CHOOSE YOUR PATH TO RECOVERY AGAINST THE UNITED STATES: TORTS V. TAKINGS

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The Court of Federal Claims has jurisdiction over takings claims against the United States and specifically does not have jurisdiction over cases "sounding in tort." Conversely, district courts have exclusive jurisdiction over claims brought under the Federal Tort Claims Act (FTCA) against the United States. The Court of Federal Claims and district courts have struggled to clarify and simplify the distinction between a tort claim and a takings claim. Historically, district courts have dismissed FTCA tort claims for better fitting the definition of a takings claim; however, there has been a more recent trend toward allowing claimants to remain in district court if they choose to characterize their claim as a tort rather than a taking. This Note explores the history of the tort-taking distinction and supports the recent trend toward allowing claimants to choose their path to recovery against the United States.

INTRODUCTION

"The best that can be said is that not all torts are takings, but that all takings by physical invasion have their origin in tort law and are types of

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governmental nuisances or, at times, trespasses."[1] Both the federal district courts and the United States Court of Federal Claims ("Court of Federal Claims") have struggled throughout the years to establish and appropriately apply a test to distinguish torts brought against the United States from constitutional takings. This distinction must be made because the Court of Federal Claims has jurisdiction over actions arising out of the constitution—such as takings claims—but not the cases "sounding in tort."[2] Concurrently, district courts have exclusive jurisdiction over those cases "sounding in tort."[3] Historically, district courts have forced tort claims out of district court and into the Court of Federal Claims for amounting to a taking rather than tort claim. However, in more recent years the district courts have trended towards allowing claimants to remain if they wish to characterize their claim as a tort.

This Note documents the creation of this trend and supports it. In Section I, the background of torts and takings are outlined including their origins and how to allege these types of actions against the United States. Section II describes how jurisdiction in the Court of Federal Claims is obtained and how this court has distinguished torts from takings. Similarly, Section III describes how jurisdiction in federal district courts is obtained for a tort claim and how these courts, and their corresponding appellate courts have handled the tort-taking distinction. Section IV discusses various courts' recent trend toward allowing more claimants to remain in federal district court with their tort claims. In conclusion, this Note suggests this trend is a positive occurrence and claimants should be able to characterize their claim as a tort if they wish. Claimants should be able to choose their path to recovery after evaluating the pros and cons of filing in federal district court versus the Court of Federal Claims.

I. BACKGROUND ON TORTS AND TAKINGS

Although torts derive from common law and takings derive from the United States Constitution, the basic principles that establish each type of claim overlap at times. There has been a dispute throughout the years whether the same operative facts can give rise to both a tort and a taking, but, as will be explained below, the answer seems to be shifting toward the affirmative. To bring a suit against the United States under either theory requires overcoming the government's sovereign immunity. The Federal Tort Claims Act (FTCA) provides such waiver of immunity for

[1] Hansen v. United States, 65 Fed. Cl. 76, 80 (2005) (discussing the convoluted history of distinguishing between tort claims and takings claims in the Court of Federal Claims).

[2] Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005).

[3] Karlen v. United States, 727 F. Supp. 544, 548 n.4 (C.D. S.D. 1989).

some tortious conduct. Similarly, the United States Constitution itself provides a waiver for takings claims.

A. Source of Torts and Takings

"[T]he historical origin and application of the basic principles of takings jurisprudence reveal that there is no clear cut distinction between torts and takings."[4] Tort law is typically derived from the common law of the state where a tort occurs.[5] Takings jurisprudence is derived from the Constitution, which provides that "[n]or shall private property be taken for public use, without just compensation."[6] However, the definition of "property" within this clause of the Constitution depends on common law trespass and nuisance tort principles.[7] As a result, the development of takings law can be described as "an extension of the principles of trespass and nuisance to the actions of the government."[8]

The scope of trespass and nuisance tort claims are broader and therefore easier to allege than takings claims. The Restatement (Second) of Torts describes that a person trespasses

> if he intentionally (a) enters land in the possession of [an]other, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.[9]

The Restatement (Second) of Torts describes a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[10] Historically, because it was much easier to allege the United States "intentionally entered" or "invaded another's private use and enjoyment of land," courts attempted to limit takings liability to only those instances "where the harm resulted directly from government action . . . ."[11] By doing so, courts incorporated the additional tort elements of causation-in-fact and proximate cause into early takings analysis.[12]

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[4] *Hansen*, 65 Fed. Cl. at 80.

[5] *See generally* Nelson P. Miller, *An Ancient Law of Care*, 26 WHITTIER L. REV. 3 (2004) (discussing the history and development of tort law).

[6] U.S. CONST. amend. V.

[7] *Hansen*, 65 Fed. Cl. at 96 ("Indeed, the common law of property relied on tort principles, particularly trespass and nuisance, to help define the concept of property itself and the scope of property interests.").

[8] *Id.*

[9] RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW. INST. 1965).

[10] *Id.* at § 821D.

[11] *Hansen*, 65 Fed. Cl. at 96.

[12] *Id.*

Because takings jurisprudence is somewhat dependent on the basic elements of tort law,[13] drawing the line between takings and torts has caused a great deal of confusion in the courts. In particular, both takings and torts rely on causation—one of the most troublesome elements needed to establish tortious conduct (and similarly, takings).[14] However, takings typically assume the government acted intentionally and lawfully, and "the [g]overnment should have predicted or foreseen the resulting injury."[15] The requirements for alleging a tort or taking against the United States will be further discussed in Sections II and III.

B. Overcoming the United States' Sovereign Immunity in Torts and Takings Cases

To bring a claim against the United States for either a tort or a taking requires overcoming the United States' sovereign immunity. The United States is immune from suit unless the Constitution or federal law provide otherwise.[16] The FTCA provides a limited waiver of sovereign immunity for actions based on common law torts.[17] Similarly, the United States Constitution provides a waiver of sovereign immunity for the taking of private property for public use without providing compensation.[18]

The FTCA was enacted by Congress in 1946 to provide a judicial forum in federal district courts for parties to bring tort claims against the United States.[19] It provides:

> [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, or personal injury or death 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 . . . .[20]

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[13] Bud Davis, *Strengthening the Floodwalls: Reinterpreting the Federal Circuit's Ridge Line Test to Limit Government Liability in Takings Jurisprudence*, 26 FED. CIR. B.J. 29, 39 (2016) ("[T]he elements of a tort are (1) a duty owed from one to another; (2) an act or omission that breaches that duty; (3) causation; and (4) injury to another.").

