OF FIRES AND FLOODS: WHY COURTS SHOULD ADOPT A FLOOD-BASED ANALYSIS TO EVALUATE FIRE-BASED FIFTH AMENDMENT CLAIMS

BY

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In the last several years, litigants have filed numerous Fifth Amendment takings claims arising out of the federal government's wildfire suppression activities. These claims collectively seek billions of dollars in compensation, and future claims will almost certainly seek billions more. This Article contends that courts should modify how they evaluate the merits of these claims. Using the 2017 Chetco Bar Fire as a case study to show the factual complexities of modern firefighting, this Article argues that the current analytical framework applicable to fire-based Fifth Amendment claims is muddled and does not consider all the factors needed to disentangle government-caused impacts from nature-caused harms. This Article argues that courts evaluating fire-based Fifth Amendment claims should abandon the current merits test and instead adopt the multi-factor test used in modern temporary flood-based Fifth Amendment claims. Adoption of a consistent merits test would provide much-needed clarity and coherence in this area, particularly as litigation related to wildfires continues to increase.

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I. INTRODUCTION

The nearby national forest was a major selling point. The new owner valued her solitude and knew that the forest would limit future development. She had heard about past wildfires in the area, but she was careful to cut tree limbs and other vegetation away from her cabin. After all, she reasoned, if there was nothing to burn, her home would be safe if a fire ever threatened. But when a lightning storm rolled in one hot summer night, she was surprised by its ferocity. The fire started small, just one tree struck by a single bolt of lightning deep in the forest. The vegetation was dry, and before long a large column of smoke appeared. Soon, firefighters, planes, helicopters, and bulldozers were everywhere. As the wind began carrying embers from the main fire directly towards her cabin, she knew it was time to evacuate. When she returned a few days later, she found her cabin in ruins. As she began the cleanup process, she heard her neighbors talking: "Everything was fine until the government showed up." The government, she thought, must have done something that caused the fire to reach her property.

On the same day the owner returned to her cabin, a group of firefighters finished a two-week stint extinguishing the last remnants of the wildfire. The firefighters were exhausted after scrambling up steep ravines in smoky, 100-degree temperatures. The firefight was particularly challenging because the forest was so dense this time of year. The United States Forest Service (Forest Service) had proposed a thinning operation to reduce overgrowth years ago, but a lack of funding and the threat of litigation from an environmental group had stymied the plan. The firefighters had spent much of their time removing combustible vegetation—first with chainsaws and, as the fire continued to grow, by intentionally burning underbrush. The firefighters' options were particularly limited, however, when high winds picked up and pushed the main fire towards nearby private properties.

When the property owner evaluates her legal options to recoup her losses, she may follow the lead of several other claimants and consider filing a Fifth Amendment takings claim against the federal government. After all, the United States had allowed combustible vegetation to build up before the fire, and it intentionally set fires as part of its suppression efforts. It is at least possible that those acts caused the fire to move onto her property and damage her cabin. The Fifth Amendment prevents the United States from taking property without paying just compensation.[1]

[1] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

Could the cabin owner recover her losses by arguing that the United States caused fire to invade her property temporarily?

The merits assessment of the cabin owner's fire-based Fifth Amendment claim is currently uncertain. Lower courts considering the issue seem to agree that the owner must first prove that the United States caused the damage to her property.[2] But even that basic position is not definite, and is sometimes challenged by litigants.[3] Current law is clearer that the cabin owner can only succeed on her claim if she satisfies a two-part test, which courts contend aims to differentiate between Fifth Amendment claims and tort claims.[4] To satisfy that test, the cabin owner would have to prove first that the damage to her property was the foreseeable result of some government action, and second that the United States appropriated a benefit at her expense, or at least preempted her ability to use her property for an extended period.[5] However, little reason exists to think that the test accomplishes what it purports to do: meaningfully differentiate Fifth Amendment claims from tort claims.

This Article argues that courts should abandon the current merits test for fire-based Fifth Amendment claims and instead adopt the test that applies to temporary flood-based Fifth Amendment claims. In temporary flood-based claims, a litigant typically argues that the United States violated the Fifth Amendment when some government action caused water to temporarily invade and damage private property. In the recent decision *Cedar Point Nursery v. Hassid*,[6] the Supreme Court held that because flood-based takings claims raise "complex questions" and present "unique considerations," the government's liability turns on whether the plaintiff can prove that a multi-factor merits test demonstrates the government's liability.[7] The Court was correct to adopt that analysis for temporary flood-based takings claims and it should adopt the same approach to fire-based claims.

Part II discusses how fire-based claims typically arise, with the aim of highlighting the factual complexities that might complicate courts' efforts to distinguish between government-caused impacts and nature-caused impacts. This Article discusses these complexities in two ways—first, by discussing how the federal government typically fights wildfires and second, by discussing how the government responded to the 2017 Chetco Bar Fire in northwest Oregon. Part II concludes by explaining why courts should expect to see an increase in federal fire-based takings cases in the future. Part III examines the current legal treatment of federal fire-based claims. That section argues that the current merits test is confusing and does not adequately consider the complex issues that often

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[2] *See* Cary v. United States, 79 Fed. Cl. 145, 148 (2007).

[3] *See* McDonough Fam. Land, LP v. United States, 172 Fed. Cl. 414, 425 (2024).

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

[5] Cary v. United States, 552 F.3d 1373, 1376–77, 1380 (Fed. Cir. 2009) (quoting *Ridge Line*, 346 F.3d at 1355–56).

[6] 594 U.S. 139 (2021).

[7] *Id.* at 160.

arise in those claims. That section concludes that a more comprehensive and better reasoned liability test is required. Part IV considers the merits test that applies to temporary flood-based Fifth Amendment claims. Although the test itself makes sense, courts should reconceptualize the purpose the test serves and recognize that the test is properly understood as akin to the tort concept of proximate causation, which aims to distinguish between government-caused impacts and nature-caused impacts. Part V argues that courts assessing the merits of fire-based takings claims should adopt the merits test applicable to temporary flood-based claims. The Supreme Court's conclusion that temporary flood-based claims raise "unique considerations" is incorrect because fire-based claims raise equally complicated factual issues and also require courts to distinguish government-caused impacts from nature-caused impacts. This Article concludes by arguing that there is nothing unique about flood- or fire-based takings claims. Courts should use the same merits test to re-examine more broadly their treatment of temporary physical Fifth Amendment claims, and require all such takings plaintiffs to prove both but-for causation and satisfy the proximate cause-type analysis.

II. HOW FIRE-BASED FIFTH AMENDMENT CLAIMS TYPICALLY ARISE

Before addressing the legal treatment of fire-based Fifth Amendment claims, Part II discusses how these claims typically arise. Part II(A) discusses how the federal government typically responds to large wildfires. Part II(B) then discusses the federal response to a particular fire, the 2017 Chetco Bar Fire, and uses that case to describe the factual complexities that may arise in these cases.[8] Part II(C) discusses why fire-based Fifth Amendment claims are likely to grow in number in the coming years.

A. How the Federal Government Typically Responds to Large Wildland Fires

Fighting a large wildfire in a remote location carries significant physical risks. Crews may be exposed to dangerously hot temperatures, heavy smoke, falling limbs, and uncontrolled and often unpredictable

[8] Every massive wildfire is unique in terms of cause, federal response, and impact. But focusing on a single fire is helpful to see what issues might arise in fire-related claims. The Chetco Bar Fire represents an example of a typical wildland fire and the Forest Service's responses to that fire are not unusual. Further, the Chetco Bar Fire offers a useful exemplar because the fire's initiation, the Forest Service's response, and the effects of the fire are well understood and set forth in a publicly available, detailed report prepared by the United States Government Accountability Office (GAO). *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-424, WILDFIRE: INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE (2020) [hereinafter INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE].

flames.[9] Responding to large wildfires also presents complex management challenges. Suppression efforts may involve the combined efforts of thousands of individuals who may work at dozens of different state, local, and federal agencies.[10] Managers may have limited resources and must make quick decisions with imperfect data.[11] Developing and implementing a coordinated and effective firefighting response requires significant logistical expertise.

The federal government uses Incident Management Teams (IMTs) to provide leadership and structure to manage large disasters, including

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[9] U.S. DEP'T OF THE INTERIOR ET AL., INTERAGENCY STANDARDS FOR FIRE AND FIRE AVIATION OPERATIONS 4 (2025) [hereinafter INTERAGENCY STANDARDS FOR FIRE AND FIRE AVIATION OPERATIONS] ("Fire is a complex, dynamic, and often unpredictable phenomenon. . . . While the magnitude and complexity of the fire itself and of the human response to it will vary, the fact that fire operations are inherently dangerous will never change."); *Heat Disorders*, NAT'L WILDFIRE COORDINATING GRP. (Oct. 8, 2025), https://www.nwcg.gov/6mfs/firefighter-health-and-first-aid/heat-disorders [https://perma.cc/LA86-WEBH] (discussing heat disorders resulting from prolonged exposure to hot temperatures); *Effects of Smoke Exposure*, NAT'L WILDFIRE COORDINATING GRP. (Oct. 8, 2025), https://www.nwcg.gov/6mfs/firefighter-health-and-first-aid/effects-of-smoke-exposure [https://perma.cc/YEX3-BL7X] ("Wildland fire smoke is a complex mix of chemicals and particles, which varies depending on the fuels, soil, weather, fire intensity, and the burning phase of the fire. Some of the chemicals and particles that are present can pose a health risk particularly with higher exposures or long duration exposures. Wildland fire smoke can cause irritating respiratory symptoms and, over time, could possibly increase the risk of developing long-term illnesses."); *Falling Snags*, NAT'L WILDFIRE COORDINATING GRP. (Sep. 18, 2025), https://www.nwcg.gov/6mfs/felling-safety/falling-snags [https://perma.cc/36JB-9WSX] ("Snags (dead, standing trees without leaves or needles in the crowns) and other hazard trees present a significant hazard to wildland firefighters."); NAT'L WILDFIRE COORDINATING GRP., WILDLAND FIRE SUPPRESSION TACTICS REFERENCE GUIDE 7 (1996) ("Wind-driven fires can pose serious threats to safety as the fire grows.") [hereinafter WILDLAND FIRE SUPPRESSION TACTICS REFERENCE GUIDE].

[10] For example, 9,500 individuals responded to the 1988 Yellowstone Fire, which burned more than 820,000 acres of land. NAT'L PARK SERV., WILDLAND FIRE REPORT 1988, at 3 (1989); *see also* CONG. RSCH. SERV., IF10732, FEDERAL ASSISTANCE FOR WILDFIRE RESPONSE AND RECOVERY 1 (2021) (discussing coordinated interagency response among various federal agencies and state partners to respond to wildfires); Jessica Gardetto & Kim Van Hemelryck, *Behind the Scenes: Who is Responsible for Wildfire Management in the U.S.?*, U.S. DEP'T OF THE INTERIOR (Dec. 12, 2024), https://www.doi.gov/wildlandfirenews/behind-scenes-who-responsible-wildfire-management-us [https://perma.cc/G2U2-KGCV] (discussing the need for partnerships among various federal agencies and state, local, and tribal governments, and private industry to respond to wildfires); ABIGAIL A. VARNEY ET AL., WHAT COLOR IS YOUR NOMEX?: CATEGORIZING AND QUANTIFYING THE WILDLAND FIRE RESPONSE WORKFORCE 16–23 (2025) (discussing various entities involved in wildfire suppression efforts); INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 24 (stating that 788 firefighters were working on the Chetco Bar Fire as of August 21, 2017).

[11] Matthew P. Thompson & Dave E. Calkin, *Uncertainty and Risk in Wildland Fire Management: A Review*, 92 J. ENV'T MGMT. 1895, 1895 (2011) ("Managing uncertainty is of course nothing new to fire managers, who have and continue to make decisions with imperfect information.").

large wildfires.[12] IMTs are created under the National Incident Management System and may include members from federal, state, local, tribal, and territorial agencies.[13] An IMT must develop its firefighting response based on an assessment of several factors: "The circumstances under which a fire occurs, and the likely consequences on firefighter and public safety and welfare, natural and cultural resources, and values to be protected . . . ."[14] In addition, modern Forest Service practice and policy require decision-makers to prioritize firefighter and public safety.[15] Thus, Forest Service policy requires, "[i]n conducting wildland fire suppression, responsible officials shall give first priority to the safety of firefighters, other personnel, and the public."[16]

Unlike urban settings, remote areas often lack hydrants and crews must bring water to the area by truck, or depend on plane or helicopter water drops.[17] But those efforts may be ineffective, or even counterproductive, when weather conditions make flying too dangerous or the fire is on a steep grade.[18] When a direct attack (that is, using water or dirt to knock down flames on the fire's edge or perimeter) is infeasible, firefighters might attempt an indirect or parallel attack to try to stop or reroute a fire's progression by constructing a "fireline" to deprive the main fire of fuel (combustible vegetation) between the main fire perimeter and a control line.[19] Firefighters may create a fireline by dozer, by hand

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[12] *Incident Management Teams*, NAT'L INTERAGENCY FIRE CTR., https://www.nifc.gov/resources/firefighters/incident-management-teams [https://perma.cc/YM29-Q9TT] (last visited Nov. 19, 2025).

[13] *See* INTERAGENCY STANDARDS FOR FIRE AND FIRE AVIATION OPERATIONS, *supra* note 9, at 148; *Incident Management Teams*, *supra* note 12. For example, the IMT assigned to fight the 2017 Alice Creek Fire in Montana directed employees of the State of Montana, the Bureau of Land Management, the National Park Service, the Bureau of Indian Affairs, and the United States Fish and Wildlife Service. *McDonough Fam. Land, LP*, 172 Fed. Cl. 414, 417 (2024).

[14] INTERAGENCY STANDARDS FOR FIRE AND FIRE AVIATION OPERATIONS, *supra* note 9, at 2.

[15] *Id.* at 1.

[16] INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 11. Similarly, interagency standards published by the National Interagency Fire Center state that the purpose of fire suppression is to "protect values at risk of loss by putting the fire out in the safest, most effective, and efficient manner. Every firefighter, whether in a management, command, support, or direct suppression role, should be committed to maximizing the safe, effective, and efficient engagement of capable firefighters in suppression action." INTERAGENCY STANDARDS FOR FIRE AND FIRE AVIATION OPERATIONS, *supra* note 9, at 5.

