IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-PL-352

Town of Linden, Indiana, et al.,
Appellants (Defendants below)

–v–

Darrell Birge and Sandra Birge,
Appellees (Plaintiffs below).

Argued: December 8, 2022 | Decided: March 7, 2023

Appeal from the Montgomery Circuit Court,
No. 54C01-1409-PL-774
The Honorable Thomas H. Busch, Special Judge

On Petition to Transfer from the Indiana Court of Appeals,
No. 21A-PL-1811

Opinion by Justice Goff

Chief Justice Rush and Justices Massa, Slaughter, and Molter concur.

Goff, Justice.

State and federal courts have long held that a constitutional taking may occur from government-induced flooding. Analysis of a takings claim under these circumstances depends on whether the flooding is permanent or temporary in nature. Whereas a permanent flooding constitutes a *per se* taking, liability for a temporary flooding hangs on several case-specific factors. Because the intermittent flooding of the landowners' property here is inevitably recurring, we hold that the trial court properly analyzed the claim as a permanent taking. But the trial court's findings left unresolved whether the flooding's interference was substantial enough to create a taking and the court should have considered the landowners' property lying within the drainage easement. For those reasons, we vacate the trial court's order and remand for further factual findings consistent with this opinion and, if necessary, a final determination of damages.

Facts and Procedural History

Originally built for agricultural purposes in 1898, the James Hose Drain carries water through the Town of Linden from the south, then through a drainage easement located on the Birges' Property, after which it empties into a ditch just north of the Property. Due to years of neglect, the Drain had fallen into disrepair, resulting in frequent flooding of the Town, and ultimately hampering urban development. In 2009, the Town, along with Montgomery County, hired an engineering firm to propose a drainage-improvement plan. The approved plan called for the expansion of a water-detention area just south of the Town; the replacement of the Drain with a 48-inch pipe; and the construction, at the drainage easement on the Birges' Property, of two smaller 30-inch pipes splitting from the larger one (the Transfer Point), between which would lie a grated manhole to permit the flow of water in and out.

To help fund the project, the Town imposed a special assessment on the landowners living within the watershed. After a final public hearing, the Birges were assessed benefits from the improvements in the amount of $7,679. The county drainage board then adopted the county surveyor's

report and issued a reconstruction order, to which the Birges filed no objection.[1] After the reconstruction project began in March 2012, contractors discovered existing underground utilities in the water-detention area, prohibiting its planned enlargement. Engineers ultimately determined that the new drainage pipes, along with construction of a berm (an artificial ridge), would suffice to prevent flooding. When construction of the Transfer Point on the Property began, the Birges complained about the grated manhole, demanding—by formal written notice—that it not be installed or that contractors bury it deep enough to avoid impacting their farmland. After engineers confirmed the necessity of the manhole (due to the Property's grading), and after concluding that the Birges had failed to timely object to the reconstruction plan, the county drainage board proceeded with the approved project—the surface-level grated manhole included.

After completion of the project in late 2012, low-lying portions of the Birges' Property flooded after any heavy rainfall, encumbering the Birges' farming enterprise. So, rather than pay the $7,679 assessment, the Birges sued the Town, County, and others (collectively, the Defendants) for inverse condemnation. Defendants moved to dismiss, claiming discretionary-function immunity under the Indiana Tort Claims Act. The trial court granted the motion, but a panel of the Court of Appeals reversed. *Birge v. Town of Linden*, 57 N.E.3d 839 (Ind. Ct. App. 2016).

On remand, the Defendants unsuccessfully moved for summary judgment. After a subsequent hearing on the takings issue, at which both parties presented expert testimony and evidence of the flooding's causation, the trial court found that

- before the reconstruction project, the Birges' Property experienced "no problem with flooding";

[1] *See* Ind. Code § 36-9-27-52(d) (permitting a landowner to file written objections to a drainage assessment).

- while the reconstruction project resolved the Town's flooding problems, "all the runoff from the entire watershed now flows into" the Birges' Property due to increased pressurization at the Transfer Point during "every heavy rainfall";
- the "repeated flooding" increases the "surface flooding" and raises the "water table on [the Birges' Property] outside of the drainage easement"; and
- while the Property's agricultural yields match the County average, the flooding has made farming on the Property "more difficult" than before.