[14] *Id.* (establishing the element of proximate cause requires "consideration[] of directness, foreseeability, and probability, which are not always easily discernible").

[15] *Id.* (citing Moden v. United States (*Moden II*), 404 F.3d 1335, 1343 (Fed. Cir. 2005)).

[16] JOHN T. PARRY, CASES AND PROBLEMS IN CIVIL RIGHTS LITIGATION 28 (2016).

[17] *Id.* at 32.

[18] *Id.* at 28.

[19] Jed Michael Silversmith, *Takings, Torts & Turmoil: Reviewing the Authority Requirement of the Just Compensation Clause*, 19 UCLA J. ENVTL. L. & POL'Y 359, 364 (2001–2002) (Prior to enactment of the FTCA, a claimant's "only avenue of relief was . . . to obtain a private bill from Congress."). However, by the 1940s, Congress was overburdened and "was considering upwards of 2,000 private bills a year.").

[20] 28 U.S.C. § 1346(b)(1) (2012).

The liability of the United States under the FTCA is determined "in accordance with the law of the place where the act or omission occurred."[21] Therefore, state tort law must be analyzed in each FTCA law suit.

In addition, there are multiple exceptions to the FTCA's waiver of sovereign immunity.[22] The United States often raises the defense that its act or omission was a discretionary function. The discretionary function exception protects the United States where it uses discretion in the performance of its duties.[23] The FTCA's waiver of sovereign immunity also does not apply to "claim[s] arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ."[24] There are other exceptions to the waiver, but they are outside the scope of this discussion.

In order to file a claim against the United States in district court under the FTCA, a claimant must first exhaust his administrative remedies.[25] An administrative tort claim must first be filed with the appropriate federal agency, which will then either be settled or denied.[26] If the agency fails to make a final disposition within six months after filing, the claim is considered denied. [27] A two-year statute of limitations applies to the FTCA; therefore, a claimant must present the claim to the federal agency within two years after the claim accrues.[28] As further discussed in Section

[21] *Id.*

[22] 28 U.S.C. § 2680 (2012).

[23] *Id.* § 2680(a) (The FTCA does not apply to "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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."). *See, e.g.*, United States v. Gaubert, 499 U.S. 315, 322 (1991) ("The exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice,' . . . and 'it is the nature of the conduct, rather than the status of the actor' that governs whether the exception applies. The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'") (citations omitted) (alterations in *Gaubert*).

[24] 28 U.S.C. § 2680(h) (2012). *See, e.g.*, JBP Acquisitions, LP v. United States, 224 F.3d 1260, 1262 (11th Cir. 2000) (finding the plaintiff's claim against the United States barred by the FTCA misrepresentation exception); Talbert v. United States, 932 F.2d 1064, 1065 (4th Cir. 1991) (finding the plaintiff's claim barred by the libelous statement exception to the FTCA).

[25] 28 U.S.C. § 2675(a) (2012).

[26] *Id.*

[27] *Id.*

[28] 28 U.S.C. § 2401(b) (2012) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months

IV, the limitations period may be restarted if a continuing tort theory is successfully alleged.[29]

As previously mentioned, the United States Constitution provides a waiver of sovereign immunity for takings claims against the United States. The Tucker Act establishes that jurisdiction for takings claims greater than $10,000 is in the Court of Federal Claims:[30]

> The United States Court of Federal Claims shall have 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 liquidated or unliquidated damages in cases not sounding in tort.[31]

The predecessor to the Court of Federal Claims—the United States Court of Claims ("Court of Claims")—was established in 1855 to help relieve Congress from the number of private bills.[32] The Tucker Act was enacted in 1887 and "greatly expanded the Court of Claims' jurisdiction to include virtually all money claims against the United States . . . ."[33] By 1982, Congress split the Court of Claims into two by placing trial jurisdiction into the United States Claims Court ("Claims Court") and appellate jurisdiction into the United States Court of Appeals for the Federal Circuit ("Federal Circuit").[34] The name of the Claims Court was changed by Congress in 1992 to the Court of Federal Claims.[35]

The phrase "in cases not sounding in tort" has been interpreted broadly to "exclu[de] . . . tort cases from the court's jurisdiction" entire-

after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.").

[29] *See infra* Section IV (suggesting a claimant can avoid being forced out of district court and into the Court of Federal Claims by correctly characterizing his claim as a tort, continuous if necessary).

[30] However, the district courts have jurisdiction over takings claims where damages are less than $10,000. *See* 28 U.S.C. § 1346(a)(2) (2012) ("The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . . [a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon the Constitution . . . ."). Furthermore, the Federal Circuit has appellate jurisdiction over both claims in district courts and the Court of Federal Claims for takings claims. *See* Silversmith, *supra* note 19, at 364.

[31] 28 U.S.C. § 1491(a)(1) (2012).

[32] Robert Meltz, *Takings Claims Against the Federal Government*, SE18 ALI-ABA 475, 477 (1999).

[33] *Id.*

[34] *Court of Claims, 1855–1982*, FED. JUD. CTR., https://www.fjc.gov/history/courts/court-claims-1855-1982.

[35] Meltz, *supra* note 32, at 477. Both the Court of Federal Claims and Claims Court will be referred to and cited in this Note but should essentially be considered the same court.

ly.[36] As a result, to allege a taking claim, a claimant must properly characterize his claim as a taking and avoid characterizing it as a tort to avoid being dismissed from the Court of Federal Claims for lack of jurisdiction. Furthermore, the Tucker Act subjects claimants to a six-year statute of limitations for takings claims.[37]

C. Alleging Both a Tort and Taking Under the Same Operative Facts

There is disagreement among the legal community regarding whether a claim can be characterized as both a tort and a taking or whether they are two distinct claims. Regardless of which is true, a claimant cannot double recover by alleging a tort claim in district court and a takings claim in the Court of Federal Claims.

The Claims Court has found—in dicta—that a claim can be characterized as both a tort or taking, as long as double recovery is not obtained. In *Clark v. United States* (*Clark III*), a claimant filed suit in the Claims Court alleging a taking and two months later filed suit in district court alleging a tort.[38] After the district court found the claimant had successfully alleged a tort under the FTCA, the claimant then brought her claim back to the Claims Court.[39] Although the Claims Court dismissed because double recovery is not allowed, the court stated that "[a]lthough [the claimant] was proceeding under a tort theory before the district court, seeking damages for diminution in the value of her property, the facts established in the district court proceeding also give rise to a taking claim."[40]

Some commentators agree with the Claims Courts and argue that a claimant may file both a tort claim and taking based on the same operative facts.[41] For example, one commentator explains that although a

[36] Hansen v. United States, 65 Fed. Cl. 76, 95 (2005); *see, e.g.*, Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997) ("The Court of Federal Claims is a court of limited jurisdiction. It lacks jurisdiction over tort actions against the United States.").