[17] MAX BENNETT ET AL., REDUCING FIRE RISK ON YOUR FOREST PROPERTY 18 (2010); WILDLAND FIRE SUPPRESSION TACTICS REFERENCE GUIDE, *supra* note 9, at 246–247.

[18] For example, during the Chetco Bar Fire, the Chetco Effect winds and heavy smoke from the fire limited use of aviation assets at certain times. Jerry Ingersoll et al., FACILITATED LEARNING ANALYSIS: PACKER'S CABIN SERIOUS NEAR MISS 16–17 (2017) [hereinafter FACILITATED LEARNING ANALYSIS].

[19] WILDLAND FIRE SUPPRESSION TACTICS REFERENCE GUIDE, *supra* note 9, at 12, 16–17. A "control line" is a natural or human-made barrier that the firefighters have some confidence will limit the further spread of the fire (such as a road, trail, river, lake, or previously burned area). *Id.* at 5, 335.

(known as a "handline"), or by intentionally setting fires (known as "burnout operations").[20] In some settings, burnout operations are the only viable means to construct an effective fireline.[21] But those operations often carry risks. If a burnout operation moves in an unexpected direction, the intentionally-set fire may burn a larger (or different) area than the natural fire would have burned if firefighters had done nothing.[22]

B. The Example—The Chetco Bar Fire

1. The Chetco Bar Fire

During the summer of 2017, the Chetco Bar Fire burned 190,000 acres of land in and near the Rogue River-Siskiyou National Forest (Forest).[23] The Forest offers a beautiful, yet unforgiving, landscape. The Forest includes large swaths of roadless areas, steep terrain, and rugged geological features, especially in the most remote part of the Forest known as the Kalmiopsis Wilderness (Wilderness).[24] The Wilderness is characterized by steep canyons, clear mountain streams (the Chetco and North Fork Smith Rivers), and blistering hot summers.[25]

On July 12, 2017, a commercial airline pilot flying over the Wilderness reported seeing smoke.[26] Later investigations concluded the fire likely started during lightning storms a few weeks earlier, but some locals continue to believe the fire was human-caused.[27] Less than two hours after receiving the pilot's report, the Forest Service sent a helicopter to investigate.[28] On that initial investigation, a group of firefighters rappelled from the helicopter to a steep ridge above the fire to clear a helicopter landing area.[29]

After dropping the firefighters, the helicopter joined an ongoing water-drop exercise, and eventually 17,000 gallons of water were dropped on the fire the first day.[30] During this initial attack, firefighters estimated the fire to be smaller than half an acre.[31] But the initial attack did not

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[20] *Id.* at 12, 141; INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 18.

[21] INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 18.

[22] *Id.*

[23] *Id.* at 1.

[24] *Id.* at 5.

[25] *Kalmiopsis Wilderness*, U.S. FOREST SERV. (Aug. 4, 2025) https://www.fs.usda.gov/r06/rogue-siskiyou/recreation/kalmiopsis-wilderness [https://perma.cc/L6U2-TRUM].

[26] INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 13.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 12.

extinguish the fire.[32] By early afternoon the next day, the original fire had grown and Forest Service leadership was concerned about firefighter safety and a low probability of success.[33] As some firefighters explained, they were working on a steep ridge above an active fire and had no good safety zone or escape route.[34] In addition, the helicopter water drops were ineffective and risked making things worse by "causing burning logs and other debris to roll down the hill and create spot fires."[35] Leadership evacuated the firefighters and, by July 13, the fire had grown to almost ten acres.[36]

The Forest Service's concerns were likely influenced by the knowledge that this area was prone to large and dangerous fires.[37] In the decades before the Chetco Bar Fire, the Forest had experienced several damaging fires, including the Silver Fire in 1987 (which burned nearly 100,000 acres) and the Biscuit Fire in 2002 (which burned nearly 500,000 acres).[38]

After the initial attack failed to extinguish the fire, the Forest Service prepared for an extended attack by creating an organizational structure led by an IMT.[39] The team scouted locations to fight the fire and initiated an indirect attack on the main fire by cutting vegetation to construct firelines.[40] By July 29, the fire had grown to almost 2,200 acres.[41]

On August 15, conditions deteriorated quickly when the area was hit by Chetco Effect winds—"warm, dry, and strong winds flowing down the Chetco River Basin," which pushed the fire towards the Oregon coast and the town of Brookings.[42] Firefighters reported that "nothing could be done

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[32] As the GAO reports, firefighting efforts on a large wildfire typically involve two phases: an "initial attack" followed by an "extended attack." *Id.* at 8, 12.

[33] *Id.* at 15.

[34] *Id.*

[35] *Id.* at 31.

[36] *Id.* at 12, 15.

[37] *Id.* at 7.

[38] *Id.* at 6–7. After the Chetco Bar Fire, the area experienced another fire (the Klondike Fire) in 2018, which burned about 175,000 acres. *Id.* at 7. Another fire occurred in 2023 (the Flat Fire), which burned more than 31,000 acres. Nick Gibson, *Firefighters Make Progress on Wildfires Burning More Than 45,000 Acres in Oregon*, THE OREGONIAN (Aug. 3, 2023, at 09:46 PT), https://www.oregonlive.com/news/2023/08/firefighters-make-progress-on-wildfires-burning-more-than-45000-acres-in-oregon.html [https://perma.cc/JC5M-7XVU].

[39] INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 17. IMTs are organized by wildfire complexity, which range from Type-5 (least complex) to Type-1 (most complex). INTERAGENCY STANDARDS FOR FIRE AND FIRE AVIATION OPERATIONS, *supra* note 9, at 148. The Chetco Bar Fire IMT was initially designated as a Type-3 IMT. INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 17.

[40] INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 17, 27.

[41] *Id.* at 18.

[42] *Id.* at 21.

to moderate the fire's behavior when the Chetco Effect winds were in effect."[43] By August 17, the fire had grown to 8,500 acres.[44]

By August 18, the fire was moving west and approaching a historic structure known as Packer's Cabin.[45] Firefighters conducted a last-ditch effort to save the cabin by burning combustible vegetation along a nearby road.[46] As a helicopter pilot who watched the burnout operation explained in an after-action report, when the operation began, the main fire was already established in the drainage to the north and south of the road near the cabin and "it was just a matter of time before fire burned everything on both sides of the . . . road."[47] The burnout operation saved the cabin, but the main fire continued moving west towards the Chetco River, private timberlands, and homes.[48] On August 19, the Forest Service conducted additional burnouts near a residential area known as the "Wilderness Retreat."[49] Though those burnout operations were also a success, they did not slow the main fire's progression.

Some locals believe that burnout operations were not intended to protect structures and, instead, served some environmental purpose the Forest Service wanted to achieve.[50] Some locals also believe that the operations were initiated on private properties and that they might have caused the natural fire to grow more than it would have if left alone.[51]

No matter who is correct, once the fire crossed the Chetco River, it blew up. By August 22, more than 1,700 firefighters were assigned to the fire,[52] the fire had burned six residences, and grown to 97,758 acres.[53] The fire continued to grow until September 23, when rains finally contained the fire.[54] In the final tally, firefighters had cut 128 miles of fireline by bulldozers and another fifty-two miles of handline, and had dropped over 950,000 gallons of water, 55,000 gallons of retardant and 10,000 gallons of gel.[55] Approximately 191,197 acres of land had burned.[56]

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[43] *Id.*

[44] *Id.*

[45] FACILITATED LEARNING ANALYSIS, *supra* note 18, at 3; *Packer's Cabin*, U.S. FOREST SERV., https://www.fs.usda.gov/r06/rogue-siskiyou/recreation/packers-cabin [https://perma.cc/BG9N-LBCQ] (last visited Jan. 17, 2026).

[46] FACILITATED LEARNING ANALYSIS, *supra* note 18, at 3.

[47] *Id.* at 5.

[48] INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 23–24, 23 n.38.

[49] *Id.* at 23.

[50] *See, e.g.*, Complaint at 1–3, Chetco Res., LLC v. United States, No. 1:22-cv-01568-RTH (Fed. Cl. Oct. 21, 2022).

[51] *Id.*

[52] INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 25–26.

[53] *Id.* at 23–25.

[54] *Id.* at 27.

[55] *Id.*

[56] *Id.*

2. The Aftermath of the Chetco Bar Fire

The public's second-guessing of the Forest Service's decision-making began before the embers cooled. In addition to raising complaints about a lack of public communications, the public questioned the government's staffing decisions, the number of helicopter water drops, the failure to extinguish the fire earlier, and the decision to limit the number of burnout operations.[57] Some commentators and many locals who participated in public meetings during the fire expressed their belief that the Forest Service had decided to "let 'er burn," perhaps as part of some agenda to "let forest fires burn in order to revitalize the overall health of the ecosystem . . . ."[58] In October 2017, after the Chetco Bar Fire was finally contained, the Josephine County Board of Commissioners fueled debate about the Forest Service's response by passing a no-confidence vote and requesting that the Forest Service outsource its land management responsibilities to the State of Oregon.[59]

In 2022, two timber operators and several landowners sued the United States in the Court of Federal Claims for a claimed violation of

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[57] *Id.* at 30–32.

[58] *See* Curtis Hayden, *Aftermath of the 2017 Chetco Bar Fire: Commissioners Hit Forest Service With Vote of "No Confidence," But They Stand Alone*, GEOS INST., https://geosinstitute.org/past-initiative-forest-legacies/fire-ecology/aftermath-of-the-2017-chetco-bar-fire/ [https://perma.cc/3N46-ZHQD] (last visited Nov. 19, 2025); *see also* Zach Urness, *Forest Service Keeps Wildfires Burning in Oregon's Wallowa Mountains for Forest Health*, STATESMAN J. (Aug. 26, 2019, at 06:00 PT), https://www.statesmanjournal.com/story/news/2019/08/26/ forest-service-allows-wildfires-burn-wallowa-mountains-granite-gulch-fire/2101464001/ [https://perma.cc/Z6KQ-23X3] (suggesting the Forest Service may have used the Chetco Bar Fire "for forest management by allowing [the fire] to burn"); Liam Moriarty, *Could The Chetco Bar Fire Have Been Prevented?*, JEFFERSON PUB. RADIO (Oct. 11, 2017, at 13:18 PT), https://www.ijpr.org/environment-energy-and-transportation/2017-10-11/could-the-chetco-bar-fire-have-been-prevented [https://perma.cc/2L7K-EPFC] (recalling one resident who accused the Forest Service on a YouTube blog of "allowing the Chetco Bar fire to burn as part of a liberal agenda"); Liam Moriarty, *Angry Citizens Demand Answers On Chetco Bar Fire*, JEFFERSON PUB. RADIO (Sep. 29, 2017, at 01:37 PT), https://www.ijpr.org/environment-energy-and-transportation/2017-09-29/angry-citizens-demand-answers-on-chetco-bar-fire [https://perma.cc/DGQ6-R78R] (reporting that during a public meeting with the Forest Service, another member of the public "demand[ed] a full investigation as to why [community members] weren't given any protection").

[59] *See Josephine County Officials Vote 'No Confidence' in USFS Fire Response*, NBC (Oct. 25, 2017), https://kobi5.com/news/63631-63631/ [https://perma.cc/SP8M-XNFL]; JOSEPHINE CNTY. BD. OF CNTY. COMM'RS, WEEKLY BUSINESS SESSION — OCTOBER 25, 2017, at 1 (Nov. 8, 2017), https://cms9files.revize.com/josephinecountyor/Agendas%20and%20Minutes/2017/ Weekly%20Business%20Session%2010-25-17.pdf [https://perma.cc/25V6-3EBW] (adopting Resolution No. 2017-047 "[e]xpressing [n]o [c]onfidence in the U.S. Forest Service [r]esource [m]anagement [p]lan and [f]ire [p]olicy"); Moriarty, *Could The Chetco Bar Fire Have Been Prevented?*, *supra* note 58 (quoting a county commissioner who purported to speak "for many" in the area and expressed that the Forest Service has "a fairly convincing story that they tried to put the fire out early . . . [but] it's very, very difficult for us to accept that as really the reality of what happened").

the Fifth Amendment.[60] The *Chetco* plaintiffs alleged that the United States took their properties (timber, structures, and real property) when it used the Chetco Bar Fire "to pursue natural resource management objectives" on the Forest, and when it used their properties "as fuel for its planned ignitions and backfiring operations."[61] The complaint's allegation about "natural resource management objectives" appeared to be a claim that the Forest Service "used the Chetco Bar Fire to restore the natural role of fire."[62]

C. The Future of Fire-Based Fifth Amendment Cases

The *Chetco* case is a single example of a growing number of federal fire-based Fifth Amendment cases filed in recent years. Some of these claims allege that the Forest Service failed to extinguish a wildfire in a national forest and that failure to act resulted in fire growth, which eventually damaged private properties. Other claims allege that the Forest Service set backfires to slow or stop a wildfire, and that the backfires, not the natural fire, impacted private properties. Still other claims allege some version of all these theories—that the Forest Service simultaneously did too little and too much to suppress a wildfire.[63] As of the date of this Article, the total discernible amount at issue in the cases likely exceeds $1.7 billion.[64]

Although that is a lot of money, federal courts should expect the number of these claims to increase. Most observers report that the number of fires in the United States remains relatively level from year-

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[60] Complaint at 1–3, Chetco Res., LLC v. United States, No. 1:22-cv-01568-RTH (Fed. Cl. Oct. 21, 2022); Complaint at 1, 3, Worlton v. United States, No. 1:22-cv-01569-LAS (Fed. Cl. Oct. 21, 2022). The two complaints are substantially identical.

[61] Complaint at 14, *Chetco Res., LLC*, No. 1:22-cv-01568-RTH.

[62] *Id.* at 13.

[63] Complaint at 4–9, McDonough Fam. Land, LP v. United States, 178 Fed. Cl. 229 (2025) (No. 1:20-cv-00368-LKG) (demanding $8.8 million in damages caused by the 2017 Alice Creek Fire); Complaint at 1–2, 14, 17, *Chetco Res., LLC*, No. 1:22-cv-01568-RTH (demanding not less than $10,000 for damages caused by the 2017 Chetco Bar Fire); Complaint at 2–3, Johnson v. United States, 2023 WL 1428603 (2023) (No. 1:22-cv-00584-MHS) (demanding approximately $2.4 million in restitution for damages caused by the 2020 August Complex Fire); Complaint at 1–2, 17, County of Mora v. United States, No. 1:25-cv-01236-RMM (Fed. Cl. July 28, 2025) (demanding over $1.6 billion for damages caused by the April 2022, Hermit's Peak/Calf Canyon Fire); Complaint at 1–2, 12, Pendaries Vill. Cmty. Ass'n v. United States, No. 1:22-cv-00814-AOB (Fed. Cl. July 26, 2022) (demanding an unspecified money judgment for just compensation for damages caused by the April 2022, Hermit's Peak/Calf Canyon Fire); Complaint at 1–6, 20–21, Allard v. United States, No. 1:23-cv-01569-EGB (Fed. Cl. Sep. 12, 2023) (approximately 400 individuals and entities demanding an unspecified money judgment for just compensation for damages caused by the September 2020, Holiday Farm Fire).