App. Vol. 5, pp. 58–60. Based on these findings, the trial court concluded that, by using the Property "as the overflow basin for any heavy rain," the project amounted to a taking in the form of a "permanent physical invasion." *Id.* at 61. The court then set the matter for a final determination of damages. *Id.* at 61–62.

On interlocutory appeal, the Court of Appeals reversed, holding—in a unanimous published opinion—that "the trial court erred as a matter of law when it found that the frequent but non-permanent flooding of the Property constituted a *permanent* physical invasion of the property and a per se taking." *Town of Linden v. Birge*, 187 N.E.3d 918, 931 (Ind. Ct. App. 2022). The panel acknowledged, however, that, under the United States Supreme Court's decision in *Arkansas Game & Fish Commission v. United States*, government-induced flooding need not be permanent to be a compensable taking. *Id.* (citing 568 U.S. 23, 34 (2012)). To resolve a takings claim in a temporary flooding case, the panel added, *Arkansas Game* directs courts to consider several factors—namely "(1) the duration of the interference, (2) the degree to which the invasion is intended or is the foreseeable result of authorized government action, (3) the character of the land at issue, (4) the owner's reasonable investment-backed expectations regarding the land's use, and (5) the severity of the interference." *Id.* at 931 (cleaned up). And, because the takings question is an "*ad hoc*, factual inquiry," the panel remanded to the trial court to consider the *Arkansas Game* factors. *Id.* (citation omitted).

While finding the trial court's takings analysis dispositive, the panel also concluded (1) that nothing in the record suggested the trial court improperly relied on the "highest and best use of the property" to find a taking,[2] (2) that sufficient evidence supported the trial court's finding that the drain reconstruction (rather than some external factor) caused the flooding, and (3) that the trial court properly limited its consideration of the flooding's impact to those portions of the Property that lie beyond the county's drainage easement. *Id.* at 932–934.

The Birges petitioned for transfer, which we grant to clarify the proper analytical framework for takings claims based on flooding and to address whether the drainage-easement statute exempts the County from liability for a taking. We summarily affirm the Court of Appeals on the first and second issues outlined above. *See* Ind. Appellate Rule 58(A)(2).

Standards of Review

When, like here, the trial court issues special findings and conclusions under Trial Rule 52, an appellate court applies a two-tiered standard of review—first determining whether the evidence supports the findings and, if so, whether the findings support the judgment. *Indiana Land Tr. Co. v. XL Inv. Properties, LLC*, 155 N.E.3d 1177, 1182 (Ind. 2020). Without reweighing the evidence or reassessing witness credibility, the appellate court applies a "clearly erroneous" standard, deferring to the trial court's factual findings "as long as they are supported by evidence and any legitimate inferences therefrom." *Id.*

A de novo standard of review applies to the trial court's conclusions of law and the parties' constitutional challenges. *In re Adoption of I.B.*, 32 N.E.3d 1164, 1169 (Ind. 2015).

[2] *See Tornatta Investments, LLC v. Indiana Dep't of Transp.*, 879 N.E.2d 660, 664 (Ind. Ct. App. 2008) (courts consider the "highest and best use" of a property only when calculating damages from a taking) (quotation omitted), *trans. denied*.

Discussion and Decision

When the State exercises its inherent authority to take private property for public use, the United States Constitution requires just compensation for that taking. U.S. Const. amend. V. If the government takes property but fails to initiate eminent-domain proceedings, an affected property owner may recover money damages from the State by suing for inverse condemnation. Ind. Code § 32-24-1-16. An action for inverse condemnation requires the claimant to show (1) a taking or damaging (2) of private property (3) for public use (4) without payment of just compensation (5) by a government entity. *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010) (internal quotation marks and citations omitted).

The question here focuses on the first of these factors—whether and to what extent a taking has occurred.

The Birges argue (I) that the trial court properly determined that the Defendants' actions resulted in a permanent physical invasion. The Court of Appeals, they insist, misconstrued applicable federal precedent—and misapplied *Arkansas Game*—by concluding that the flooding of their Property amounted only to a temporary physical invasion. The Birges also argue (II) that, by limiting the flooding's impact to those portions of the Property lying beyond the drainage easement, the Court of Appeals improperly expanded the Defendants' statutory immunity from a takings claim.