[37] 28 U.S.C. § 2501 (2012) ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.").

[38] Clark v. United States (*Clark III*), 19 Cl. Ct. 220, 221 (Cl. Ct. 1990); *see also* Clark v. United States (*Clark I*), 8 Cl. Ct. 649, 650 (Cl. Ct. 1985); Clark v. United States (*Clark II*), 660 F. Supp. 1164, 1175 (W.D. Wash. 1987), *aff'd*, 856 F.2d 1433 (9th Cir. 1988).

[39] *Clark III*, 19 Cl. Ct. at 221.

[40] *Id.*

[41] Silversmith, *supra* note 19, at 389 ("The only conduct that can potentially be both a Fifth Amendment taking and a tort are trespasses and nuisances."); *see also* Meltz, *supra* note 32, at 493 ("An interesting question is whether a government action can constitute a tort and taking at the same time. A predecessor [Court of Federal Claims] court suggests yes. A commentator, however, has criticized *Clark*, in part because of then-existing case law indicating that no illegal acts of the United States of any kind can form the basis for a taking. However, recall the Federal Circuit's recent

claimant cannot pursue a Tucker Act claim while another complaint is pending in district court, or file two claims simultaneously, "[t]here is one loophole . . . ."[42] If you first file a claim in the Court of Federal Claims, there is nothing preventing a claimant from then filing a claim based on the same operative facts from seeking the same relief in district court.[43] However, it is important to be mindful of procedural requirements such as the statute of limitations and other jurisdictional barriers.[44]

Others have criticized the *Clark III* dicta suggesting a tort and taking can be based on the same facts. One commentator argues *Clark III's* "reasoning is flawed and misconstrues the issue."[45] He argues the main difference between a tort and taking is the "bedrock principle of Fifth Amendment jurisprudence that a taking claim must be predicated on an *authorized* government act."[46] Because a taking claim must be based on an authorized act and all torts must be based on unauthorized tortious conduct, he believes the two cannot be based on the same set of facts.[47] Similarly, the Court of Federal Claims found fault with *Clark III's* reasoning. In *Moden v. United States* (*Moden I*), the court determined that "the standard set forth in *Ridge Line* and the long line of precedent cases which have articulated the test to determine whether a claim sounds in tort under the FTCA or whether it is a Fifth Amendment taking case is a sound one which militates against such a viewpoint."[48] However, the Federal Circuit expressed the opposite view upon appeal in a footnote: "several of our cases also indicate that the same operative facts may give rise to both

limiting of this defense to *ultra vires* government actions, as opposed to mere mistakes. This limitation calls into question the view that operative facts cannot form the basis for both types of action.") (internal citations omitted).

[42] Silversmith, *supra* note 19, at 366.

[43] *Id.* at 366–67; *see also* Hansen v. United States, 65 Fed. Cl. 76, 93 (2005) ("Plaintiff's tort action in district court has been stayed pending litigation in this court.").

[44] Silversmith, *supra* note 19, at 367 ("In light of these statute of limitation issues, a plaintiff would be advised to immediately file an administrative tort claim with the relevant agency. Subsequently, the plaintiff should file in the Court of Federal Claims and seek a stay in that court pending resolution of the administrative claim. The plaintiff should then file a tort claim in district court. Finally, if the tort claim is unsuccessful, the plaintiff should resume the Court of Federal Claims case.").

[45] Daniel W. Kilduff, *Tort, Taking, or Both?*, 42 FED. LAW. 25, 27 (1995).

[46] *Id.* at 28 (emphasis in original).

[47] *Id.* at 29. ("An accidental or negligent impairment of the value of property is not a taking, but, at most, a tort, and as such is not within the jurisdiction conferred on the Court of Claims by Congress.") (emphasis removed) (citing Columbia Basin Orchard v. United States, 132 F. Supp. 707, 710 (Ct. Cl. 1955)).

[48] Moden v. United States (*Moden I*), 60 Fed. Cl. 275, 288 (Fed. Cl. 2004) (granting the United States' motion to dismiss a claim alleging ground water contamination due to the use of trichloroethylene (TCE) in aircraft degreasers during the 1940s and 1950s because the facts gave rise to a tort claim rather than a taking).

a taking and a tort."[49] Although the Federal Circuit has not made an express finding on this issue, it is clear the court has come to believe torts and takings may be based on the same facts.

Regardless of whether a tort and a taking can both arise from the same set of facts, a claimant cannot recover under both theories. "Congress did not intend for a plaintiff to recover damages under a taking theory in [the Court of Federal Claims], after recovering damages in an FTCA action based on the same operative facts."[50]

II. JURISDICTIONAL REQUIREMENTS FOR A TAKINGS CLAIM IN THE COURT OF FEDERAL CLAIMS

As mentioned previously, the Court of Federal Claims does not have jurisdiction over cases "sounding in tort."[51] If the court determines that a claim is sounding in tort, it must dismiss the claim and force the claimant to either not recover or recover under a tort theory in district court.[52] As a result, over the past century, the Court of Federal Claims (and its predecessor courts) has struggled to establish a clear test for the tort-taking distinction.[53] An illustration of a more recent—but no longer used—vague test was to determine

> whether the injury to the claimant's property is in the nature of a tortious invasion of his rights or 'rises to the magnitude' of an appropriation of some interest in his property for the use of the gov-

[49] Moden v. United States (*Moden II*), 404 F.3d 1335, 1340 (Fed. Cir. 2005) (clarifying that *Moden I* dismissed the claim on summary judgment rather than jurisdictional grounds).

[50] Clark v. United States (*Clark III*), 19 Cl. Ct. 220, 222 (Cl. Ct. 1990). This opinion is cited for its judgment regarding prohibition of double recovery; however, it has been criticized for its dicta on whether a claimant may allege both a tort and taking on the same operative facts. *See* Meltz *supra* note 32.

[51] *See supra* Section I.

[52] *Moden I*, 60 Fed. Cl. at 279.

