permanent liability to intermittent but inevitably recurring overflows."[9]

In a 1917 flooding case, the Supreme Court found a taking where the erection of a lock and dam system on the Cumberland River subjected the plaintiff's lands to frequent overflows. It explains that these intermittent overflows were not a case of temporary floodings or consequential injury where takings liability would be denied, but instead a permanent condition resulting from the erection of the lock and the dam.[10] The Supreme Court further stated that "no difference of kind between a permanent condition of continual overflow and a permanent liability to intermittent but inevitably recurring overflows" is made for purposes of compensating for a taking.[11]

Intermittent overflow and flowage easements are well known to people along some parts of the Missouri River system. In northwest Knox County, where the Niobrara and Missouri Rivers converge, flowage easements have been acquired through negotiations with the Corps, and takings established through legal proceedings that resulted in recovery of damages for inverse condemnation.[12]

When Does the Time to Sue Accrue?

Inverse condemnation claims can involve very tricky statute of limitations issues. Federal law bars claims unless filed in court within six years after their accrual.[13] Compliance with the statute of limitations is critical because in the area of takings litigation, it is jurisdictional and cannot be waived.[14] A claim exists, and the government may first be sued, when "all events" have transpired that fix the government's alleged liability entitling the claimant to demand payment and sue in the Claims Court.[15]

Property owners cannot wait to sue and test their legal theories to see if it floods in the future, thinking their claims be brought down the road several years, if necessary.

What Does it Take to Prove Either a Permanent Invasion or Inevitably Recurring Flooding, i.e., a Taking?

First, invasion of land by water, including "super induced actions of water so effective as to destroy or impair [the usefulness of property] is a taking within the meaning of the

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9 *United States v. Cress*, 243 US 316 (1917); *United States v. Kansas City Life Ins. Co.*, 339 US 799 (1950).
10 *Cress*, 243 US at 327.
11 *Cress*, 243 US at 328
12 *Barnes v. United States*, 538 F2d 865 (Ct Cl 1976).
13 28 *USC* § 2501, the statute of limitations governing claims against the United States and limiting the authority of the Federal Claims Court to adjudicate them. Claims of persons under disabilities may be extended and filed within three after the disability ceases.
14 *Soriano v. United States*, 352 US 270, 273 (1957)
15 *Leeth v. United States*, 22 Cl Ct 467, 483 (CFC 1991)

Constitution.[16] In fact, until recent decisions, the Court considered "a physical intrusion by government to be a property restriction of an unduly serious character for purposes of [Fifth Amendment's] Takings Clause."[17] In flooding cases, a "complex balancing process"[18] was used. Courts recognized that "isolated invasions, such as one or two floods… do not make a taking… but repeated invasions of the same type… did."[19] Generally, when the invasion "preempts the owner's right to enjoy his property for an extended period of time" principles of constitutional deprivation of property apply.[20] The problem is to distinguish between short-term invasions of property by water which result from natural occurrences, either attenuated or mitigated by dams and releases from them on the one hand, or by government takings actions on the other.

Government induced flooding was a recognized physical intrusion.[21] But, more prominent decisions clarify that this invasion must be more than a single-time event, and must involve proof of a likelihood of recurrent flooding. Even a long-term invasion, like three months, but a single flood, may make it impossible to win an inverse condemnation case against the government.

These issues have produced hotly contested decisions and split courts.[22] The law in this areas is very complex and case specific. Recognizing this uncertainty, we think the bottom line is there is a much lower probability for success in court if the theory asserted against any federal agency involves a claim of long-term temporary invasion, such as the 90-day water invasion in 2011 by Missouri River flood waters, as contrasted with proof of inevitably likely recurrent flooding.

The science of hydrology must be resorted to in order to prove how frequently flooding is expected to recur on a scientific basis. These disputes often involve complicated computer modeling and hydrology studies, generally relying heavily on river data collected by the Corps.[23] The proof involved in expert testimony must be specifically and sufficiently certain to be well founded in science and testable for a margin or rate of error, and it must employ recognized scientific methods and not "junk science."[24]

First, the Original High Watermark must be proven. Below this mark, which varies from case to case and is not necessarily the same as a flood map's designations of floodways or flood plains, the United States has a well recognized "navigational servitude" or right to use the space below this mark for flowage of water, without paying just compensation.

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16 *Pumpelly v. Green Bay Co.*, 80 US 166 (1872)
17 *Loretto v. Teleprompter Manhattan CATV Corp*, 458 US 419, 426 (1982).
18 *Id*. at 436 N12
19 *Ridgeline, Inc., v. United States*, 346 F3d 1346, 1357 (Fed Cir 2003).
20 *Ridgeline*, 346 F3d at 1356.
21 *Loretto v. Teleprompter*, *supra* at FN ___.
22 *Arkansas Game & Fish Commission v. United States*, 637 F3d 1366 (Fed Cir 2011).
23 *Id.*.
24 *Id.*

The "navigational servitude" is a "superior navigation easement existing on all land with a high watermark adjacent to a navigable stream, and it creates a 'blanket exception to the Takings Clause'… to promote navigation."[25]

Proof of the location of the Original High Watermark is also required and proof that water exceeded the OHWM is necessary to establish a takings case.

Summary

Management of the nation's rivers in the public interest is complicated hydrologically, physically, and from an engineering perspective. These complications are compounded by congressional mandates affecting management of the river and by the progressive nature of those mandates which have persistently failed to distinguish between or among one another in order to prioritize river management objectives.

Without river management objectives, flood control is "just another reason" for the Missouri River dams to exist or to be managed in a particular way. Congress has never made flood control more important, or a higher priority, than fish & wildlife, or endangered species protection, or irrigation, or hydroelectric power, or any of the other priorities.

The Corps of Engineers is immune from suit for torts, i.e., one time invasions of property in floods, even if caused by the government. The government is never liable for floods either because nature caused the flooding, or because, on an isolated one-time basis, the government made a mistake.

The likelihood of recurrence must be established, along with the other elements of proof mentioned in this paper to prevail in a claim for compensation for damage to one's property in the 2011 floods.

What Will Our Action Be?

We do not know whether sufficient evidence can be marshaled to prove a takings case. A comprehensive hydrology study is needed and, without it, we simply cannot tell whether a takings case can be proven. We support conduct of the study and think its occurrence is wise. It may be wise to develop a system by non-lawyers, preferably to raise funds and provide a membership vehicle for investment by members with interests in the outcome and the right to use the results. A high-quality hydrologist, sufficiently armed with data and assured of compensation, must do his or her work and decide whether, on a scientific basis, the facts are present to support and prove a claim.

[25] *Kaiser Aetna v. United States*, 444 US 164, 171-3 (1997).