[64] *See* sources cited *supra* note 63 (combining the total discernable amount at issue in the complaints).

to-year, but the size of the fires has increased significantly over time.[65] The National Interagency Fire Center, for example, reported that in 2024, approximately 65,000 wildfires burned nearly nine million acres.[66] Data from a year earlier suggest that approximately 56,000 fires burned approximately 2.7 million acres.[67] National Interagency Fire Center data show that the ten largest wildfire years by acreage have occurred since 2004, and 2020 was the year with the largest acreage (at more than ten million acres burned).[68] As one 2015 report prepared for the Forest Service and the Department of the Interior concluded, "[t]he occurrence of large fires in the western United States has been increasing, while, at the same time, fire seasons have been increasing in length, according to recent assessments."[69] Given these trends, it comes as no surprise that studies suggest projected future climate conditions are likely to result in longer wildfire seasons and an increased potential for wildfires.[70]

The continued expansion of housing into areas historically maintained as wildland-urban interface areas risks increasing the cost of these fires because these interface areas are so close to combustible wildland vegetation. One study reported that approximately 2.6 million new homes were constructed in wildland-urban interface areas during the 2010s, and a total of approximately 44.1 million homes were in wildland-urban areas as of 2020.[71]

The Trump Administration's efforts to reduce federal expenditures by cutting the Forest Service budget and staff add to the concern about future wildfires. In August 2025, for example, Governor Newsom expressed the State of California's concern over the Forest Service's loss

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65 *Wildfire Statistics 2025: The $893 Billion Burning Problem*, FIRE STAT. (Apr. 10, 2025) [hereinafter *Wildfire Statistics 2025*], https://firestatistics.org/resources/us-wildfire-statistics [https://perma.cc/EQ87-BXC9].

66 *Id.*

67 *Id.* The Environmental Protection Agency reported similar results, showing an increasing trend line in terms of area burned from 1983 to 2022. *See Climate Change Indicators: Wildfires*, U.S. ENV'T PROT. AGENCY (Aug. 27, 2025), https://www.epa.gov/climate-indicators/climate-change-indicators-wildfires [https://perma.cc/W9DK-WFYP].

68 *Wildfire Statistics 2025*, *supra* note 65.

69 INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 7 (referencing BOOZ ALLEN HAMILTON, 2014 QUADRENNIAL FIRE REVIEW FINAL REPORT (May 2015)).

70 *Climate Change Will Increase Wildfire Risk and Lengthen Fire Seasons, Study Confirms*, DRI (Dec. 7, 2023), https://www.dri.edu/climate-change-will-increase-wildfire-risk-and-lengthen-fire-seasons-study-confirms/ [https://perma.cc/6B7Q-QC2Z]; INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 7 (noting that some "assessments have found that these increases are due in part to climate change, which has contributed to increasing temperatures and droughts in the West, as well as a later onset of fire-season-ending rains"); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-157SP, HIGH-RISK SERIES: SUBSTANTIAL EFFORTS NEEDED TO ACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS 110 (2019) (concluding that the cost of disasters, including wildfires, is projected to increase as extreme weather events such as droughts become more frequent and intense due to climate change).

71 Volker C. Radeloff et al., *Rising Wildfire Risk to Houses in the United States, Especially in Grasslands and Shrublands*, 382 SCI. 702, 706 (2023).

of "10% of all positions and 25% of positions outside of direct wildfire response—both of which are likely to impact wildfire response this year."[72] It stands to reason that a reduced Forest Service budget may result in less effective future firefighting responses.

The billions of dollars now at issue in the currently-pending federal fire-based Fifth Amendment claims reflect the increasing trend of historically-large and historically-expensive wildfires. For example, between 1980 and 2025, the United States experienced twenty-four different wildfires that each resulted in damage of a billion dollars or more.[73] In total, those twenty-four events caused damage of nearly $213.4 billion, or approximately $8.9 billion per event.[74] The trend line of billion-dollar wildfire events has increased markedly between those years, with the peak damage of such events occurring in 2025 as a result of the Palisades and Eaton Fires in the Los Angeles area.[75] Those fires burned tens of thousands of acres, destroyed thousands of buildings, and resulted in direct losses thought to exceed $60 billion.[76] As the number and cost of these fires increase, federal courts should expect to see an increase in the number of fire-based Fifth Amendment claims.

III. LEGAL TREATMENT OF FIRE-BASED FIFTH AMENDMENT CLAIMS

For more than 100 years, the Supreme Court has recognized the possibility of successful fire-based Fifth Amendment claims. Yet these claims are litigated less often than their flood-based counterparts, and some of the early cases focused on the affirmative defense of necessity rather than a merits assessment. As a result, the precise liability test applicable to these claims is less certain than flood-based claims.

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[72] *Five Years Since Devastating 2020 Fire Siege: Here's How California is Better Prepared for Catastrophic Wildfire*, GOVERNOR GAVIN NEWSOM (Aug. 15, 2025), https://www.gov.ca.gov/2025/08/15/five-years-since-devastating-2020-fire-siege-heres-how-california-is-better-prepared-for-catastrophic-wildfire/ [https://perma.cc/9AVD-58C8].

[73] *Summary Statistics: U.S. Billion-Dollar Weather and Climate Disasters*, CLIMATE CENT., https://www.climatecentral.org/climate-services/billion-dollar-disasters/summary-stats [https://perma.cc/N7ES-B7KB] (last visited Feb. 15, 2026). These data were updated by the federal government until the Trump Administration eliminated funding for the data collection project "[i]n alignment with evolving priorities, statutory mandates, and staffing changes"). *Billion-Dollar Weather and Climate Disasters: Summary Stats*, NOAA: NAT'L CTRS. FOR ENV'T INFO., https://www.ncei.noaa.gov/access/billions/summary-stats/US/2024 [https://perma.cc/K9XN-957G] (last visited Dec. 17, 2025). The data are currently maintained by Climate Central, an independent group of scientists and communicators. *About Us*, CLIMATE CENT., https://www.climatecentral.org/what-we-do [https://perma.cc/JZ96-LYJR] (last visited Feb. 15, 2026). Each of the figures identified here are Consumer Price Index-Adjusted to 2024 dollars.

[74] *Summary Statistics: U.S. Billion-Dollar Weather and Climate Disasters*, *supra* note 73.

[75] *Events*, CLIMATE CENT., https://www.climatecentral.org/climate-services/billion-dollar-disasters /events?begYear=2025&endYear=2025&s=endDate%3Adesc&f=beginDate%3Abetween%3A20250101..20251231&ps=50 [https://perma.cc/LUA6-KB5J] (last visited Feb. 15, 2026).

[76] *Id.*

In *Bowditch v. Boston*,[77] for example, the Supreme Court based its analysis on the necessity doctrine:[78] an affirmative defense that reflects the common law understanding that "in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."[79] If the doctrine applies, it immunizes the government against "liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent' . . . or [to] forestall . . . grave threats to the lives and property of others . . . ."[80] In *Bowditch*, city firefighters demolished a private building which was not yet burning because it was "at a place of danger in the immediate vicinity [of the fire]" and its destruction was thought to help "arrest the spreading of the fire."[81] The Court held that the doctrine of necessity absolved the city of takings liability: "At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner."[82] Because the Court rejected the takings claim based on necessity grounds, it did not articulate a merits-based test.

As discussed in Part III(A) and (B), in more recent years, two decisions from the United States Court of Appeals for the Federal Circuit (Federal Circuit) (*Cary v. United States*[83] and *TrinCo Inv. Co. v. United States*[84]) have established the current merits test in fire-based takings claims. Part III(C) discusses some of the potential confusion these cases have generated.[85]

A. The Tort Versus Takings Analysis Offered in Cary v. United States

Cary v. United States arose out of the Cedar Fire, one of the largest fires in California's history.[86] That fire started when a deer hunter lost in the Cleveland National Forest near San Diego lit an illegal signal fire to aid his rescue.[87] Before it was extinguished, the Cedar Fire burned 273,000 acres and destroyed thousands of structures, including the Carys' home.[88] The Cedar Fire was not the first fire in that forest and, in the

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77 101 U.S. 16 (1879).

78 *Id.* at 19.

79 United States v. Caltex (Philippines), Inc., 344 U.S. 149, 154 (1952).

80 *TrinCo*, 722 F.3d 1375, 1377 (Fed. Cir. 2013) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 n.16 (1992)).

81 *Bowditch*, 101 U.S. at 16.

82 *Id.* at 18–19.

83 552 F.3d 1373 (Fed. Cir. 2009).

84 722 F.3d 1375, 1380 (Fed. Cir. 2013).

85 *See infra* Part III(A) and III(B)

86 *Cary*, 552 F.3d at 1375.

87 *Id.*

88 *Id.*

past, the Forest Service had attempted to suppress fires before they grew. By 2003, the year of the Cedar Fire, the Forest Service had extinguished ninety-seven percent of the fires within twenty-four hours of their discovery.[89] The Carys based their argument on a theory that the Forest Service's past fire suppression tactics had "altered the 'fire ecology' of the [forest] by disrupting the natural, frequent, low-intensity fires."[90] According to the Carys, those land management policies caused the Cedar Fire to spread outside the forest boundaries onto private property.[91]

The Federal Circuit affirmed dismissal in *Cary* based on a conclusion that the factual allegations stated, at most, a tort claim and *not* a Fifth Amendment takings claim.[92] At the federal level, the distinction between tort claims and takings claims raises an important jurisdictional issue. The Court of Federal Claims hears nearly all federal takings claims because it has exclusive jurisdiction over claims for money damages greater than $10,000 "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."[93] Thus, the Court of Federal Claims lacks jurisdiction to hear tort claims, and tort claimants must bring their claims in federal district court.

The *Cary* court assessed the claim using the two-part test, which it "characterized as causation and appropriation," that had been articulated in the flooding case of *Ridge Line, Inc. v. United States*[94] to distinguish between tort claims and takings claims.[95] First, regarding causation, the Federal Circuit in *Cary* used the word "causation" in this context to mean something other than actual, but-for causation.[96] Instead, the Federal Circuit explained that "causation" in the *Ridge Line* test means that "the government intend[ed] to invade a protected property interest or [that] the asserted invasion [was] the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action."[97] This "direct, natural, or probable" factor requires a determination of whether the impact "on the claimant[']s

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89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.* at 1379–81.

93 28 U.S.C. § 1491(a)(1) (2018); *see also* United States v. Mitchell, 463 U.S. 206, 216 (1983) (explaining how a substantive right must be found in the Constitution, an Act of Congress, or an executive regulation).

94 346 F.3d 1346 (Fed. Cir. 2003).

95 *Cary*, 552 F.3d at 1376–77; *see also* Moden v. United States, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (stating that the *Ridge Line* test exists to require plaintiffs to "show that treatment under takings law is appropriate").

96 *Cary*, 552 F.3d at 1376–77.

97 *Id.* (quoting *Ridge Line*, 346 F.3d at 1355).

property was the *predictable* result of the government action."[98] Thus, at least in this context, the word "causation" appears to mean something nearly equivalent to foreseeability. Second, the *Ridge Line* panel held that "to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner[']s right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value."[99] Regarding the appropriation prong, the Federal Circuit offered that "the government's interference with any property rights [must be] substantial and frequent enough to rise to the level of a taking."[100]

The Federal Circuit concluded that the Carys had failed to satisfy the two-part *Ridge Line* test.[101] The court first concluded that the Carys had failed to "show that the consumption of their property by fire was the likely, foreseeable result of Forest Service action":

> The only relevant direct, natural, or probable result of the Forest Service [land management] policies pleaded by the landowners was a heightened risk, not a wildfire that would spread to neighboring properties. The hole in the causal chain is the conversion of this risk into a wildfire by the hunter who started it.[102]

According to the court, even if the Forest Service's policies increased the risk of fire, those policies did not "cause" the Cedar Fire because "[t]he hunter setting the fire was an intervening cause which broke any perceived chain of causation between the Forest Service's policies and the Cedar Fire."[103]

Second, the court stated that the *Ridge Line* appropriation prong required the Carys to show that the government appropriated a benefit to itself "at the expense of the property owner . . . ."[104] The court concluded the Carys failed to make this showing as well because, rather than taking some property interest for the government, the Cedar Fire "destroyed the public interests the policies sought to protect."[105]

B. The Necessity Analysis Offered in TrinCo Inv. Co. v. United States

The Federal Circuit's next substantive discussion of fire-related Fifth Amendment claims appeared in 2013 in *TrinCo Inv. Co. v. United*

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98 *Ridge Line*, 346 F.3d at 1356 (emphasis added); *see also* Ideker Farms v. United States, 136 Fed. Cl. 654, 678 (2018) (finding that foreseeability is judged on an objective, rather than subjective, basis).

99 *Ridge Line*, 346 F.3d at 1356.

100 *Id.* at 1357.

101 *Cary*, 552 F.3d at 1378–80.

102 *Id.* at 1377–78.

103 *Id.* at 1378–79.

104 *Id.* at 1380.

105 *Id.*

States.[106] TrinCo Investment owned properties surrounded by the Shasta-Trinity National Forest, which was impacted by the Iron Complex Fire in 2008.[107] During that fire, the Forest Service and CAL FIRE conducted extensive burnout operations to remove combustible vegetation and slow the fire's progress.[108] The fire eventually burned over 100,000 acres of land, including some of TrinCo's properties.[109]

The *TrinCo* lower court had dismissed the claim under the doctrine of necessity, holding that the taking or destruction of private property in the pursuit of fighting a fire, regardless of the circumstances, is non-compensable.[110] The Federal Circuit held that the doctrine of necessity applies only if the government proves that there was "an imminent danger and an actual emergency giving rise to actual necessity."[111] The court remanded to the trial court for further factual development.[112] The *TrinCo* court decisions were limited to the doctrine of necessity issue, and because plaintiff voluntarily dismissed its complaint on remand, it is unclear what liability standard the lower court would have applied had the parties moved forward with trial.[113]

C. The Resultant Confusion in Evaluating Fire-Based Takings Claims

The current framing of the merits of federal fire-based Fifth Amendment claims, therefore, appears to rely solely on the two-part test established by *Ridge Line*, a flood-based claim. The first point of confusion arising from this framing is whether a litigant must prove actual, but-for causation and, if so, whether that is an independent requirement or merely a component of the two-part test. As discussed above, the Federal Circuit's *Cary* decision, which incorporated the *Ridge Line* test, equates

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106 722 F.3d 1375, 1378 (Fed. Cir. 2013).