[53] For a discussion of early takings analysis, see Hansen v. United States, 65 Fed. Cl. 76, 80 (2005) ("[H]istory reveals that takings jurisprudence has its origin in the common law of property and particularly the tort of nuisance . . . . Courts have accordingly applied the tort concept of proximate (or 'legal') causation, which involves concepts . . . rooted in tort law to a takings analysis, courts have struggled with the meaning of 'foreseeability' and its proper role in takings cases. This struggle is highlighted by courts' use of the concept of foreseeability in two distinct ways. First, some courts employ foreseeability in terms of the intent of the actors, to determine whether they acted with a specific intent to cause the alleged harm. On the other hand, some courts refer to foreseeability in the context of the relationship between the government action and the taking itself, *i.e.*, as an element of a causation analysis.") (internal citations omitted). For examples of earlier cases applying such analysis, see Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329 (1922); Columbia Basin Orchard v. United States, 132 F. Supp. 707, 711 (Ct. Cl. 1955); Cotton Land Co. v. United States, 75 F. Supp. 232, 235 (Ct. Cl. 1948).

> ernment. Determining whether a claim sounds in tort or taking is a fact-based inquiry.[54]

However, in 2003, the Federal Circuit made its best attempt yet at clarifying the tort-taking distinction test.[55] In *Ridge Line, Inc. v. United States*, a landowner brought a takings claim against the United States for construction of a Postal Service facility adjacent to and uphill from his property, which allegedly resulted in the taking of a water flowage easement.[56] The Court of Federal Claims found the government action did not rise to the level of a taking because it did not constitute "permanent and exclusive occupation" of the land.[57] On appeal, the Federal Circuit found the claim did amount to a taking, rejected the Court of Federal Claims test,[58] and established its own two-pronged test.

> The *Ridge Line* two-prong test—still used today—is as follows:
>
> 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.[59]

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[54] Drury v. United States, 52 Fed. Cl. 402, 403–04 (Fed. Cl. 2002) (internal citation omitted). The court dismissed the claim as "sounding in tort" because it involved allegations of "trespass, disturbing the peaceful possession of the lessee of the property, conversion, failure to repair property, failure to notify plaintiff of defendant's acts, loss of rental income, and destruction of certain improvements on the property . . . ." *Id.* at 404.

[55] *See* Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003); *see also* Jennifer Helgeson-Albertson, *Setting* Moden *Straight:* Hansen v. United States *and the Model Application of the Tort-Taking Distinction Test*, 11 GREAT PLAINS NAT. RESOURCES J. 101, 109 (2007) ("The Federal Court of Claims struggled to determine where the line between a tort and a taking occurred until *Ridge Line, Inc. v. United States* clarified the distinction with a two pronged, tort-taking distinction test.").

[56] *Ridge Line*, 346 F.3d at 1350–51.

[57] *Id.* at 1352.

[58] *Id.* ("A permanent and exclusive physical occupation of private land by or on the authority of the government is one incontestable case for compensation under the Takings Clause. However, a permanent occupation need not exclude the property owner to be compensable as a taking. Nor must the occupation be continuous.") (citations omitted).

[59] *Id.* at 1355–56 (emphasis added). Subsequent courts have slightly altered the second prong of the test by adopting different language from *Ridge Line*. For the Federal Circuit's alteration, see Moden v. United States (*Moden II*), 404 F.3d 1335, 1342 (Fed. Cir. 2005) ("Second, it must show that the invasion appropriated a benefit to the government at the expense of the property owner, at least by preempting the property owner's right to enjoy its property for an extended period of time, rather than merely by inflicting an injury that reduces the property's value."). For a district court's description of the same test, see Judy Family Trust v. United States, No. CV11-006440E-EJL, 2012 WL 12894841, at *3 (D. Idaho June 5, 2012) ("[T]he invasion

In other words, the first prong requires a showing that "the effects of the government action are predictable . . . ."[60] The second prong has been described as the "substantiality" prong.[61] An illustration of substantiality is that "'[i]solated invasions, such as one or two floodings . . . , do not make a taking . . ., but repeated invasions of the same type have been held to result in an involuntary servitude.'"[62]

The *Ridge Line* test is applied in the context of summary judgment motions rather than motions to dismiss for lack of subject matter jurisdiction. Originally, the Court of Federal Claims used the test to determine whether it was required to dismiss for lack of jurisdiction. However, the Federal Circuit has since clarified the test is used for summary judgment motions and not jurisdictional motions. As a result, the Federal Circuit first determines jurisdiction on other grounds and then uses the *Ridge Line* test to address the tort-taking issue on summary judgment. The cases that follow illustrate this shift and how the *Ridge Line* test has been subsequently interpreted.

In *Hansen v. United States*, a ranch owner brought a takings claim against the United States alleging groundwater on his property was contaminated as a result of the Forest Service burying cans containing pesticides on adjacent property.[63] The United States filed a motion to dismiss and motion for summary judgment based on lack of jurisdiction allegedly because the claim gave rise to a tort.[64] The Court of Federal Claims denied the United States' motions and found the claimant had "produced sufficient evidence for the court to conclude that genuine issues of material fact preclude summary judgment under the [*Ridge Line*] tort-taking distinction test . . . ."[65] The first prong (the "causation" prong) was satisfied because even "the Forest Service itself ha[d] acknowledged that it

must appropriate a benefit to the [Government] at the expense of the property owner; *or* . . . the invasion must at least preempt the owner's right to enjoy the property for an extended period of time, rather than merely inflict an injury that reduces its value.") (emphasis added).

[60] *Ridge Line*, 346 F.3d at 1356.

[61] Hansen v. United States, 65 Fed. Cl. 76, 101 (2005).

[62] *Ridge Line*, 346 F.3d at 1357 (omission in original) (quoting Eyherabide v. United States, 345 F.2d 565, 569 (1965)).

[63] *Hansen*, 65 Fed. Cl. at 81–82.

[64] *Id.* at 80–81 (explaining what a plaintiff must prove to overcome a challenge to jurisdiction: "[S]o long as there is some material evidence in the record that establishes the predicates for a traditional takings claim, including an unreasonable interference of a property interest by the government that is both substantial and continuous, a showing of legal (or 'proximate') causation, and the existence of at least broad authorization for the governmental acts involved, a plaintiff succeeds in demonstrating subject matter jurisdiction in this court based on the Tucker Act and the Taking Clause of the Fifth Amendment.").