We address both these arguments in turn.

I. The trial court properly analyzed the government-induced flooding as a permanent physical invasion.

In 1871, the United States Supreme Court first recognized that a taking may occur from government-induced flooding. In *Pumpelly v. Green Bay & Mississippi Canal Co.*, the State of Wisconsin created a lake by damming a section of the Fox River, overflow from which "remained continuously"

on the petitioner's land. 80 U.S. (13 Wall.) 166, 177 (1871). When "real estate is actually invaded by superinduced additions of water, earth, sand, or other material," effectively destroying or impairing its usefulness, the Court considered it "a taking, within the meaning of the Constitution." *Id.* at 181.

Following *Pumpelly* and its progeny, the Supreme Court, in *United States v. Cress*, considered another flooding-related takings claim. The government in that case erected a lock and dam along the Cumberland River in southern Kentucky, resulting in periodic, "frequent overflows" onto the landowner's property and diminishing its value by half. 243 U.S. 316, 318 (1917). In holding that the "damage" to the land amounted to a taking, the Court noted that "this is not a case of temporary flooding or of consequential injury" but, rather, "a permanent condition, resulting from the erection of the lock and dam."[3] *Id.* at 327. To be sure, the Court acknowledged that, unlike cases in which the "overflowing [of] lands by permanent back-water" resulted in a taking, the property at issue was "not constantly but only at intervals overflowed." *Id.* at 327–28, 329. But that was a distinction "only of degree" rather than of kind. *Id.* at 328. The "character of the invasion" determines whether a taking occurred, the Court emphasized, "not the amount of damage resulting from it, so long as the damage is substantial." *Id.* And a "right to compensation" for "intermittent but inevitably recurring overflows," the Court concluded, was no less valid than a right to compensation for a "condition of continual overflow by back-water." *Id.*

Nearly a century later, in *Arkansas Game*, the Supreme Court considered "whether a taking may occur, within the meaning of the Takings Clause, when government-induced flood invasions, although repetitive, are temporary." 568 U.S. at 26. In that case, the U.S. Army Corps of Engineers had authorized seasonal flooding of the Black River over a limited "span

[3] Rather than focusing on the "permanence of the **government action**—construction of the lock and dam—[as] the controlling factor," as the Birges contend, *see* Pet. to Trans. at 10 (emphasis added), the takings analysis in *Cress* rested on the "condition" (*i.e.*, the flooding) that **resulted from** the government action.

of years"—between 1993 and 2000—to provide downstream farmers with an extended harvest time. *Id.* at 27–28. The cumulative impact of this periodic flooding resulted in the destruction of thousands of acres of timber owned by the petitioner-landowners. *Id.* at 26. In 2005 (five years after the floodings had ceased), the landowners sued the government, arguing that the Corps' seven-year practice amounted to a compensable taking under the Fifth Amendment. *Id.* at 29. The United States Court of Federal Claims ruled in favor of the landowners, but the United States Court of Appeals for the Federal Circuit reversed, concluding that, while government-induced flooding may warrant a takings claim, such flooding must be "a permanent or inevitably recurring condition, rather than an inherently temporary situation." *Id.* at 27, 29 (quoting *Arkansas Game & Fish Com'n v. United States*, 637 F.3d 1366, 1378 (Fed. Cir. 2011)). The Supreme Court disagreed, holding that government-induced flooding of a temporary nature, or of "finite duration," receives "no automatic exemption from Takings Clause inspection." *Id.* at 27, 34, 38.

Based on this precedent, we analyze a flooding-related takings claim as follows: (1) if the flooding is continuous or "intermittent but inevitably recurring," and the invasion is "substantial," then it results in a *per se* taking; (2) if, on the other hand, the flooding is temporary or of "finite duration," then the *Arkansas Game* factors apply.

The Birges argue that *Cress* is controlling.[4] Defendants, by contrast, insist that this case "is more like an intermittent, temporary flooding issue that should be analyzed using the *Arkansas Game* factors." Oral Argument at 17:50–18:00; *see also* County's Resp. in Opp. to Trans. at 11 (arguing that the "trial court erred by failing to expressly consider and balance" the *Arkansas Game* factors).