107 *Id.* at 1376–77.

108 CAL. DEP'T OF FORESTRY & FIRE PROT., 2008 JUNE FIRE SIEGE 115 (2015).

109 *Id.* at 114; *TrinCo*, 722 F.3d at 1377.

110 *TrinCo*, 722 F.3d at 1379–80.

111 *Id.* at 1378. A year after the *TrinCo* decision, the Alaska Supreme Court considered the doctrine of necessity in *Brewer v. State* and noted that the "inquiry should not devolve into an after-the-fact evaluation of the wisdom of the fire-fighting policies and tactical choices that preceded the taking . . . ." 341 P.3d 1107, 1118 (Alaska 2014). Instead, "[w]hether a taking is necessary must be judged at the time the taking occurs. The essence of the doctrine is that the government is acting 'under pressure of public necessity and to avert impending peril' and chooses to damage private property as the lesser of two evils. It is that choice, in that moment, for which necessity may provide a defense." *Id.* (internal citation omitted).

112 *TrinCo*, 722 F.3d at 1380–81. On remand, after discovery, the lower court concluded that it could not resolve liability without trial and denied the parties' cross-motions for summary judgment. Trin-Co Inv. Co. v. United States, 130 Fed. Cl. 592, 604 (2017).

113 In 2019, before trial was due to start, TrinCo voluntarily dismissed its complaint with prejudice. Joint Stipulation of Dismissal with Prejudice at 1, Trin-Co Inv. Co. v. United States, No. 1:11-cv-00857-EJD (Fed. Cl. Nov. 19, 2019).

the term "causation" to the concept of foreseeability.[114] But other physical takings claims, like *Moden v. United States*,[115] emphasize that but-for causation is an independent requirement a plaintiff must prove in addition to satisfying the two-part *Ridge Line* test.[116] As the *Moden* court explained, "proof 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."[117]

Although this but-for causation proof requirement appears certain in non-fire-based physical takings claims, the existing law has caused some uncertainty in fire-based takings claims. For example, in *McDonough Family Land, LP v. United States*[118] plaintiffs in a fire-based Fifth Amendment claim argued that "because they allege a *per se* physical taking, they are not required to satisfy the but-for standard of causation . . . ."[119] The trial court disagreed, concluding that the *McDonough* plaintiffs had provided "no persuasive basis for carving out an exception to the but-for standard of causation," and requiring them to show that their property would not have burned "absent the firing operations and other suppression efforts undertaken by the government."[120] The trial court's decision is precisely correct—no legal or logical basis exists to depart from the standard requirement that all plaintiffs raising physical takings claims demonstrate that the government actually caused the harm (that is, that the government was the but-for cause).[121]

A second point of potential confusion arises from the exception to the two-part rule announced in the *Cary* decision itself. In its discussion of the first prong (foreseeability), the *Cary* court concluded that the third-party ignition of the wildfire was an intervening act which broke the "chain of causation."[122] Though that analysis is a sensible application of the principle of foreseeability, the court went on to announce that foreseeability should be assumed in some future cases:

> For instance, had the government action been to accumulate fuel loads in the [forest], even without knowledge that such fuel loads would become a large conflagration upon any ignition, then any ignition, even one negligently started by unauthorized human hands, would be adequate for that government act to satisfy the causation prong. This is because an ignition is the direct, natural and probable result of the government intentionally allowing fuel loads to accumulate in a fire zone, and a

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114 *See supra* Part III(A).

115 404 F.3d 1335 (Fed. Cir. 2005).

116 *Id.* at 1343.

117 *Id.*

118 172 Fed. Cl. 414, 425 (2024).

119 *Id.* (emphasis added).

120 *Id.*

121 After trial, the *McDonough* court rejected plaintiffs' claims based on a failure to prove but-for causation. *McDonough Fam. Land, LP*, 178 Fed. Cl. 229, 238–41 (2025).

122 *Cary*, 552 F.3d 1373, 1378–79 (Fed. Cir. 2009).

> conflagration is the direct, natural, and probable result of this ignition in a forest with high fuel loads.[123]

The identified exception suggests that the Carys could have proven foreseeability if they had alleged that the Forest Service's policies had increased the fuel load because the act of accumulating fuel loads, apparently, necessarily means that any later fire was foreseeable.

The court offered no justification supporting the exception, and none is apparent. Furthermore, the scope of the exception is unclear. The exception appears to cover at least those situations where the government actively took steps to accumulate fuel loads, perhaps by stacking combustible materials in an area that had no pre-existing fire risk. But would the exception cover instances where the Forest Service planted trees which eventually provided fuel to a wildfire? The *Cary* court decision offers no guidance.

Finally, the meaning of the second part of the *Ridge Line* test (appropriation) raises its own potential confusion. In concluding that the government's interference with a property right was not "substantial and frequent enough to rise to the level of a taking,"[124] the *Cary* court highlighted flooding cases—primarily *United States v. Cress*[125] and *Sanguinetti v. United States*[126]—which the panel understood to require either permanent inundation or inevitably recurring flooding.[127] Citing *Sanguinetti v. United States*, the Federal Circuit held, "floods that visit once and then recede do not give rise to takings claims."[128] As the court explained, a single fire could never meet the "inevitably recurring" standard:

> Here, the fire has come and gone, and there is no allegation that the injuries prevent future use of the land, or that the fire will intermittently but inevitably recur. To satisfy the appropriation requirement, the preemption must be sufficiently permanent that it can be said that the government has exercised dominion over the property.[129]

Thus, the second part of the *Ridge Line* test offers little guidance to the standard that courts should apply to assess when a fire is "substantial and frequent enough" to constitute a taking.[130] The *Cary* court's statement suggests that a single fire could never constitute a taking based on an understanding that flood-based claims require proof of a permanent flood condition or inevitably recurring flooding. But, as

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123 *Id.* at 1379.
124 *Id.* at 1380 (quoting *Ridge Line*, 346 F.3d 1346, 1357 (Fed. Cir. 2003)).
125 243 U.S. 316 (1917).
126 264 U.S. 146 (1924).
127 *Cary*, 552 F.3d at 1380–81.
128 *Id.* at 1381 (citing *Sanguinetti*, 264 U.S. at 150).
129 *Id.*
130 *See id.* at 1380.

discussed below, more recent decisions call that understanding into question.

IV. CURRENT TREATMENT OF TEMPORARY FLOOD-BASED FIFTH AMENDMENT CLAIMS

The merits test in modern temporary flood-based Fifth Amendment cases presents a far better way to analyze liability than the *Ridge Line* test discussed above. As discussed in Part IV(A), flood-based cases are some of the earliest takings claims. Although the viability of temporary flood-based takings claims was considered questionable for many years, the Supreme Court held in 2012 (after *Cary*) that such claims might succeed if the property owner could prove the government's action was the but-for cause of the harm and satisfy a multi-factor merits test. Part IV(B) explains that analysis is an appropriate liability test despite some courts' confused message about the purpose the test serves. A better way to characterize the merits assessment is that it requires proof of but-for causation and proximate causation-like principles to distinguish between government-caused damage and nature-caused damage.

A. The Current Merits Test for Temporary Flood-Based Fifth Amendment Claims

1. The Merits Test Articulated in Arkansas Game & Fish Commission v. United States

The Supreme Court has long recognized the viability of permanent flood-based takings claims. In 1871, for example, the Supreme Court issued *Pumpelly v. Green Bay Co.*,[131] which involved a claim that a state-owned dam had caused water to "overflow [plaintiff's] land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries . . . worked an almost complete destruction of the value of the land."[132] The *Pumpelly* court held that the operation of the dam had effected a taking by permanent flooding—"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 . . . ."[133]

Prior to 2012, however, the viability of temporary flood-based Fifth Amendment claims was questionable. In several early flood-based Fifth Amendment cases, like *Pumpelly*, the Supreme Court appeared to distinguish between two conditions: a "permanent condition of continual

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[131] 80 U.S. 166 (1872).
[132] *Id.* at 177.
[133] *Id.* at 181.

overflow" of water onto private property or a condition of "intermittent but inevitably recurring overflows" of water on the one hand, and temporary invasions of water that resulted in "merely an injury to the property" on the other hand.[134] Although the case law demonstrated that the former condition could violate the Fifth Amendment, the viability of a takings claim based on the latter condition was more questionable.

The Supreme Court's 2012 decision in *Arkansas Game & Fish Commission v. United States*[135] resolved the matter by announcing that a litigant might be able to raise a successful temporary flood-based Fifth Amendment claim even absent evidence of inevitably recurring future flooding.[136] That case arose when the United States temporarily modified its release schedule for Clearwater Dam, which lies several miles upstream of the Game & Fish Commission's Dave Donaldson Wildlife Management Area.[137] The United States Army Corps of Engineers (Corps) had operated Clearwater Dam under a water control manual for decades but, in the early 1990s, downstream farmers approached the Corps to request an operational modification. Rather than making a small number of large releases, the farmers asked the Corps to make more frequent and smaller releases, which they believed would avoid inundating their properties.[138] The Corps agreed, and from 1993 to 2000 deviated from its normal dam operations.[139] Although the change seemed to benefit the farmers, the Commission complained that the modified release schedule caused more flooding on its property, which damaged timber and caused "a substantial change in the character of the terrain, which necessitated costly reclamation measures."[140]

The Commission's lawsuit argued that the Corps violated the Fifth Amendment by temporarily taking private property without paying just compensation. That is, that the Corps' actions had acquired the right to temporarily flood the Commission's property without paying for that right (or, stated in the alternative, the Corps had taken a temporary flowage easement over private property).[141]

When the Commission's claim reached the Federal Circuit, the panel approached the issue with the understanding that a condition of permanent flooding or "inevitably recurring" flooding could violate the

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134 *Cress*, 243 U.S. 316, 328 (1917); *Sanguinetti*, 264 U.S. 146, 149 (1924); *see* United States v. Kan. City Life Ins. Co., 339 U.S. 799, 810, 810 n.8 (1950) (relying on *Cress* for its conclusion that a taking occurred due to the "permanent[] invas[ion] by the percolation of . . . waters"). In *Cress*, the Supreme Court held that regularly recurring flooding gives rise to a takings claim that is no less valid than the claim of an owner whose land was continuously kept under water. 243 U.S. at 328–329.

135 Ark. Game & Fish Comm'n v. United States (*Ark. Game & Fish Comm'n III*), 568 U.S. 23 (2012).

136 *Id.* at 27.

137 *Id.*

138 *Id.* at 28.

139 *Id.*

140 *Id.* at 29.

141 *Id.*

Fifth Amendment, but that a condition of temporary, non-inevitably recurring flooding could not.[142] The Federal Circuit panel appeared to believe the different treatment flowed from the idea that the former situation was a takings claim while the latter condition was a mere tort.[143]

The Supreme Court reversed, holding that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability."[144] In rejecting the lower court's position that a flood-based Fifth Amendment claim requires a permanent condition of flooding (or, at least, proof of inevitably-recurring flooding), the Supreme Court relied on several non-flooding temporary takings cases involving physical occupations during wartime,[145] periodic overflight claims,[146] and temporary regulatory restrictions.[147] Although none of those cases involved flooding, the Supreme Court held those cases nevertheless demonstrated that "government-induced flooding of limited duration may be compensable."[148]

The Supreme Court then turned to *Sanguinetti v. United States*, a prominent flood-based takings claim, which the Federal Circuit panel had relied on to reach its decision.[149] That case arose after a government canal allegedly caused temporary flooding on plaintiff's property following a period of heavy rainfall.[150] In rejecting the Sanguinettis' claim, the Supreme Court emphasized that "[n]one of the land of appellant was permanently flooded, nor was it overflowed for such a length of time in any year as to prevent its use for agricultural purposes."[151] The *Sanguinetti* court's emphasis on permanence and a complete prevention of use relied, in part, on the Supreme Court's decisions in *Pumpelly v. United States* and *Cress v. United States*, both of which had involved a permanent condition of flooding.[152]

The Supreme Court in *Arkansas Game & Fish Commission* disagreed with the Federal Circuit's reading of *Sanguinetti*, concluding that *Sanguinetti* had turned not on the permanency of the flooding but instead

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142 Ark. Game & Fish Comm'n v. United States (*Ark. Game & Fish Comm'n II*), 637 F.3d 1366, 1376 (2011), *rev'd*, 568 U.S. 23 (2012).

143 The Federal Circuit explained that it "must distinguish between a tort and a taking. An injury that is only 'in its nature indirect and consequential,' i.e. a tort, cannot be a taking." *Id.* at 1374.

144 *Ark. Game & Fish Comm'n III*, 568 U.S. at 27.

145 *E.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 3 (1949).

146 *E.g.*, United States v. Causby, 328 U.S. 256 (1946).

147 Tahoe-Sierra Pres. Council, Inc. v. Reg'l Plan. Agency, 535 U.S. 302, 337 (2002).

148 *Ark. Game & Fish Comm'n III*, 568 U.S. at 24–33 (explaining the impact of *Kimball Laundry Co.*, *Causby*, and *Tahoe-Sierra Pres. Council, Inc.* on flooding-related takings clause liability).

149 *Id.* at 34–37 (discussing *Sanguinetti* to determine if there can be a taking caused by floods); *Sanguinetti*, 264 U.S. 146, 147 (1924).

150 *Sanguinetti*, 264 U.S. at 147.

151 *Id.*

152 *Id.* at 148–49.