[65] *Id.* at 120.

caused the . . . contamination."[66] Furthermore, the contaminate had long been known for its toxicity and there remained an issue of material fact whether the United States should have foreseen the harm.[67] The second prong (the "substantiality" prong) was satisfied because the contamination on the ranch was found to be a "permanent and substantial invasion"; it was predicted to persist for an "indefinite period, at least several years," and the water was undrinkable and unsafe for other purposes.[68] In summation, the Court of Federal Claims determined it had jurisdiction to hear the claimant's takings claim by using the *Ridge Line* test.

In *Moden II*, landowners located near an Air Force base brought suit against the United States alleging their property was taken as a result of operations at the base leading to environmental contamination.[69] The Court of Federal Claims dismissed the claim for lack of subject matter jurisdiction for constituting a tort rather than a taking.[70] On appeal, the Federal Circuit agreed with the trial court's outcome but clarified the distinction between dismissal for subject matter jurisdiction and summary judgment.[71] The court explained "that when a defendant disputes the merits of a claim in a motion to dismiss for lack of subject matter jurisdiction, jurisdiction should be assumed and the merits of the claim should be addressed."[72] Furthermore, the court placed less emphasis on the Tucker Act jurisdictional bar for cases "sounding in tort."[73] Instead of using the *Ridge Line* test to ensure the court has subject matter jurisdiction, a claim should only be dismissed for lack of subject matter jurisdiction if "the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit . . . .'"[74] In the present case, the Federal Circuit found the Court of Federal Claims did have

[66] *Id.* ("Mr. Showman's memo and the notes from the Forest Service interviews with its former employees indicate that Forest Service employees both buried and spilled substantial quantities . . . of EDB on the Work Center property in the mid-1970's. Furthermore, the Forest Service has taken substantial efforts to detect, locate, and clean-up the EDB contamination . . . .").

[67] *Id.* at 122.

[68] *Id.* at 120.

[69] Moden v. United States (*Moden II*), 404 F.3d 1335, 1338 (Fed. Cir. 2005).

[70] *Id.* at 1339.

[71] *Id.* at 1342 ("Thus, we treat the dismissal as a grant of summary judgment.").

[72] *Id.* at 1340.

[73] *Id.* at 1341. The court failed to discuss the phrase "in cases not sounding in tort" at all. Instead, the court noted the following: "In Tucker Act jurisprudence [the] neat division between jurisdiction and merits has not proved to be so neat. In these cases, involving suits against the United States for money damages, the question of the court's jurisdictional grant blends with the merits of the claim." *Id.* (citing Fisher v. United States, 402 F.3d 1167, 1171–72 (Fed. Cir. 2005)) (brackets in *Moden II*).

[74] *Moden II*, 404 F.3d at 1341 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998)).

jurisdiction to hear the claim and they were in reality applying the *Ridge Line* test to a summary judgment motion.[75]

The Federal Circuit's analysis went on to determine whether the claimant had presented a genuine issue of material fact sufficient to allege a taking under the *Ridge Line* test. The court determined the proper question to ask was "whether the contamination of the [claimants'] ranch with [trichloroethylene (TCE)] was the foreseeable or predictable result of the authorized use of TCE on [the base]."[76] The first prong of the test was clarified to require that "the injury was the likely result of the act," rather than "the act was the likely cause of the injury."[77] Although causation must also be shown, it is not alone sufficient to establish liability.[78] Overall, the Federal Circuit agreed with the Court of Federal Claims and determined the claimants failed to prove the United States "should have foreseen the release of the chemical solvents into the groundwater."[79] Thus, the Court of Federal Claims had jurisdiction to hear the claimant's takings claim regardless of the *Ridgeline* test but dismissed the claim on summary judgment after application of the test.

Thus, to obtain jurisdiction in the Court of Federal Claims for a takings claim, a claimant must prove a genuine issue of material fact with respect to the *Ridge Line* two-pronged test. Although the court does not have jurisdiction to hear cases "sounding in tort," it evaluates the tort-taking distinction under summary judgment motion.

III. JURISDICTIONAL REQUIREMENTS FOR A TORT CLAIM IN DISTRICT COURT

As previously mentioned, the FTCA placed exclusive jurisdiction for torts against the United States in the federal district courts:

> [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, or personal injury or death 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 . . . .[80]

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[75] *Id.* at 1341–42 ("In short, we have jurisdiction to address the merits of this case, as did the Court of Federal Claims, because the Modens' claim is neither frivolous nor so insubstantial, implausible, foreclosed by prior decisions, or otherwise completely devoid of merit as not to involve a federal controversy.").

[76] *Id.* at 1343.

[77] *Id.*

[78] *Id.* ("[P]roof of causation, while necessary, is not sufficient for liability in an inverse condemnation case.").

[79] *Id.* at 1344–46.

[80] 28 U.S.C. § 1346(b)(1) (2012); *see also supra* Section I.

After filing an administrative tort claim with a federal agency and either receiving a denial of the claim or no response after six months, a claimant may file a lawsuit in the district court in which the tort occurred.[81] Once in court, the United States is liable to the extent a private party would be—thus, state tort law applies.[82]

As a result, for a claimant to successfully allege the United States is liable it must prove (1) "injury or loss of property, or personal injury or death," (2) caused by "the negligent or wrongful act or omission,"[83] (3) of a federal employee, (4) acting within the scope of his employment, (5) who would be liable for such action under state law.[84] However, there are various exceptions to the FTCA waiver of sovereign immunity, as mentioned previously.[85]

Furthermore, the FTCA two-year statute of limitations must also be overcome for a claimant to be successful in a suit against the United States. One way for a claimant to overcome this obstacle is to assert a continuous tort (if possible). "For permanent torts, the claim accrues the later of when the injury first occurs or when the plaintiff learned or should have learned of his injury and its cause."[86] However, for continuing torts, "the claim continues to accrue as long as tortious conduct continues, although the plaintiff's recovery is limited by the statute of limitations to the two-year period dating back from when the plaintiff's complaint was filed."[87] For example, in *Hoery v. United States*, the Tenth Circuit denied the United States' motion to dismiss for lack of subject matter jurisdic-

[81] 28 U.S.C. § 2675 (2012).

[82] *See* 28 U.S.C § 2674 (2012); *see also* Arcade Water Dist. v. United States, 940 F.2d 1265, 1267 (9th Cir. 1991) ("The FTCA further dictates that state law determines federal government liability.").

[83] *See* Laird v. Nelms, 406 U.S. 797, 800–01 (1972); *see also* Dalehite v. United States, 346 U.S. 15, 44–45 (1953). The United States cannot be held strictly liable for actions such as trespass. Instead, negligent or wrongful conduct must have been the cause of the damage.