We agree with the Birges.

[4] The Birges also argue that, even if the flooding were temporary, the trial court made sufficient findings to address the *Arkansas Game* factors. But, because we find *Cress* controlling here, we need not address that argument.

Unlike in *Arkansas Game*, where the "recurrent floodings" were of "**finite duration**" (lasting from 1993 to 2000), 568 U.S. at 27 (emphasis added), the floodings here are repetitive and of **indefinite duration**—*i.e.*, they amount to a "permanent condition," *see Cress*, 243 U.S. at 327. As the trial court expressly found, and as the record evidence supports, the drain reconstruction project has resulted in "repeated flooding events" on the Birges' Property due to increased pressurization at the Transfer Point during "every heavy rainfall." App. Vol. 5, p. 59; *see* Tr. Vol. 2, p. 56 (expert testifying to the same effect). In other words, the flooding here amounts to a permanent physical invasion by way of "intermittent but **inevitably recurring** overflows." *See Cress*, 243 U.S. at 328 (emphasis added). Indeed, so long as the Property sustains "heavy rainfall" (or unless and until the County takes the necessary corrective measures), the flooding will persist indefinitely. This type of physical appropriation reflects the "clearest sort of taking," which we assess by "using a simple, *per se* rule: The government must pay for what it takes." *See Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021) (internal quotation marks and citations omitted).

Still, a taking occurs only when "the damage is **substantial**." *Cress*, 243 U.S. at 328 (emphasis added). Here, the Birges presented evidence of the flooding's interference with their use of the Property. Brian Shelby, the farmer who rents the Birges' Property, testified that the Property, to his recollection, "[n]ever pool[ed] water" before the reconstruction project. Tr. Vol. 2, p. 31. But since the project's completion, he attested, the Property is "almost always" wet, creating "root issues" for the crops and preventing him in some years from farming it "at all without getting equipment stuck." *Id.* at 31–32. The constant saturation of the Property, he added, delays the annual planting season by up to a month, preventing him from **ever** attaining the "maximum yield." *Id.* at 32.

Whether this (and other) evidence shows an interference substantial enough to create a taking was a question of fact for the factfinder. *See Mendenhall v. City of Indianapolis*, 717 N.E.2d 1218, 1227 (Ind. Ct. App. 1999). But the trial court here found only that the flooding rendered farming on the Property "more difficult" than before. App. Vol. 5, p. 60. We thus remand for further development of the trial court's factual

findings to support its determination whether the flooding amounted to a permanent physical invasion.

We now turn our attention to the geographic scope of the Birges' takings claim.

II. The statutory right of entry does not exempt a county from liability for a takings claim.

Indiana Code section 36-9-27-33 gives to a county a "right of entry over and upon land" lying within seventy-five feet of a regulated drain and it exempts a county from liability for any necessary drain "reconstruction or maintenance" that results in damage to crops grown within that right of way. I.C. § 36-9-27-33(a), (d) (2013).

The trial court here expressly limited its findings to the Birges' Property "**outside** of the drainage easement." App. Vol. 5, p. 59 (emphasis added). This finding, the Court of Appeals concluded, restricted the compensable taking to the flooding's effect on Property lying beyond the "pre-existing drainage easement." *Birge*, 187 N.E.3d at 934. The Birges fault the Court of Appeals for misinterpreting Indiana Code section 36-9-27-33. Pet. to Trans. at 7–8. Such a reading of the statute, they contend, "improperly expanded the grant of immunity" to permit the destruction of "*all* crops within 75 feet of a regulated drain." *Id.* at 19, 20.

Defendants, on the other hand, insist that Indiana courts interpreting the statute "have routinely held that this property right constitutes an easement." County's Resp. Opp. to Trans. at 15; *see Mattingly v. Warrick Cnty. Drainage Bd.*, 743 N.E.2d 1245, 1249 (Ind. Ct. App. 2001) ("A plain reading of the statute shows that the legislature intended to create both a seventy-five foot right-of-entry and a seventy-five foot right-of-way, or easement."); *Johnson v. Kosciusko Cnty. Drainage Bd.*, 594 N.E.2d 798, 804 (Ind. Ct. App. 1992) (concluding that "state law grants the county an easement of up to 75 feet on either side of the drain"). And because it holds an interest in the Property here "by way of this statutory easement," the County argues that no taking may arise based on changes to the

Property lying within the easement. County's Resp. Opp. to Trans. at 7, 17.