"on settled principles of foreseeability and causation."[153] The Supreme Court concluded that the word "permanent" (which appears in some form five times in the short *Sanguinetti* decision) was not dispositive and, in any event, the *Sanguinetti* decision predated *First English Evangelical Lutheran Church v. Los Angeles County*,[154] where the Court "first homed in on the matter of compensation for temporary takings."[155] With this interpretation of *Sanguinetti* in hand, the Supreme Court found "no suggestion" in the case "that flooding cases should be set apart from the mine run of takings claims."[156]

Before announcing its liability test, and as further justification for its ultimate decision, the Supreme Court highlighted the advantages of multi-factor analyses in this area:

> We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.[157]

The Supreme Court explained further that, apart from a "permanent physical occupation of property" (for which the Court offered as an example the permanent installation of a rooftop cable box in *Loretto v. Teleprompter Manhattan CATV Corp.*)[158] and a "regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land" (for which the Court offered *Lucas* as its example),[159] "most takings claims turn on situation-specific factual inquiries."[160] The only example the Supreme Court offered for a "situation-specific" type case, however, was *Penn Central Transportation Co. v. New York City*,[161] which introduced the well-known multi-factor test applicable to non-*Lucas* regulatory takings claims.[162]

Having concluded that temporary flood-based takings claims "gain[] no automatic exemption from Takings Clause inspection . . . ," the Supreme Court announced its liability test: when a "regulation or temporary physical invasion by government interferes with private property," liability requires consideration of multiple factors:

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153 *Ark. Game & Fish Comm'n III*, 568 U.S. at 34–35.

154 First Eng. Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304 (1987).

155 *Ark. Game & Fish Comm'n III*, 568 U.S. at 35.

156 *Id.*

157 *Id.* at 31.

158 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (holding that a New York statute effectively acted as a taking of the appellant's property, for which they were entitled to just compensation).

159 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

160 *Ark. Game & Fish Comm'n III*, 568 U.S. at 31–32.

161 Penn Cent. Transp. Co. v. New York City (*Penn Central*), 438 U.S. 104 (1978).

162 *Ark. Game & Fish Comm'n III*, 568 U.S. at 32 (citing *Penn Central*, 438 U.S. 104, 124 (1978)); *see Penn Central,* 438 U.S. at 124 (describing the factors).

"time is indeed a factor in determining the existence *vel non* of a compensable taking";

"the degree to which the invasion is intended or is the foreseeable result of authorized government action";

"the character of the land at issue";

"the owner's 'reasonable investment-backed expectations' regarding the land's use"; and

"[s]everity of the interference figures in the calculus as well."[163]

[163] *Ark. Game & Fish Comm'n III*, 568 U.S. at 38–39.

The *Arkansas Game & Fish Commission* test is similar to the *Penn Central* test, which applies in most regulatory takings claims.[164] The grid below summarizes both tests to compare similar-sounding elements:

***Arkansas Game & Fish Commission* factors**[165]	***Penn Central* factors**[166]
Time	
Intended or Foreseeable Result	
Character of the land	Character of the governmental action
Owner's reasonable investment-backed expectations	Extent to which the regulation interfered with the owner's reasonable investment-backed expectations
Severity of interference	Economic impact of the regulation

The Supreme Court concluded its analysis by quoting *Portsmouth Harbor Land & Hotel Co. v. United States*,[167] a takings claim based on the military's firing of live shells over private property, for the proposition that "while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence."[168]

On remand, the Federal Circuit believed itself limited to the record the lower court had developed two years before the Supreme Court announced its new multi-factor liability test.[169] In separate sections of its decision, the Federal Circuit discussed duration, causation, foreseeability, and severity.[170] The Federal Circuit understood "duration" to mean the seven years during which the Corps deviated from its normal operations (equivalent to "time" in the Supreme Court's decision), during which time the trial court had found that the Commission's property experienced "a substantial increase" in the number of flooding days.[171]

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164 The *Penn Central* test does not apply when the government regulation deprives a property owner of the entire economically beneficial or productive use of her property. *See Lucas*, 505 U.S. 1003, 1015–16 (1992) (describing "at least two discrete categories of regulatory action as compensable without case-specific inquiry . . . ").

165 *Ark. Game & Fish Comm'n III*, 568 U.S. at 38–39.

166 *Penn Central*, 438 U.S. at 124.

167 Portsmouth Harbor Land & Hotel Co. v. United States (*Portsmouth*), 260 U.S. 327 (1922).

168 *Ark. Game & Fish Comm'n III*, 568 U.S. at 39 (quoting *Portsmouth*, 260 U.S. at 329–30 (1922)). As discussed above, the Federal Circuit offered a similar view in *Ridge Line*. *See supra* text accompanying note 100 (quoting *Ridge Line*, 346 F.3d 1346, 1357 (Fed. Cir. 2003)).

169 Ark. Game & Fish Comm'n v. United States (*Ark. Game & Fish Comm'n IV*), 736 F.3d 1364, 1369 (Fed. Cir. 2013).

170 *Id.* at 1369–75.

171 *Id.* at 1369–70; *Ark. Game & Fish Comm'n III*, 568 U.S. at 38–39 (holding time is a factor).

Although not identified in the Supreme Court's multi-factor test, the Federal Circuit next discussed "causation."[172] The Federal Circuit treated "causation" as "but-for causation"—that is, a comparison of the flooding that actually occurred during the deviation years with the flooding that would have occurred had the government not acted during that time period.[173] If the same (or more) amount of flooding would have occurred in the absence of the government action, the government is not the but-for cause of the flooding and the claim cannot succeed.[174] If less flooding would have occurred in the no-government-action condition, the claim may proceed to a multi-factor assessment.[175] Based on the trial court record, the Federal Circuit found this element favored the Commission's position.[176] Next, the Federal Circuit assessed whether the flooding that occurred during the deviation period was a "foreseeable result of the deviations that the Corps approved during that period."[177] Because the Commission had complained during the deviation period, this factor also favored the Commission.[178] Finally, the Federal Circuit considered the severity of impact on the Commission's property, deferring to the lower court's findings that the "change in the flooding pattern effected a wholesale change in the ability of the Management Area to support timber harvesting and a wildlife preserve of the sort that the Commission had historically maintained."[179]

Thus, the Federal Circuit concluded that all the factors supported the Commission's Fifth Amendment claim and held the United States liable for a temporary taking.[180] The Federal Circuit did not assess the "character of the land at issue" or the Commission's "reasonable investment-backed expectations" because the court limited itself to the original trial record and the parties had not addressed those factors below.[181] The court's decision not to reopen the record was potentially critical because the "character of the land at issue" was an often-waterlogged area with historically poor drainage and high timber mortality.[182] And the Commission's "reasonable investment-backed expectations" were arguably limited because it acquired its property well

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172 *Ark. Game & Fish Comm'n IV*, 736 F.3d at 1370–72.

173 *Id.* at 1372. Footnote two in the decision describes the proper comparison for but-for causation: "At oral argument, the parties acknowledged that in determining the scope of any invasion of property rights, the proper comparison would be between the flooding that occurred prior to the construction of Clearwater Dam and the flooding that occurred during the deviation period." *Id.* at 1372 n.2.

174 *See id.* at 1370.

175 *Id.* at 1369.

176 *Id.* at 1372.

177 *Id.*

178 *Id.*

179 *Id.* at 1374.

180 *Id.* at 1369–80.

181 *Id.* at 1369–75; *Ark. Game & Fish Comm'n III*, 568 U.S. at 39.

182 *Ark. Game & Fish Comm'n IV*, 736 F.3d at 1371; *Ark. Game & Fish Comm'n III*, 568 U.S. at 39.

after the Corps issued its manual, which had always allowed the Corps to deviate from "ordinary flowage rates at any time."[183]

The Supreme Court's release of the *Arkansas Game & Fish Commission* decision opened the door to a type of claim some had believed was foreclosed—a Fifth Amendment claim based on the government's temporary imposition of flood waters on private property. Not surprisingly, a deluge of temporary flood-based takings claims followed.[184] As discussed below, although the new multi-factor test resolved whether claimants could pursue temporary flood-based claims, the *Arkansas Game & Fish Commission* court did not explain the limits to that rule—did the test apply only to flood-based Fifth Amendment claims, or did the Supreme Court intend the rule to apply more broadly to other types of temporary physical takings claims?

2. The Limitation of the Arkansas Game & Fish Commission *Test in* Cedar Point Nursery v. Hassid

Although *Arkansas Game & Fish Commission* involved only a temporary flood-based takings claim, the tenor of the decision suggested future courts might extend the holding to any type of temporary physical invasion of private property. The Supreme Court seemed to invite just such a broad application when it pronounced, "[t]here is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property."[185]

But nine years later, the Supreme Court appeared to limit the scope of its holding when it assessed whether a *per se* or multi-factor analysis applies in a much different type of takings claim. *Cedar Point Nursery* arose out of a California state statute that granted labor organizations a "'right to take access' to an agricultural employer's property."[186] The law allowed labor groups to enter and use temporarily—up to four, thirty-day

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[183] *Ark. Game & Fish Comm'n IV*, 736 F.3d at 1375; *Ark. Game & Fish Comm'n III*, 568 U.S. at 39.

[184] *See, e.g.*, Quebedeaux v. United States, 112 Fed. Cl. 317, 324 (2013); Big Oak Farms, Inc. v. United States, 131 Fed. Cl. 45, 46–47 (2017); St. Bernard Parish Gov't v. United States, 887 F.3d 1354, 1358 (Fed. Cir. 2018); *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 138 Fed. Cl. 658, 249 (2018); Labruzzo v. United States, 144 Fed. Cl. 456, 472–73 (2019); Orr v. United States, 145 Fed. Cl. 140, 150 (2019); Ministerio Roca Solida, Inc. v. United States, 145 Fed. Cl. 756, 760 (2019); Alford v. United States, 961 F.3d 1380, 1385 (Fed. Cir. 2020); Ideker Farms, Inc. v. United States, 71 F.4th 964, 979–80 (Fed. Cir. 2023); Bd. of Supervisors of Issaquena Cnty. v. United States, 84 F.4th 1359, 1361 (Fed. Cir. 2023). On December 22, 2025, before publication of this article, the Federal Circuit affirmed the federal government's liability in several claims arising out of flooding associated with Hurricane Harvey in Houston, Texas. Ablan v. United States, 162 F.4th 1364 (Fed. Cir. 2025). The *Ablan* court held the government liable for a permanent taking but nevertheless proceeded through the *Arkansas Game & Fish Commission*'s multi-factor analysis to support its statement that even if the flooding were temporary, it would have held the government liable for a temporary taking. *Id.* at 1376–78.

[185] *Ark. Game & Fish Comm'n III*, 568 U.S. 23, 36 (2012).

[186] *Cedar Point Nursery*, 594 U.S. 139, 143 (2021) (quoting CAL. CODE REGS. tit. 8, § 20900(e)(1)(C) (2020)).

periods in a calendar year—the premises of an agricultural employer to meet and talk with employees and solicit union support.[187] Two employers subject to the statute sued the state on the ground that the regulation effected an unconstitutional *per se* physical taking without compensation.[188]

The Ninth Circuit Court of Appeals rejected the growers' argument, concluding that the liability analysis required evaluation under the *Penn Central* multi-factor balancing test.[189] The Ninth Circuit reasoned that the case raised a classic regulatory takings claim—application of a regulation that involved a temporary impact on access to the growers' property—which did not deprive the growers of all economically beneficial use of their property.[190]

The Supreme Court reversed and held that a *per se* liability test applied. In its analysis, the Court reasoned that its jurisprudence established two possible assessments. On the one hand, the government "commits a physical taking" and a *per se* analysis applies when the government exercises the power of eminent domain, when it "physically takes possession of property without acquiring title to it," or "when it occupies property—say, by recurring flooding as a result of building a dam."[191] But, on the other hand, a different assessment applies when the government "imposes regulations that restrict an owner's ability to use his own property."[192] In the latter situation, a flexible multi-factor analysis is required "[t]o determine whether a use restriction effects a taking."[193]

The Court reasoned that California's regulation "appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking."[194] This is so because the regulation gives union organizers a legal right to come onto the growers' land and remain there for up to three hours per day for as many as 120 days each year. Instead of merely limiting how owners may use their property, the regulation transfers for the enjoyment of third parties the owners' right to exclude.[195] Because the California statute resulted in a temporary, physical occupation of private property, a *per se* analysis applied, not a multi-factor analysis.

The Supreme Court recognized a potential conflict between its decision in *Cedar Point Nursery* and its earlier holding in *Arkansas Game & Fish Commission*. The *Cedar Point Nursery* decision held that a *per se* analysis applied because the California statute involved something more than merely restricting the owner's use—it involved a temporary physical

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187 *Id.* at 144.
188 *Id.* at 145.
189 Cedar Point Nursery v. Shiroma, 923 F.3d 524, 533 (9th Cir. 2019).
190 *Id.* at 526–27, 530.
191 *Cedar Point Nursery*, 594 U.S. at 147–48.
192 *Id.* at 148.
193 *Id.*
194 *Id.* at 149.
195 *Id.*

invasion of property.[196] But how did the *Cedar Point Nursery* decision comport with the *Arkansas Game & Fish Commission* decision? Like *Cedar Point Nursery*, the claim in *Arkansas Game & Fish Commission* involved something more than merely restricting the Commission's right to use its property for a period—the government's operation of Clearwater Dam had also caused a temporary physical occupation of private property. Why should a temporary invasion of union organizers onto private property warrant a *per se* treatment but a temporary invasion of water onto private property require a multi-factor analysis? As discussed below, the different treatment is appropriate, but the Supreme Court's effort to distinguish the two cases is both confusing and not compelling.

B. The Modern Approach to Temporary Flood-Based Fifth Amendment Cases is Best Understood to Require Proof of Actual Causation and Something Akin to Proximate Causation

1. Cedar Point Nursery*'s Attempt to Distinguish Temporary Flood-Based Claims*

The Supreme Court's effort to distinguish a temporary physical invasion of union organizers onto private property (which deserves *per se* liability treatment) and a temporary physical invasion of water onto private property (which deserves a multi-factor liability treatment) appears in a single paragraph, copied in relevant part below:

> Because this type of flooding can present complex questions of causation, we instructed lower courts evaluating takings claims based on temporary flooding to consider a range of factors including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue . . . . Our approach in *Arkansas Game and Fish Commission* reflects nothing more than an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding.[197]

The Court's effort to distinguish flood-based Fifth Amendment claims is both confusing and internally inconsistent.

i. The Court's Language is Confusing

The *Cedar Point Nursery* court's discussion of flood-based claims causes some confusion in two ways. First, the language quoted above offered to justify a different multi-factor analysis of temporary flood-based claims appears two pages after the Supreme Court identified "recurring flooding as a result of building a dam" as an example of the

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[196] *Id.* at 148–49, 152 (reasoning that because the California regulation allows union organizers to temporarily "take access" to the growers' property, a *per se* analysis applies).