[84] 28 U.S.C. § 1346(b) (2012).

[85] *See supra* notes 17–19 and accompanying text. Also, the waiver of sovereign immunity only applies to actions of "any employee of the Government," which does not include independent contractors. "Employee of the government" includes officers or employees of any federal agency. 28 U.S.C. § 2671 (2012). However, "federal agency" does not include any contractor with the United States. *Id.* "[T]he critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the detailed physical performance and day-to-day operations of the contractor." Hines v. United States, 60 F.3d 1442, 1446 (9th Cir. 1995) (internal quotes and citations omitted).

[86] Hoery v. United States, 324 F.3d 1220, 1222 (10th Cir. 2003).

[87] *Id.*

tion due to application of the FTCA statute of limitations, because the plaintiff's claim was considered a continuing tort under state law.[88]

Early cases illustrate how the district courts have forced claims out of district court and into the Court of Federal Claims after determining they do not have jurisdiction over takings claims. In *Myers v. United States*, two claimants sought to recover against the United States under the FTCA in district court for exceeding the scope of a road right-of-way, resulting in damage to their property.[89] The district court dismissed the case after finding the United States had reserved the road right-of-way for a width of 300 feet and were acting within the bounds of such easement.[90] However, on appeal, the Ninth Circuit did not reach the merits of the claims because it found the district court did not have jurisdiction.[91] Without detailed explanation, the court found the Court of Claims had exclusive jurisdiction to hear the claim because the facts alleged a taking rather than a tort ("[t]he repeated characterization by the appellants of the taking by the United States as one of trespass and the commission of waste upon the lands in question does not convert the claims to cases sounding in tort . . . ").[92]

Similarly, the First Circuit came to the same conclusion in *Roman v. Velarde*.[93] In this case, claimants brought suit against the United States for money damages alleging the United States wrongfully purchased their property with knowledge of a defect in title.[94] The district court dismissed the claim finding that the government had not consented to suit under the FTCA; the First Circuit did not reach the merits because it found subject matter jurisdiction lacking.[95] The court reasoned "the FTCA does not provide a supplementary forum for plaintiffs demanding compensation

[88] *Id.* at 1422–24 (requesting certified questions to the Colorado Supreme Court regarding whether the claim did amount to a continuing tort).

[89] Myers v. United States, 323 F.2d 580, 581–82 (9th Cir. 1963) (claimants seeking damages "arising out of the construction by McLaughlin, Inc., of a road known as the Wasilla-Big Lake Junction Road, under contract with the Bureau of Public Roads in the year 1959").

[90] *Id.* at 582 ("Prior to the issuance of the patents to the appellants, the lands were public lands of the United States, and at the time of the issuance of the patents there existed a road or trail across portions of the lands in question . . . "). The parties disagreed about the extent of the width reserved to the United States in the land patent. *Id.*

[91] *Id.*

[92] *Id.* at 583 ("To us the claims of appellants against the United States are founded upon the Constitution, and the acts of the United States complained of are in the nature of inverse condemnation.").

[93] Roman v. Velarde, 428 F.2d 129 (1970).

[94] *Id.* at 131 (private party defendant obtaining false title to the property and subsequently selling it to the United States).

[95] *Id.* at 130–32.

for land permanently taken."[96] It also noted the lack of relief the district court can provide compared to the Court of Claims on these facts.[97]

Another interesting case is *Drury v. United States*.[98] In this case, a claimant filed suit against the United States in district court under the FTCA.[99] The district court—finding the claim more properly alleged a taking—transferred the case to the Court of Federal Claims, which then re-transferred the case back to the district court finding the claim more properly alleged a tort.[100] The Court of Federal Claims used one of the pre-*Ridge Line* tests referred to previously: "whether the injury to the claimant's property is in the nature of a tortious invasion of his rights or 'rises to the magnitude' of an appropriation of some interest in his property for the use of the government."[101] The court determined the damages alleged (trespass, conversion, failure to repair property, destruction of property, etc.) did not amount to a taking.[102] However, this was a unique case because re-transfers of cases should not be allowed "unless the transfer decision was 'clearly erroneous and would work a manifest injustice.'"[103]

These cases demonstrate how federal district courts originally interpreted the FTCA and Tucker Act to preclude them from hearing claims more properly characterized as takings.

IV. CURRENT TRENDS

More recently, there has been a trend in federal district courts and circuit courts to allow claims brought under the FTCA to remain in district court as torts rather than being forced into the Court of Federal Claims as takings. Even in cases which most often appear to be takings (permanent trespasses or nuisance claims), courts have been willing to evaluate the claim under a tort theory if the claimant would rather take that path.

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[96] *Id.* at 132 ("Such a 'condemnation action in reverse,' would be conducted under rules manifestly more appropriate than those available under a 'continuing trespass' theory.") (citations omitted).

[97] *Id.* at 133 ("The relief that the district court is empowered to give for trespass is limited, both in time, and in quality. Time, because the award is normally for a finite period, and quality, because the judgment is simply for monetary damages. In the Court of Claims complete and final compensation for land permanently taken can be awarded. The measure of damages is the full value of the locus at the time of entry.").

[98] Drury v. United States, 52 Fed. Cl. 402 (Fed. Cl. 2002).

[99] *Id.* at 403.

[100] *Id.*

[101] *Id.* at 403–04 (quoting BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998)); *see supra* note 47 and accompanying text.

[102] *Id.* at 404.

[103] *Id.* (quoting Rodriguez v. United States, 862 F.2d 1558, 1560 (Fed. Cir. 1988)).

As early as 1989, the district courts began showing more leniency in allowing tort claims to survive an initial dismissal for lack of subject matter jurisdiction. In *Karlen v. United States*, the District Court for the District of South Dakota allowed a tort claim to remain in district court: the claimants "arguably could sue in the Court of Claims for a fifth amendment taking through inverse condemnation, [but] this Court is reluctant to dismiss the case at this early stage when tort theories support the suit."[104] In this case, the claimants alleged the United States had damaged their property by negligently designing and constructing a road outside the scope of its easement.[105] The United States filed a motion to dismiss based on lack of subject matter jurisdiction.[106] The court noted although the claimant's "assertion of 'acquisition without just payment' certainly sounds of a fifth amendment taking[,]"[107] "[t]he substance of the claim and not the characterization controls . . . ."[108] The court declined to follow *Myers*[109] for multiple reasons (including the obvious one that it was not controlling precedent in this circuit) and emphasized the Ninth Circuit had since "adopted a somewhat less restrictive approach to finding jurisdiction . . . ."[110] This case illustrates an early shift toward allowing torts to remain torts rather than forced to be takings. It was also one of the first cases to reject application of *Myers*—the following cases continue this trend.