Again, we agree with the Birges.

When interpreting a statute, we begin by reading its words in their plain and ordinary meaning, taking into account "the structure of the statute as a whole." *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016). Mindful of what the statute says and what it doesn't say, we aim to "avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results." *Id.* (quotation and citation omitted). Rather, we presume the "legislature intended for the statutory language to be applied in a logical manner consistent with the statute's underlying policy and goals." *Rodriguez v. State*, 129 N.E.3d 789, 793 (Ind. 2019) (quotation and citation omitted). Ultimately, "our goal is to determine and give effect to" the legislature's intent. *State v. Int'l Bus. Machines Corp.*, 964 N.E.2d 206, 209 (Ind. 2012) (citation omitted).

Whether we refer to the County's interest in the Property as an "easement" or something else, the statute here grants the County a "right of entry over and upon land" lying within seventy-five feet of a regulated drain for the **limited** purpose of the drain's "operation" or "reconstruction or maintenance." *See* I.C. § 36-9-27-33(a), (d). To facilitate this right of entry, the statute prohibits the erection of permanent structures and the planting of "woody vegetation" along the easement without the county's written consent. I.C. § 36-9-27-33(d). And, while a landowner need not secure approval for the placement of temporary structures, the county may order the immediate removal of those structures, along with any "woody vegetation," if necessary for the drain's operation or maintenance. *Id.*

Beyond these limited restrictions, the statute permits the landowner to "**use the land** in any manner consistent with this chapter and the proper operation of the drain," including the planting of crops. *Id.* (emphasis added). And, while exempting the County from liability for any damage done to "[c]rops grown on a right-of-way" when "necessary in the reconstruction or maintenance of the drain," the statute expressly directs

the County, when "exercising the right" of entry, and "to the extent possible," to "**use due care to avoid damage**" to the "crops and approved structures inside the right-of-way." I.C. § 36-9-27-33(c), (d) (emphasis added). Moreover, when exercising its right of entry, the county must notify the property owner, either orally or in writing, of the "purpose for the entry." I.C. § 36-9-27-33(c).

The "intrusions contemplated" by this statute, Indiana courts have opined, are merely "incidental," "minimal and infrequent." *Johnson*, 594 N.E.2d at 804 (distinguishing such intrusions from takings, which involve "actual interference with, or disturbance of property rights, which are not merely consequential, or incidental injuries to property or property rights"). While such "incidental" damage to crops still permits the farmer to "use the land" in a "manner consistent with" Indiana drainage law, *see* I.C. § 36-9-27-33(d), the **complete destruction of crops** from intermittent yet inevitably recurring (*i.e.*, permanent) flooding does not. Interpreting the statute as immunizing the county from liability for **any** loss occurring within the easement would deprive the Birges of their right to farm the land and to realize its fullest economic potential. *Cf. Johnson*, 594 N.E.2d at 804–05 (holding that the drain's conversion to a "regulated drain" resulted in "no additional taking of the property" where landowners "presented no evidence that they [would] be unable to use the property" and "even acknowledge[d] that they may plant crops" within the easement).

In short, the right of entry under Indiana Code section 36-9-27-33 does not exempt the county from liability for a takings claim.

Conclusion

For the reasons above, we hold that the Birges' takings claim is properly analyzed as a *per se* permanent taking—one encompassing that portion of the Property lying both within and outside of the county's drainage easement. But whether the flooding's interference is substantial enough to create a taking is a question left unresolved by the trial court's findings. We thus vacate the trial court's order and remand (1) for further factual findings on the issue of whether the flooding here amounted to a

substantial permanent physical invasion of the Property (including that portion lying within the drainage easement), and (2) for a final determination of damages (if any), the assessment of which should include consideration of the flooding's effect on the Birges' use of the Property within the statutory right of way.

Rush, C.J., and Massa, Slaughter, and Molter, JJ., concur.

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