[197] *Id.* at 160.

"clearest sort of taking" that courts must assess "using a simple, *per se* rule" because the "government must pay for what it takes."[198] Thus, the same court opinion first identifies claims based on "recurring flooding" as the epitome of *per se* claims before identifying flood-based claims as "unique[ly]" deserving of a multi-factor analysis.

The confusion almost certainly results from imprecise language—by "recurring flooding as a result of building a dam," the Supreme Court must have meant "*inevitably* recurring flooding as a result of building a dam." For more than 100 years, the Court has used the term "inevitably recurring" flooding as equivalent to a permanent condition of flooding.[199] Further, because the *Cedar Point Nursery* decision endorses the *Arkansas Game & Fish Commission* multi-factor test for temporary flood-based claims, it is unreasonable to believe that the Court intended to create a new *per se* liability test for claims involving "recurring flooding."

A second point of potential confusion arises from the fact that the Supreme Court's recitation of factors in *Cedar Point Nursery* is inconsistent with the list the Court offered in *Arkansas Game & Fish Commission*. In *Cedar Point Nursery*, the Court's list of factors now omits two: the owners' "reasonable investment-backed expectations," and the severity of interference. Again, the best explanation is that the omissions arise from imprecise language. There is no suggestion in the decision that the Supreme Court intended to announce a new analytical standard for temporary flood-based claims by omission. Despite the imprecise language, then, the best understanding is that the Supreme Court intended to retain all the factors identified in *Arkansas Game & Fish Commission*. The Federal Circuit's discussion of the multi-factor test in *Ablan v. United States*,[200] which identifies reasonable investment-backed expectations and severity of interference as relevant factors, supports this understanding.[201]

ii. The Court's Explanation is Internally Inconsistent

More problematic than the Court's imprecise language is the fact that the rationale offered to justify a different treatment of temporary flood-based claims appears internally inconsistent. The Court's first sentence in its explanatory paragraph suggests that temporary flood-based claims demand a different treatment because those claims "present complex questions of causation."[202] But the final sentence in the same

198 *Id.* at 148.

199 *Cress*, 243 U.S. 316, 328 (1917).

200 *Ablan v. United States*, 162 F.4th 1364 (Fed. Cir. 2025).

201 *Id.* at 1376–77. Interestingly, the *Ablan* court "assume[d], without deciding, that the Supreme Court's decision in *Arkansas Game* incorporated the 'reasonable investment-backed expectations' test from the regulatory takings context into the temporary flooding context." *Id.* at 1377 n.5. The court's apparent discomfort with the reasonable investment-backed expectations factor, as suggested in that footnote, will almost certainly be a point of dispute in future cases.

202 *Cedar Point Nursery*, 594 U.S. at 160.

paragraph suggests a different justification—the multi-factor analysis is necessary to distinguish between trespass claims (that is, tort claims) and takings claims. So, which is it? Is the multi-factor test needed in order to allow a trial court to examine a fact-based issue (the often-complex causation-related issues that arise in temporary flood-based claims) or is that test designed to allow courts to properly characterize the claim (either as a tort or a taking)?

The causation-based explanation is curious. As discussed above, when squarely presented with the issue, in cases like *Moden v. United States*, the Federal Circuit has required plaintiffs to prove but-for causation in physical takings claims in addition to satisfying any multi-factor analysis.[203] But the same court seemed to identify "causation" as one factor to be weighed in the multi-factor *Arkansas Game & Fish Commission* test.[204] Did the *Cedar Point Nursery* Court's reference to the "complex questions of causation" suggest the Supreme Court believes the traditional but-for causation test is somehow inadequate to assess those complex factual questions?

The last sentence in the same explanatory paragraph offers a different rationale—the multi-factor test treatment "reflects nothing more than an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding."[205] As discussed in the next section below, courts have long struggled to articulate a coherent way to distinguish between tort claims and takings claims. Those efforts have generally centered on some concept of foreseeability, but the test discussed in *Arkansas Game & Fish Commission* offers a wider group of factors courts must consider for flood-based claims. Does *Cedar Point Nursery* reflect the Supreme Court's effort to supplant or modify the tort versus taking analysis in such claims?

Related to these concerns is the Supreme Court's concluding statement that temporary flooding cases raise "unique considerations" without providing any reason why. *Cedar Point Nursery* suggests that one liability test (a multi-factor analysis) applies to one particular type of temporary physical Fifth Amendment claim (temporary flood-based Fifth Amendment claims). Does that mean that a different liability test (a *per se* test) applies to every other type of temporary physical Fifth Amendment claim? Stated in a slightly different way, do flood-based claims really raise "unique considerations" because of their inherent complexities? Or, as discussed below, does it make sense to apply the Court's multi-factor test to another equally complicated type of temporary physical Fifth Amendment claim—fire-based takings claims?

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203 *See supra* notes 95, 98–99.

204 *Ablan*, 162 F.4th at 1376–77.

205 *Cedar Point Nursery*, 594 U.S. at 160.

2. The Tort Versus Taking Distinction Justification

Before offering a recharacterized justification for the *Arkansas Game & Fish Commission* multi-factor test, this section addresses the court's second basis for that test: to distinguish between torts and takings claims. This issue has caused much confusion among lower courts and courts have struggled to identify, justify, and consistently apply a viable test. As the Federal Circuit itself explained:

> In Tucker Act jurisprudence, however, [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. This mixture has been a source of confusion for litigants and a struggle for courts.[206]

Several reasons likely explain the confusion stemming from the effort to distinguish between takings claims and tort claims. First, the entire exercise of attempting to distinguish between Fifth Amendment claims and tort claims is odd because the same operative facts can support both a tort claim and a Fifth Amendment claim.[207] Thus, the difference between the two claims appears to turn on a litigant's pleading decision. If the same facts can support either a Fifth Amendment claim or a tort claim, it is difficult to see how one might develop a coherent test to distinguish between the two claims.

Second, the confusion heightened after 2012 when the Supreme Court adopted a new multi-factor test in *Arkansas Game & Fish Commission* (which differs from the two-part *Ridge Line* test) that also intended to distinguish between tort claims and takings claims. If both tests serve the same purpose, why are they different tests? The Federal Circuit's decision in *Ablan* reflects this confusion. In its discussion of the merits test for a temporary flood-based Fifth Amendment claim, the court spends several pages discussing *Arkansas Game & Fish Commission*'s multi-factor test, and references *Ridge Line* without discussion after a "*see also*" introductory signal.[208]

Third, using either test as a tool to distinguish between torts and takings is a curious approach because some of the same factors are required to prove either type of claim. The *Ridge Line* test, for example, suggests that if a litigant cannot prove foreseeability or impact, he loses

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[206] Fisher v. United States, 402 F.3d 1167, 1171–72 (Fed. Cir. 2005).

[207] *See Moden*, 404 F.3d 1335, 1339–40 n.1 (Fed. Cir. 2005) (citing Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363 (Fed. Cir. 1998); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1365 (Fed. Cir. 2001); El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1353 (Fed. Cir. 2004)). One court also noted that takings claims have a "familiar ring" with tort claims because takings claims often contain elements of tort law. Nicholson v. United States, 77 Fed. Cl. 605, 615 (2007).

[208] *Ablan*, 162 F.4th 1364, 1377 (Fed. Cir. 2025).

the ability to bring a takings claim.[209] The nature of the test, however, suggests that he might instead recharacterize his allegations as a viable tort claim. But that treatment is odd because a successful tort litigant must also prove foreseeability (as a component of proving the tortfeasor was the proximate cause of the claimed injury) and damage. Thus, if a Fifth Amendment claimant proves foreseeability, a court might conclude takings treatment is appropriate. But he would have to make a substantially similar showing to support a hypothetical tort claim based on the same facts. And a claimant's failure to prove foreseeability means he has raised, at most, a tort claim. But his failure of proof likely dooms his hypothetical tort claim. The tests, then, are an odd way to distinguish the two types of claims.

The historical record offers a possible explanation for courts' focus on a tort versus taking dichotomy. One of the first courts to discuss the dichotomy was the Supreme Court's 1924 decision in *Sanguinetti v. United States*, which, as discussed above, involved large storms that had overwhelmed the capacity of a government canal.[210] The Supreme Court focused on foreseeability in rejecting the claim: "[t]he engineers who made the examination and recommended the plans determined, upon the information which they had, that the canal would have a capacity considerably in excess of the requirements in this respect."[211] Because the *Sanguinetti* decision predated the enactment of the Federal Tort Claims Act,[212] the Supreme Court's decision to frame its holding in terms of a tort versus takings distinction is best understood as equating the word "tort" to the phrase "no remedy." It was not shown that the overflow was the direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the government. By holding that the plaintiff stated only a tort, the *Sanguinetti* court meant that "[t]here is no remedy in such case against the United States."[213]

Later courts, including the Supreme Court in *Arkansas Game & Fish Commission*, have continued to use the tort versus taking rationale. But these courts are not really attempting to distinguish between different types of claims; they are, instead, evaluating whether the plaintiff raised a meritorious takings claim. As discussed in the section below, a more coherent approach is to abandon the tort versus taking rationale and recognize the real purpose the factors identified in *Arkansas Game & Fish*

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209 *See Ark. Game & Fish Comm'n III*, 568 U.S. 23, 39 (2012) (explaining that foreseeability and impact are part of a multi-factor test).

210 *See supra* Part IV(A)(1) (discussing *Sanguinetti* and its influence on the *Arkansas Game & Fish Commission* court); *Sanguinetti*, 264 U.S. 146, 147 (1924).

211 *Sanguinetti*, 264 U.S. at 148.

212 Federal Tort Claims Act, 28 U.S.C. § 1346 (2018).

213 *Sanguinetti*, 264 U.S. at 150; *see also* Berenholz v. United States, 1 Cl. Ct. 620, 628 (1982), *aff'd*, 723 F.2d 68 (Fed. Cir. 1983) ("The likelihood of the outcome serves to distinguish conduct which is taking from that which is tortious."); Baird v. United States, 5 Cl. Ct. 324, 330 (1984) (explaining that "probability and foreseeability of the damage is a primary determinative element in whether a taking or tort occurred").

Commission serve—to require takings plaintiffs to prove something akin to proximate cause.

3. The Court's Treatment of Temporary Flood-Based Claims is Best Understood to Rest on Something Akin to Proximate Cause

The discussion below first offers a brief overview of proximate cause principles in tort claims to underscore how closely related those principles are to the factors identified in *Arkansas Game & Fish Commission*. The analysis then turns to a discussion of how courts considering takings claims sometimes, but rarely, evaluate proximate cause principles. Finally, the section concludes by arguing that courts should abandon the current "tort versus taking" justification and recognize instead that the *Arkansas Game & Fish Commission* multi-factor test serves to require plaintiffs to prove something like proximate cause principles.

i. Proximate Cause Principles in Tort Claims

Causation in tort law requires consideration of two separate, but related, concepts: causation-in-fact and proximate cause.[214] Proximate cause in tort cases "defies easy summary."[215] In broad strokes, cases often refer to the concept as an attempt to encapsulate three ideas: proof of foreseeability; a connection between the injurious conduct and the alleged injury (often expressed as a lack of some intervening cause); and some sense of fundamental fairness. The Supreme Court has endorsed proximate cause as "'a flexible concept' . . . that generally 'refers to the basic requirement that . . . there must be "some direct relation between the injury asserted and the injurious conduct alleged."'"[216] The Supreme Court has further taught that proximate cause is assessed at the time of the allegedly tortious action, not with perfect hindsight.[217]

Many courts in the modern era have approached proximate causation "in terms of foreseeability or the scope of the risk created by the predicate conduct."[218] Under this view, proximate cause represents a natural and continuous sequence, unbroken by an intervening cause, which produces the injury and without which the injury would not have

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214 Paroline v. United States, 572 U.S. 434, 444 (2014).

215 *Id.*; *see also* Husted v. A. Philip Randolph Inst., 584 U.S. 756, 769 (2018) ("Proximate cause is an elusive concept."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 274 (W. Page Keeton ed., 5th ed. 1984) (discussing the concept of foreseeability in relation to proximate cause).

216 *Paroline*, 572 U.S. at 444 (quoting Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654 (2008) and CSX Transp., Inc. v. McBride, 564 U.S. 685, 707 (2011) (Roberts, C.J., dissenting)); *see also* Ollis v. Shulkin, 857 F.3d 1338, 1344 (Fed. Cir. 2017) (quoting KEETON ET AL., *supra* note 215, at 264) (adopting a similar approach in non-takings cases and stating that proximate cause is intended to limit "legal responsibility to 'those [but-for] causes which are so closely connected with the result . . . that the law is justified in imposing liability'").

217 Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U.S. 469, 476 (1876).

218 *Paroline*, 572 U.S. at 445.

occurred.[219] "[A]ny harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always 'proximate,' no matter how it is brought about, except where . . . it is not within the scope of the risk created by the original negligent conduct."[220] In these cases, proximate cause "preclude[s] liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."[221]

At other times, courts have focused on whether some intervening act broke the causal chain between the offending act and the resultant injury. Thus, some scholars have said that the concept of proximate cause "suggests either physical or temporal closeness and echoes the ancient concept of *in jure non remota causa sed proxima spectatur*," or "[i]n law the near cause is looked to, not the remote one."[222] In one early tort claim, for example, the Court of Appeals for the District of Columbia emphasized that proximate cause required proof of a "series of events which terminate in the accident. Of course, the wrong and the injury must not be separated by an independent cause. In that event, not the original wrong, but the intervening act, would be the proximate cause."[223] Still other courts focus their discussion of proximate cause on ideas of fairness. Thus, in the classic tort case *Palsgraf v. Long Island Railroad*,[224] Justice Andrews in dissent noted that proximate cause is a fuzzy concept which means "that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[225]

In modern cases, the Federal Circuit has only rarely used the term "proximate cause" to explain its reasoning in Fifth Amendment cases. But it is impossible to ignore the strong connection between the principles discussed above and the tests articulated in *Ridge Line* and *Arkansas Game & Fish Commission*. The absence of proximate cause language in takings cases is also odd because the Federal Circuit has not hesitated to

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219 Pitts v. Genie Indus., Inc., 921 N.W.2d 597, 609 (Neb. 2019).