Subsequently, in *Palm v. United States*—a 1993 case—the District Court for the Northern District of California determined it had jurisdiction over the claimants' FTCA tort claims.[111] In this case, multiple landowners who resided next to a military base alleged tortious conduct on the part of the United States for landing and exploding projectiles on their property and flying aircraft over their property.[112] Using a vague, pre-*Ridge Line* tort-taking distinction test[113] the court determined the

[104] Karlen v. United States, 727 F. Supp. 544, 548 (C.D. S.D. 1989).

[105] *Id.* at 545–46. "The Karlens' complaint in essence alleges three types of misconduct by the United States: improper flood and erosion control; groundwork exceeding rights granted by the easement; and inadequate fencing." *Id.* at 547.

[106] *Id.* at 545.

[107] *Id.* at 546 n.2.

[108] *Id.* at 546.

[109] Myers v. United States, 323 F.2d 580, 581–82 (9th Cir. 1963) (The previously mentioned Ninth Circuit case, where the court forced the claim out of district court and into the Court of Federal Claims as a taking).

[110] *Id.* at 548. The Ninth Circuit had previously asked whether the "claim sounds essentially in tort" in the tort-contract context. *Id.* (quoting Walsh v. United States, 672 F.2d 746 (9th Cir. 1982)).

[111] Palm v. United States, 835 F. Supp. 512, 518 (1993).

[112] *Id.* at 514–15.

[113] *Id.* at 516 ("In evaluating the nature of the action, one thing seems certain: on a sliding scale, a taking often involves factual circumstances that would tend to indicate more extreme governmental intrusiveness, permanent infringement, or,

claim could be interpreted as a taking, but it was also sufficient to allege a tort.[114] Upon review, in *Bartleson v. United States*, the Ninth Circuit did not address any jurisdictional issues, affirmed the district court's judgment, and allowed the claimants to successfully allege permanent nuisance.[115] These cases demonstrate the Ninth Circuit's movement toward a more lenient test for jurisdiction—the allowance of district court jurisdiction over "permanent" tort claims (traditionally thought to amount more often to takings than torts).

More recent cases further define this shift in courts' allowance of jurisdiction for FTCA tort claims that resemble takings. In *Judy Family Trust v. United States*—a 2012 case—a claimant brought a tort claim against the United States alleging the Bonneville Power Administration (BPA) trespassed and damaged its property.[116] Although BPA had a permit for the work, it accidentally conducted the work in the wrong location and "constructed a gravel road approximately 1,485 feet in length and 20 feet wide" on the claimant's land.[117] The United States filed a motion to dismiss for lack of subject matter jurisdiction arguing the claim was in the exclusive jurisdiction of the Court of Federal Claims.[118] The court cited the *Ridge Line* test, distinguished *Myers* as being "a claim of inverse condemnation [that] was clearly appropriate" because "[t]he intrusion onto the plaintiff's land was of such an invasive, purposeful and permanent nature," and cited the sliding scale test used in *Palm*.[119] Most importantly, the court supported the claimant's choice to characterize the claim as a tort:

> The [claimant] has chosen to characterize their claim as trespass, but that does not mean that there can be no variation by the Court. In this case, the Court finds the facts appear to favor characterizing the claim as trespass and some weight should be given to the decision of the [claimant] to bring this action as a common law trespass.[120]

After applying the *Ridge Line* test, distinguishing the facts of *Myers*, and comparing them to *Palm* for being more temporary in nature than

even if temporary, an exercise of dominion and control over a private party's property interests; whereas nuisance and trespass generally seem less so.").

[114] *Id.*

[115] Bartleson v. United States, 96 F.3d 1270, 1274–76 (9th Cir. 1996) (whether permanent or continuous claims can be made is a matter of state law).

[116] Judy Family Trust v. United States, No. CV11-006440E-EJL, 2012 WL 12894841, at *1 (D. Idaho June 5, 2012).

[117] *Id.* ("BPA admitted their error in laying the gravel road on the Trust's land, but the Trust prohibited BPA from entering back onto the land to remove the gravel.").

[118] *Id.*

[119] *Id.* at *3.

[120] *Id.* at *4.

permanent, the court determined the "case [was] a close call," but allowed the tort claim to remain in district court.[121]

In 2016, the Federal District Court for the District of Idaho again allowed a claimant to remain in district court with its tortious allegations.[122] In *Beavertail, Inc. v. United States*, the dispute involved "Refuge Use and Cooperative Use Agreements" between the United States and various ranchers.[123] The United States began constructing a dike to enclose the center of a lake to create a boundary between its use and the ranchers' use.[124] After the United States abandoned construction of the dike, the ranchers brought suit alleging the United States was liable "for (1) negligence, (2) negligence per se[,] (3) trespass[,] and (4) ejectment."[125] The United States filed a motion to dismiss for lack of subject matter jurisdiction with one reason being the facts more properly alleged a taking than a tort.[126] The court dismissed the motion and cited language even more favorable to claimants than previously mentioned cases:

> [J]ust because a particular set of facts could support a takings claim does not mean that plaintiffs must pursue such a theory. *See, e.g.*, *Hansen v. United States*, 65 Fed. Cl. 76, 101 (2005) ("tort and takings claims may arise from the same operative facts, both in practice and in principle"). Rather, the fact that the government's alleged actions might support a takings claims [sic] simply demonstrates that those same facts could support tort claims. "While not all torts are takings, every taking that involves invasion or destruction of property is by definition tortious."[*Id.*][127]

In addition, the court went on to reject application of *Myers* to the present facts, similar to the court in *Judy Family Trust*.[128] This court also noted the Ninth Circuit had since adopted a less restrictive test for finding tort-taking jurisdiction: whether the "claim sounds essentially in tort."[129]

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[121] *Id.* at *5.

[122] Beavertail, Inc. v. United States, No. 4:12-cv-610-BLW, 2016 WL 5662013, at *5 (D. Idaho Sept. 29, 2016).

[123] *Id.* at *1.

[124] *Id.*

[125] *Id.* at *2.

[126] *Id.* The United States also argued the claimants "are pursuing contract claims which must be heard in the Federal Court of Claims" and "the Quiet Title Act does not provide this Court with jurisdiction over plaintiffs' fourth claim for ejectment." *Id.* at *2–3.

[127] *Id.* at *5.

[128] *Id.*

[129] *Id.* (citing Walsh v. United States, 672 F.2d 746 (9th Cir. 1982)). Although *Walsh* was referring to the tort-contract distinction, the federal district court for the district of Idaho has cited it twice in the tort-taking context. *See also* Karlen v. United States, 727 F. Supp. 544, 548 (C.D. S.D. 1989).

These cases suggest there has been a developing trend toward allowing claimants to allege tort claims in district court rather than forcing them to be takings in the Court of Federal Claims, especially in the Ninth Circuit. Although the early Ninth Circuit case *Myers* forced a tort claim into the Court of Federal Claims, this case has been rejected by various district courts.[130] These courts have also stated the Ninth Circuit has adopted a new, less restrictive jurisdictional test: whether the "claim sounds essentially in tort."[131] Although this test was originally cited in the tort-contract context, it has been cited by multiple district courts in the tort-taking context, making it applicable to this analysis to some extent.[132] Furthermore, more recent district court cases have supported the claimant's characterization of his claim as a tort if that is what he chooses to do.[133] Although there has been no definitive decision in the Court of Federal Claims regarding whether the same operative facts can give rise to both a tort and a taking, it is clear the courts now believe this to be true.[134]

CONCLUSION

The Court of Federal Claims has jurisdiction over takings claims "not sounding in tort"; consequentially, the federal district courts have exclusive jurisdiction over tort claims against the United States.[135] This has caused both district courts and the Court of Federal Claims a great deal of confusion throughout the past decade. Currently, the most cited tort-taking distinction test is derived from the Federal Circuit case *Ridge Line*, which has been used by both district courts and the Court of Federal Claims. Prior to the creation of this test, district courts would often force claims out of court as being more properly alleged as takings. However, throughout the years, there has been a trend moving away from this conduct. As a result, there has been an inclination to allow a claimant to choose his path to recovery against the United States. This makes sense if one agrees that all takings are torts, but not all torts are takings. A claimant should always be allowed to characterize his claim as a tort if that is what he wishes to do. If he is unsuccessful, it should be because he did not adequately present the elements of a tort, not because his tort more

[130] *Karlen*, 727 F. Supp. at 548; Judy Family Trust v. United States, No. CV11-006440E-EJL, 2012 WL 12894841, at *1 (D. Idaho June 5, 2012); Beavertail, Inc. v. United States, No. 4:12-cv-610-BLW, 2016 WL 5662013, at *5 (D. Idaho Sept. 29, 2016).

[131] *Karlen*, 727 F. Supp. at 548; *Beavertail, Inc.*, 2016 WL 5662013, at *5.

[132] *Judy Family Trust*, 2012 WL 12894841, at *4.

[133] Drury v. United States, 902 F. Supp. 107, 110–11 (E.D. Tex. 1995).

[134] *See supra* Section I.

[135] 28 U.S.C. § 1346(a) (2012) ("The district court shall have original jurisdiction, concurrent with the United States Court of Federal Claims . . . ."); *see supra* Section I.

resembles a taking. However, if a claimant wishes to be in the Court of Federal Claims, the claim must amount to a taking.

Allowing a claimant to choose between a tort and taking would permit them to choose both the venue and compensation they wish to obtain. There are various reasons why a claimant would choose to seek recovery under the FTCA as a tort rather than a taking and *vice versa*. The following reasons are a few of many.

A claimant may wish to file suit in the Court of Federal Claims because it has traditionally been a citizen-friendly court ("[t]he institutional culture of the [Court of Federal Claims] is to provide the citizen a level playing field when suing the federal government.").[136] However, if a claimant is seeking to sue both the United States and a third party—such as a contractor—it cannot bring such third party into the Court of Federal Claims.[137] In addition, this court has the authority to "hold court at such times and in such places as it may fix by rule of court . . . with as little inconvenience and expense to citizens as is practicable.[138] which means it can "ride circuit."[139] However, under the FTCA, a claimant may file suit where the tort occurred or where they live,[140] which means the claimant is most likely situated closer to their nearby district court than the Court of Federal Claims—unless it travels. Another main reason many would seek this court over a district court under a tort theory is that the Tucker Act statute of limitations is six years[141] rather than the FTCA's two-year bar.[142] As mentioned previously, a claimant may attempt to overcome the FTCA two-year statute of limitations by successfully asserting a continuing tort claim.[143]

Choice of court is also highly driven by the amount of damages a claimant would recover in each court. The FTCA requires a claimant to request a "sum" (a specific dollar amount) in their administrative complaint, which cannot be later increased during a lawsuit unless newly dis-

[136] Meltz, *supra* note 32, at 478.

[137] *Id.* ("Note that this fact creates opportunities for the United States, through its case management decisions, to influence takings law development in the [Court of Federal Claims] that would not be available in other, multiple-defendant courts.").

[138] 28 U.S.C. § 173 (2012).

[139] Meltz, *supra* note 32, at 478.

[140] 28 U.S.C. § 1402(b) (2012).

[141] 28 U.S.C. § 2501 (2012) ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.").

[142] 28 U.S.C. § 2401 (2012) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.").

[143] *See supra* Section III.

covered evidence supports such an action.[144] Federal agencies have limited settlement authority and a claimant may end his search for recovery if an agency chooses to exercise that authority.[145] If the claimant wants more than the agency is willing to settle for or his claim is denied, he can recover the amount a private party would pursuant to the controlling state law—including actual and compensatory damages.[146] However, the United States cannot be held liable for punitive damages or prejudgment interest in FTCA suits.[147] On the other hand, in the Court of Federal Claims, if the claimant successfully alleges a taking, he is entitled to "just compensation" for the value of the property taken.[148] In addition, he is also to receive "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."[149] Thus, depending on the facts of the case, recovery in one court may be much greater than the other.

Overall, a plaintiff should be able to choose his path to recovery against the United States where his claim may establish a tort or a taking. If he wishes to file a tort claim in district court, it should not be forced into the Court of Federal Claims for being more akin to a taking.

[144] 28 U.S.C. § 2675 (2012).

[145] 28 U.S.C. § 2672 (2012) ("The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency 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: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.").

[146] 28 U.S.C § 2674 (2012).

[147] *Id.* ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.").

[148] United States v. Miller, 317 U.S. 369, 373 (1943) ("The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have if his property had not been taken.").

[149] 42 U.S.C. § 4654(c) (2012).