220 RESTATEMENT (SECOND) OF TORTS § 442B cmt. b (A.L.I. 1965).

221 *Paroline*, 572 U.S. at 444–45 ("Every event has many causes . . . . So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result."); *Ollis*, 857 F.3d at 1344 (*citing Paroline*, 572 U.S. at 445) ("Proximate cause is often explicated in terms of foreseeability . . . ."); DAN B. DOBBS, THE LAW OF TORTS 444 (2001) ("The most general and pervasive approach to proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeable risked by his negligent conduct and to the class of persons he put at risk by that conduct."); *see also* KEETON, *supra* note 215, at 273 ("[T]he scope of liability should ordinarily extend to but not beyond the scope of the 'foreseeable risks'—that is, the risks by reason of which the actor's conduct is held to be negligent.").

222 Amy L. Landers, *Proximate Cause and Patent Law*, 25 BOS. U. J. SCI. & TECH. L. 329, 354, 354 n.196 (2019) (*citing* Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 (1911)).

223 Munsey v. Webb, 37 App. D.C. 185, 189 (D.C. Cir. 1911), *aff'd*, 231 U.S. 150 (1913).

224 Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

225 *Id.* at 103 (Andrews, J., dissenting).

use proximate cause language in a variety of other claims.[226] In those other contexts, the Federal Circuit has tended to adopt the understanding of proximate cause discussed in tort claims—an assessment driven by the facts and "mixed considerations of logic, common sense, justice, policy and precedent."[227] In several of these other non-takings cases, the Federal Circuit has often focused on foreseeability as the operative consideration, suggesting that "proximate cause" and "foreseeability" are "labels" that have been used to limit remote consequences of conduct.[228]

ii. Proximate Cause Principles In Takings Claims

The core considerations involved in evaluating proximate cause-like principles (foreseeability, intervening acts, and a sense of fairness) have long existed in takings jurisprudence. Early flood-based takings claims tended to discuss these considerations using labels like "accidental" or "extraordinary" floods. In its 1916 decision *Cubbins v. MRC*,[229] for example, the Supreme Court referenced the "universally recognized" principle that landowners could not recover under a flood-based Fifth Amendment claim if the flooding occurred "in case of accidental or extraordinary floods . . . ."[230] The *Cubbins* Court's precise meaning of "accidental or extraordinary floods" is somewhat uncertain, but the context of the Court's reasoning suggests the term was intended to mean floods so large that the government could not have reasonably contemplated them.

Five years after *Cubbins*, the Supreme Court's decision in *John Horstmann Co. v. United States*,[231] a flood-based takings case arising out of operation of the Truckee-Carson Irrigation Project, used different terminology to describe a similar principle of foreseeability.[232] According to the *Horstmann* Court, the government could avoid liability if the property damage were only "incidental" because "it would border on the extreme to say that the [g]overnment intended a taking by that which no human knowledge could even predict."[233] The Supreme Court reasoned

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226 *E.g.*, T. Brown Constructors, Inc. v. Pena, 132 F.3d 724, 734 (Fed. Cir. 1997) (requiring proof of proximate cause in a breach of contract claim); Nycal Offshore Dev. Corp. v. United States, 743 F.3d 837, 843 (Fed. Cir. 2014) (requiring proof of proximate cause in a lost profit claim); Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1546 (Fed. Cir. 1995) (requiring proof of proximate cause in patentee's claim of lost profits); *Ollis*, 857 F.3d at 1343 (applying a proximate cause standard "similar" to the "usual standard" used for medical malpractice claims).

227 *Rite-Hite Corp.*, 56 F.3d at 1546.

228 *Id.* at 1546. Thus, in a lost profit case, the Federal Circuit stated, "[i]f a particular injury was or should have been reasonably foreseeable by an infringing competitor in the relevant market, broadly defined, that injury is generally compensable absent a persuasive reason to the contrary." *Id.* at 1546.

229 Cubbins v. Miss. River Comm'n, 241 U.S. 351 (1916).

230 *Id.* at 363–64.

231 John Horstmann Co. v. United States, 257 U.S. 138 (1921).

232 *Id.* at 142–43, 146.

233 *Id.* at 146.

that "[a]ny other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability."[234]

Some early flood-based takings cases focused on intervening acts, a concept well-known in tort-based proximate cause principles. In its 1948 decision in *Cotton Land Co. v. United States*,[235] for example, the Court of Claims addressed proximate-cause-like principles when it concluded that "a succession of events . . . in their natural order" can establish a taking.[236] In that case, the Corps' construction of a dam caused sediment to collect on the riverbed upstream of the dam.[237] Over time, the sediment raised the riverbed and the water level and ultimately caused the river to overflow its banks onto plaintiff's property.[238] The court held the United States liable even though the erection of the dam was not the direct cause of the flooding, but instead triggered a chain of events that resulted in the flooding.[239]

On rare occasions, courts have broken from the *Sanguinetti* mold of characterizing these issues as distinguishing takings claims from torts and used the term "proximate causation." In *Loesch v. United States*,[240] the plaintiff alleged that the United States violated the Fifth Amendment when a government project caused erosion on his property.[241] The Court of Claims held that a landowner must prove both actual and proximate causation: "[I]f there is no proper showing that governmental action was the proximate and direct cause of the erosion damage, there can be no liability on the part of the United States for a fifth amendment taking."[242]

Other courts have questioned whether proximate causation has any role in takings cases and left the issue unresolved. In *Laughlin v. United States*,[243] for example, plaintiff brought a flood-based takings case arising out of the construction and operation of a series of federal dams and reservoirs along the Colorado River.[244] The Court of Claims held that "[f]or a compensable taking to exist, the flooding under the property must be the natural and probable consequence of government action."[245] The lower court noted that some courts treat the "natural and probable

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234 *Id.*

235 75 F. Supp. 232 (Ct. Cl. 1948).

236 *Id.* at 233.

237 *Id.* at 232–33.

238 *Id.* at 233.

239 *Id.* ("[A] succession of events was initiated which, when the events had all occurred in their natural order, deprived the company of the beneficial use of its land.").

240 Loesch v. United States, 645 F.2d 905 (Ct. Cl. 1981).

241 *Id.* at 913.

242 *Id.* Other courts have relied on *Loesch* to discuss proximate cause in an erosion-based Fifth Amendment claim. *See, e.g.*, Smith v. United States, No. 93-5151, 1994 WL 32660, at *1 (Fed. Cir. Feb. 7, 1994); Kingsport Horizontal Prop. Regime v. United States, 46 Fed. Cl. 691, 694 (2000); Baskett v. United States, 8 Cl. Ct. 201, 210 (1985).

243 Laughlin v. United States, No. 91-5059, 1992 WL 164266, at *1 (Fed. Cir. July 17, 1992).

244 *Id.*

245 Laughlin v. United States, 22 Cl. Ct. 85, 101 (1990) (citing Bartz v. United States, 224 Ct. Cl. 583, 593 (1980)).

consequence" test as a bar on "[i]ndirect or consequential damages" and other courts "label it the 'direct and proximate'" test.[246] The court did not attempt to resolve this confusion, and eventually concluded that the damage was "at most conjectural, indirect, and consequential," and hence "sound[ed] in tort."[247]

iii. Courts Should Recharacterize the Liability Test in Flood-Based Claims as Requiring Proof of But-For Causation and Something Akin to Proximate Cause

Federal courts' reluctance to use the term "proximate cause" in Fifth Amendment claims may arise from efforts to respect the jurisdictional bar the Tucker Act places on the Court of Federal Claims. Yet the reluctance is curious because, as noted above, federal courts have long recognized the connection between tort and takings claims, and have often stated that the same operative facts can support both a tort claim and a Fifth Amendment claim.[248] Treating the *Ridge Line* or the *Arkansas Game & Fish Commission* tests as tools to distinguish between torts and takings, then, is not compelling and serves to muddle takings jurisprudence.

A better approach is to abandon prior characterizations and to recognize that the multi-factor analyses are similar to, and serve the same purpose as, the concept of proximate cause in the tort context. The factors aim to test whether the government could have foreseen the claimed damage. They evaluate the strength of the connection between the government's action and the claimed damage, and whether there was some intervening cause that should insulate the government from liability. They aim to untangle government-caused harms from nature-caused harms. They assess the severity of the impact and incorporate, at their core, a sense of fairness—given all the facts that led up to the impacts on private property, is it fundamentally fair to hold the government liable?

Recharacterizing the factors as a test akin to proximate cause is a small lift. As discussed above, though courts have used the term "proximate cause" in some early cases, that term appears infrequently in most claims.[249] Relabeling the analysis as incorporating proximate cause-like principles and recognizing that all the factors identified in *Arkansas Game & Fish Commission* serve the common goal of assessing something akin to proximate cause would reflect the same test's treatment in these early cases and better represent what the test intends to require.

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[246] *Id.* at 101; *see also Loesch*, 645 F.2d 905, 913 (Ct. Cl. 1981) (explaining the direct and proximate test).

[247] *Laughlin*, 22 Cl. Ct. at 108. As discussed above, the *Laughlin* trial court addressed plaintiff's claims about the elevated high groundwater table under the doctrine of relative benefits. *Id.* at 111, 114.

[248] *See supra* note 184 (listing cases arising from temporary flood-based takings claims).

[249] *See supra* Part IV(B)(3)(ii).

Thus, future courts should characterize the liability analysis in temporary flood-based takings claims for what it really is: a requirement that the plaintiff prove both but-for causation and something akin to proximate cause as set forth in the *Arkansas Game & Fish Commission* multi-factor analysis. If the plaintiff can satisfy both types of causation, he should succeed on his takings claim if the government cannot meet its burden with respect to any affirmative defense (such as the doctrine of necessity).[250]

V. THE PROPER LIABILITY ANALYSIS IN FIRE-BASED FIFTH AMENDMENT CLAIMS

A. Fire-Based Fifth Amendment Claims, Like Flood-Based Fifth Amendment Claims, Raise Complex Questions that Require a Court to Distinguish Between Government-Caused Damage and Nature-Caused Damage

With this recharacterization of temporary flood-based takings claim principles in mind, this section returns to fire-based claims. As described above, the federal government's typical response to wildland fires may involve many decisions over an extended period. The leadership structure may decide to use helicopters to drop water; it may use dozers to construct firelines to slow a fire's forward progress; it may conduct burning operations to remove combustible vegetation. It may do all these things at different times and at different places. It may change its approach as conditions warrant. It might have imperfect information and its decisions, even if reasonable, may have tragic consequences. If it conducts burning operations, those efforts may prove successful or, if they are poorly planned or the wind changes unexpectedly, the fire may grow onto private properties.

The reality of fighting wildfires is that it is often difficult to disentangle impacts resulting from some government action and impacts resulting from natural effects. It is precisely for that reason that a proximate cause-type analysis makes sense in the context of fire-based Fifth Amendment claims. A fact finder who wants to understand and examine the entirety of the government's response would, at the core, need to disaggregate government-caused impacts and nature-caused impacts.

To undertake the effort of identifying what impacts are better understood as government-caused and what impacts are better understood as nature-caused, a court would need to hear from experts in the field who might offer their opinions about what decisions were made,

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[250] Of course, the plaintiff would still need to demonstrate that she has standing, her claim is timely and ripe, that her claim is not barred by 28 U.S.C. § 1500, and meet all other non-merits-based requirements for filing suit. The discussion here focuses only on the merits assessment.

why those decisions were made, and whether those decisions complied with accepted firefighting norms. Experts may study how a fire likely started, why the fire grew, and what impact the government's actions had on the fire's development. Experts may describe what actually happened and opine about what might have occurred if the government had done nothing. Firefighters who participated in the fire might explain how they understood the risks associated with their chosen actions as well as the risks of leaving the fire alone.

The Chetco Bar Fire exemplifies the onerous task of achieving a full reckoning of the government actions taken. Why did the Forest Service conduct the mid-August burnout operations—to protect historic properties and private homes or to achieve some sort of ecological benefit for the forest? Did the fire leave the forest and impact private properties because of the high winds in mid-August or because of the burnout operations? Was the fire's growth a foreseeable result of some federal actions, or just an act of God? Does the history of large wildfires in the area mean landowners should have expected similar fires in the future? Should the Forest Service have modified its actions due to that history of wildfires? How did the fire impact private properties? Is it fair to require the United States to pay for fire losses in a situation like this?

Resolution of these issues is complicated, and they are the same types of issues that arise in temporary flood-based Fifth Amendment claims. One could easily substitute the word "water" for "fire" and the phrase "dam releases" for "burnout operations" and the questions posed above would be nearly identical to those the Supreme Court deemed relevant when it established its merits test in *Arkansas Game & Fish Commission*.

The similarity between flood-based and fire-based Fifth Amendment claims is seen too in the way courts have long analogized the two claim types in assessing liability. As discussed above, three years before the Supreme Court issued *Arkansas Game & Fish Commission*, the Federal Circuit evaluated the merits of *Cary*, a fire-based claim, by recognizing the relevance of foreseeability-like principles in *Ridge Line*, a flood-based claim.[251] When the *Cary* court attempted to justify its analysis of the tort versus taking distinction (which, as discussed above, is better characterized as further evaluation of proximate cause-like principles), the court analogized it to two prominent flooding cases—*United States v. Cress* and *Sanguinetti v. United States*.[252]

In short, the type of factual nuances that arise in fire-based Fifth Amendment claims are substantially similar to the types of factual issues that arise in flood-based claims, and courts have rightly turned to flood-based claims when evaluating the merits of fire-based claims. Both claims often require a court to examine complicated facts to assess what impacts

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[251] *Cary*, 552 F.3d 1373, 1376–78 (Fed. Cir. 2009).
[252] *Id.* at 1381.

the government caused and what impacts are better understood as resulting from natural conditions.

And both claims require an in-depth analysis of all the facts to determine whether it is fair to require taxpayers to pay plaintiffs for their losses. What did the government actually do and why? What was the nature of these properties? What expectations did the plaintiffs actually have that their properties would be free from the type of harm they allege occurred on their properties? It is for that reason that courts evaluating the merits of fire-based takings claims should require plaintiffs to prove that the United States was the but-for cause of the damage and that the multi-factor, proximate-cause-like analysis set out in *Arkansas Game & Fish Commission* favors the plaintiff's position.

B. But-For Causation in Fire-Based Fifth Amendment Claims

A court evaluating liability in a fire-based Fifth Amendment claim should evaluate but-for causation as a requirement separate from the multi-factor test.[253] Thus, if a plaintiff cannot prove but-for causation, the claim fails. Courts should not treat but-for causation as one of many factors to be weighed. The idea that but-for causation is a stand-alone element, necessary for the successful prosecution of a Fifth Amendment claim, should be considered a well-accepted principle.[254] As the Federal Circuit explained in *St. Bernard Parish Government v. United States*,[255] but-for causation is an independent requirement separate from foreseeability-related principles: "In order to establish causation, a plaintiff must show that in the ordinary course of events, absent government action, plaintiffs would not have suffered the injury."[256]

The *St. Bernard Parish* court explained further that courts cannot disaggregate pieces of a larger project—when eliminating government actions for purposes of defining the no-government hypothetical, a court must consider all government actions "directed to the same risk that is alleged to have caused the injury to plaintiffs."[257] Thus, in a fire-based claim, the plaintiff would need to prove that the damage she actually experienced was worse than the damage that would have resulted if the government had done nothing (no direct attacks and no indirect attacks).

In situations where the government initiates burnout operations either during a wildfire to protect structures or to slow or impede a fire's progression, the no-government action scenario would need to consider what would have happened without those burnout operations and any other actions the government took to suppress the fire. In a situation

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253 *Moden*, 404 F.3d 1335, 1343 (Fed. Cir. 2005).

254 *See* St. Bernard Parish Gov't v. United States, 887 F.3d 1354, 1362 (Fed. Cir. 2018) ("It is well established that a takings plaintiff bears the burden of proof to establish that the government action caused the injury.").

255 887 F.3d 1354 (Fed. Cir. 2018).

256 *Id.* at 1362.

257 *Id.* at 1365.

where the government initiates a firing operation to remove combustible vegetation and the operation results in a fire, the court would need to consider what would have happened had the government allowed the vegetation to grow unchecked and left combustible vegetation in the forest.

Thus, in future fire-based Fifth Amendment claims, courts should first assess but-for causation. If the same (or more) amount of fire would have entered the plaintiff's property in the absence of government action, the government is not the but-for cause of the fire and the claim cannot succeed. If the fire would not have entered plaintiff's property (or if a lesser amount of fire would have entered plaintiff's property) in the no-government-action condition, the claim should proceed to a proximate cause-like assessment.

C. Proximate Cause-Like Analysis in Fire-Based Fifth Amendment Claims

Like courts' assessment of the *Penn Central* factors in the context of regulatory takings claims where "no set formula exists to determine whether compensation is constitutionally due for a government restriction of property,"[258] courts considering fire-based claims should look to all relevant factors rather than for bright lines.

1. Intended or Foreseeable Result

Although identified second ("[t]ime" appears first) in *Arkansas Game & Fish Commission*'s list of relevant factors, courts should treat the "degree to which the invasion is intended or is the foreseeable result of authorized government action" as the most important factor in fire-based and flood-based Fifth Amendment cases.[259] A government burning operation intentionally initiated on private property, as exemplified by *Bowditch v. Boston*, lies on one end of the spectrum.[260] Proof that the government's invasion was intentional or foreseeable is not always dispositive,[261] but the foreseeability analysis must always form an important part of the court's weighing of relevant liability factors.

On the other end might be a case where the government constructs a fireline with a dozer, with no ability to foresee that the action might result in fire moving to private properties. In cases like *John Horstmann v. United States* (and *Moden v. United States* and *Ridge Line v. United States*), the Federal Circuit has suggested some degree of foreseeability must always be shown, and a lack of foreseeability may prove dispositive

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[258] Hendler v. United States, 952 F.2d 1364, 1373 (Fed. Cir. 1991).

[259] *Ark. Game & Fish Comm'n III*, 568 U.S. 23, 39 (2012).

[260] *Bowditch*, 101 U.S. 16, 16 (1879).

[261] Plaintiff would, of course, need to prove that his property would not have burned but for the government's firing operation.

of plaintiff's claim.[262] This is, at the core, the purpose of a proximate cause-like assessment—to allow a court the opportunity to ensure the defendant's conduct is sufficiently linked to the claimed injury.

But, as in tort cases, the best approach is to avoid drawing a bright-line rule and instead allow courts to apply a flexible concept to assess this issue.[263] Thus, courts should recognize that there may be cases where the government intentionally burns private property and is not liable; and there may be a circumstance where foreseeability is uncertain, but takings liability might nevertheless attach.

2. Reasonable Investment-Backed Expectations and Character of the Land

Courts should treat their assessment of a plaintiff's reasonable investment-backed expectations and the related character of the land element as the second most important factor in fire-based and flood-based Fifth Amendment cases. This section discusses these elements together because they address the same issue: the reasonableness of a property owner's expectation that his property will remain free from fire.

In the context of regulatory takings claims, the reasonable expectations factor "is so overwhelming . . . that it disposes of the taking question" where the plaintiff "could not have had a reasonable investment-backed expectation."[264] A somewhat similar approach should apply in the context of fire-based Fifth Amendment claims. When an individual purchases property in a fire-prone area, particularly one that has a history of fires, he should reasonably anticipate that fires are likely to occur in that area in the future. Wildfires are part of the natural cycle of forests, and properties in wildland-urban interface areas are part of that same cycle.

Areas impacted by the Chetco Bar Fire, for example, had seen numerous past fires, and the area was known to be prone to large wildfires.[265] The fire risks were so well understood that, similar to other areas in Oregon, some landowners in the area contributed to a private,

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[262] *John Horstmann Co.*, 257 U.S. 138, 146 (1921); *see also Moden*, 404 F.3d 1335, 1343 (Fed. Cir. 2005) ("Thus, we conclude that, here, the Modens must point to some evidence presenting a genuine issue of material fact [that the impact on their property] was the foreseeable or predictable result of [the government's actions].").

[263] *See Paroline*, 572 U.S. 434, 444 (2014).

[264] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005–06 (1984); *see also* Anaheim Gardens, L.P. v. United States, 953 F.3d 1344, 1351 (Fed. Cir. 2020) ("[T]he complete absence of reasonable distinct investment-backed expectations can weigh sufficiently heavily to be dispositive of a takings claim."). *But see* Palazzolo v. Rhode Island, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) ("Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'") (emphasis in original).

[265] INFORMATION ON FOREST SERVICE RESPONSE, KEY CONCERNS, AND EFFECTS OF THE CHETCO BAR FIRE, *supra* note 8, at 6.

non-profit corporation (now known as the Coos Forest Protective Association) tasked with "respond[ing] to all fire control emergencies with an effective, well trained, equipped and supervised fire control organization sufficient to achieve optimum suppression results."[266] Some landowners also had private fire insurance, reflecting their knowledge of the risk of fires.

Of course, landowners might also expect that the Forest Service would respond to fires that start on National Forests. Courts should examine that expectation and assess whether the landowners' expectation is reasonable and investment-backed. For example, a landowner cannot have a reasonable expectation that the Forest Service would immediately extinguish every fire before it might leave federal lands, especially in the absence of some federal law that requires the Forest Service to do so. And unless the government changes the Forest Service's current priorities, a landowner cannot expect the Forest Service to adopt the landowner's preferred approach to firefighting, and he must expect that the Forest Service will always prioritize firefighter safety over suppression activities.

3. Character of the Governmental Action

Although the character of the governmental action is part of the *Penn Central* analysis,[267] the *Arkansas Game & Fish Commission* court did not identify that factor. Future courts addressing flood-based and fire-based takings claims should remedy this omission and consider the character of the governmental action as part of their liability assessments. Just as in the context of regulatory takings claims, what the government did matters. Most critically, courts should assess whether the government acted in accordance with its mission protocols, or whether it took unnecessary risks in addressing the wildfire.

One area where the courts should continue to apply a bright-line rule in this context is to recognize that takings claims must be based on affirmative government actions, rather than inaction. Federal courts have long recognized that claims based on the government's failure to act "cannot state takings claims" because takings "liability must be premised on affirmative government acts."[268] This requirement is fundamental to takings law and nothing about the discussion here suggests altering that principle.[269]

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[266] *About Coos FPA*, COOS FOREST PROTECTIVE ASS'N, https://www.coosfpa.net/about [https://perma.cc/6PGA-5VMJ] (last visited Sep. 1, 2025).

[267] *Penn Central*, 438 U.S. 104, 124 (1978).

[268] Bd. of Supervisors of Issaquena Cnty. v. United States, 84 F.4th 1359, 1365 (Fed. Cir. 2023) (quoting *St. Bernard Par. Gov't*, 887 F.3d 1354, 1362 (Fed. Cir. 2018)).

[269] Though the requirement that takings plaintiffs base their claims on affirmative government actions rather than inaction has seen well-considered scholarly attention, litigating that issue is beyond the scope of this Article. *See generally* Christopher Serkin, *Passive Takings in Action*, 2021 MICH. STATE L. REV. 1417, 1417–20 (2021); Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV.

4. Severity of Interference and Time

Finally, courts should consider the severity of interference in their analysis of fire-based takings claims, as well as the related element of the amount of time the fire impacted the property. The severity factor may often favor the landowner because properties impacted by wildfires are often significantly impacted. Wildfires can burn homes and personal property, trees and grasses on private properties, and result in large financial impacts. For the same reason that courts consider the economic impact of regulations in the context of *Penn Central*, courts must include the severity of interference in the analysis of fire-related claims.

The amount of time the fire impacts the private property also matters. Takings liability requires the government to do more than just damage private property—a Fifth Amendment violation occurs only if the government takes some property interest without paying compensation. As discussed above, the Supreme Court appeared to establish a bright-line rule for physical takings claims in cases like *Portsmouth Harbor* that a single government act cannot constitute a Fifth Amendment claim, but a "continuance of them in sufficient number and for a sufficient time may prove [a taking]."[270] The Federal Circuit repeated the same position in *Ridge Line*. If applied here, virtually all fire-related claims would fail because these claims typically arise from a single, devastating fire.

But courts should reconsider the viability of the *Portsmouth Harbor* rule in this context. A bright-line, one-fire, no-liability principle finds little justification when one characterizes the liability analysis as but-for causation and proximate-cause-like tests. A landowner whose property burns due to some affirmative government act and who can satisfy the multi-factor analysis described above has a reasonable argument that the government took a property right over her property in violation of the Fifth Amendment. While the fact that the damage occurred only once is a factor to be weighed, it should not necessarily immunize the government merely because it was a one-time, temporary invasion rather than an invasion that occurred more than once. Thus, although courts should consider the amount of time fire invades private property as one of the liability factors, it should not be dispositive.

345, 361 (2014) (arguing that the government's failure to act to protect private property can constitute an unconstitutional taking). As noted above, the *Cary* court identified an exception to the foreseeability requirement in situations where the government caused an accumulation of fuel loads. *See Cary*, 552 F.3d 1373, 1376–77 (Fed. Cir. 2009). But because a litigant must base a Fifth Amendment claim on an affirmative government action, rather than inaction, at least under current law, a claim based on the government's failure to thin combustible vegetation in a fire-prone area could not support a viable claim.

[270] *Portsmouth*, 260 U.S. at 327–28.

VI. CONCLUSION

A likely response to the suggestion that courts adopt a multi-factor test to assess fire-based Fifth Amendment claims is that expansion of proximate cause-like principles in this area adds uncertainty to an already complicated subject. This critique is understandable, particularly given that the similar-sounding multi-factor *Penn Central* analysis is often criticized for its opaqueness.[271] But these complexities already exist, so including them in fire-based takings claims and adopting the *Arkansas Game & Fish Commission* approach in fire-based Fifth Amendment claims will do little to increase uncertainty in this area.

Trial courts already recognize that the factual complexities of most physical Fifth Amendment claims already discourage them from resolving claims at early stages without the benefit of a trial record.[272] And rightly so. These complexities exist for a reason—as the discussion above demonstrates, these are complicated cases and determining what impacts result from government actions as opposed to natural events is hard. The suggestions made in this Article are not intended to eliminate these existing difficulties, but instead to offer a unifying analytical framework that recharacterizes the analysis as what it really is—but-for causation and an analysis of proximate cause-like principles.

Finally, although this Article focuses on fire-related takings cases, the analysis provided here hopefully provides a justification to apply the *Arkansas Game & Fish Commission* analysis to any temporary physical Fifth Amendment claim, especially those claims where it is difficult to differentiate between government-caused and nature-caused harms. Federal takings claims are broad. In addition to fire- and flood-based takings claims, the federal government is often sued for claimed violations of the Fifth Amendment involving government projects that

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[271] In 1983, years before the courts developed the multi-factor test in *Arkansas Game & Fish Commission*, the Federal Circuit acknowledged that the "law of just compensation is hardly a model of clarity," and favorably quoted academic commentary that argued that the field was "characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric." Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed. Cir. 1983) (quoting Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1970)). *See also* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle*," 90 MINN. L. REV. 826, 827 (2006) ("Regulatory takings law is by most accounts a 'muddle.'"); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 696 (1993) (takings law is a "confused body of law containing contradictory principles and standards").

[272] *See, e.g.*, Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 466 (2009) ("Thus, due to the 'fact-intensive' nature of takings claims, courts are typically reluctant to decide such claims at the summary judgment stage, preferring to wait for a trial to fully develop the factual record."). These uncertainties prompted one scholar to call the takings field "a mess" and "in serious disarray." John Martinez, *A Proposal for Establishing Specialized Federal and State "Takings Courts,"* 61 ME. L. REV. 467, 468 (2009); John Martinez, *A Cognitive Science Approach to Takings*, 49 U.S.F. L. REV. 469, 470 (2015).

allegedly cause erosion on private properties,[273] invasion of chemicals onto private properties,[274] accretion of sand on private properties,[275] and a host of other claimed physical invasions.

Courts should apply a consistent merits analysis for each of these temporary physical takings claims—first, requiring the plaintiff to prove that some government action was the but-for cause of the claimed invasion on private property, and second, requiring the plaintiff to prove that the multi-factor analysis designed to assess something akin to proximate cause favors plaintiff's position. In the final analysis, temporary flood-based takings claims are not unique, but neither are fire-based takings claims. The Supreme Court should strive for coherence in this area and apply the temporary flood-based merits test to any Fifth Amendment claim alleging a temporary physical invasion of private property.

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[273] *E.g.*, Banks v. United States, 741 F.3d 1268, 1271–72 (Fed. Cir. 2014).
[274] *E.g.*, Penna v. United States, 153 Fed. Cl. 6, 10–11 (2021).
[275] *E.g.*, Prakhin v. United States, 122 Fed. Cl. 483, 485 (2015).